

STB EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE
CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE
COST METHODOLOGY

Decided April 3, 2003

The Board adopts requirement that parties to a rail rate reasonableness challenge to be considered under the stand-alone cost methodology participate in non-binding mediation at the outset of the case, and, if the case does not settle, in discovery and technical conferences. The Board also adopts a streamlined process for ruling on motions to compel discovery, and clarifies that parties must simultaneously file a public version of their confidential rate case submissions.

BY THE BOARD:

BACKGROUND

We initiated this proceeding to explore ways to further streamline the process for resolving rail rate challenges that are considered under our standard stand-alone cost (SAC) methodology. In our decision served September 4, 2002 (the NPRM), 67 Fed. Reg. 51,557-58 (2002), we identified several possible measures to achieve this end, including: requiring mandatory, non-binding pre-complaint mediation between the shipper and railroad under our auspices; a discovery approach tailored to our experience in SAC cases; and the establishment of an informal expedited process for resolving discovery disputes using our staff.

We received comments in October 2002 from shipper interests;¹ railroad interests;² the United States Department of Transportation (USDOT); and other parties.³ After reviewing those comments, we concluded that we would benefit from a further discussion of the topic at a public hearing. We invited additional suggestions on ways to expedite SAC cases, and held our hearing on February 27, 2003, at which nine parties (reflecting the interests of substantially all of the parties that prosecute or defend those cases)⁴ spoke. The hearing helped to clarify the parties' positions and elicit additional ideas for streamlining SAC cases.

After considering the entire record—the comments filed in October 2002, the written testimony filed in advance of the hearing, and the discussion at the hearing—we have decided to adopt parts of our original proposal, modified to reflect the concerns raised by the parties. The parties also made other suggestions, some of which we seek further comment on here and others of which we will explore separately.

MANDATORY MEDIATION

In the NPRM, we proposed that, before we consider a challenge to the reasonableness of a rail rate, the parties first be required to participate in non-binding mediation. We proposed that a shipper's request for mediation would engage the Board's processes and serve to fix the relevant limitations period for relief for rates already paid. The Board would promptly assign a mediator to work with the parties, on behalf of the agency, over a 60-day period in an effort to reach a full or partial settlement.

Most of the parties agree that such mandatory mediation, if properly administered, could encourage full or partial settlements in at least some cases. We will therefore move forward with a mediation requirement. Based on the

¹ Edison Electric Institute (EEI); National Coal Transportation Association; National Industrial Transportation League (NITL); North Dakota Public Service Commission; Otter Tail Power Company; and Western Coal Traffic League (WCTL).

² Association of American Railroads (AAR); the Burlington Northern and Santa Fe Railway Company (BNSF); and Union Pacific Railroad Company (UP).

³ John D. Fitzgerald, General Chairman for the United Transportation Union on lines of BNSF in Vancouver, WA; and OptionsNet, a private alternative dispute resolution firm located in Tulsa, OK.

⁴ USDOT; WCTL; EEI; NITL; AAR; BNSF; CSX Transportation, Inc.; Norfolk Southern Corporation; and UP.

comments we received, we are refining the procedures that will apply, as follows.

Timing

We have considered four stages at which mediation could be required: before a complaint is filed, immediately after the complaint is filed, at the close of discovery, or after the evidentiary submissions have been filed. Based upon the record that has been developed, we conclude that the most promising time to engage the mediation process is immediately after the filing of the complaint. This will avoid delay in processing the case and will not impinge on the statute of limitations period for bringing a claim and qualifying for reparations. And the parties should be more amenable to alternatives to litigation at that point than they would be after the close of discovery or after submission of evidence, as they will not be as entrenched in their litigation positions or have as much invested in the litigation. Yet the shipper will have formulated its initial position by filing its complaint, giving the parties and the mediator basic information on which to conduct the mediation. Because at least some of those people representing the parties in mediation should be different from those conducting the litigation, any additional burden imposed by contemporaneous processes should be minimal.⁵ Discovery may proceed simultaneously with the mediation period.

Confidentiality

The mediation will be private and confidential, so that any concessions offered, or information disclosed, during the course of mediation discussions may not be disclosed outside of the confines of mediation without the consent of the other party.

⁵ Given our decision not to require mediation at a pre-complaint stage, we need not consider the suggestion of some shipper parties that, to avoid the delay that would otherwise result from pre-complaint mediation, we require railroads to establish a common carriage rate 5 months prior to the expiration of a contract. In light of the court's ruling in *Burlington N.R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996), it is uncertain that we could require a rate to be established that far in advance, and in any event we do not believe that it would be fruitful to do so in view of the intense negotiations that generally are ongoing in the months leading up to a contract's expiration.

Duration of Mediation

Various parties have suggested that, in the event of an impasse, we permit early termination of the mediation period by one party's opt-out, by both parties' mutual agreement, or by certification of the mediator. We believe that allowing termination other than by the mediator would undermine the mediation. However, permitting the mediator to halt the mediation could be helpful in conserving time and resources if the parties are truly at an impasse.⁶

Selection of Mediator

As proposed, the Board will select the mediator, who will be a suitable qualified neutral individual not otherwise involved in the Board's substantive review of rail rate cases. At this juncture, the Board will pay the cost of mediation. We may revisit this issue after we gain some experience with the mediation process.

Participation by Parties

We will require each party to select at least one principal with authority to make a binding settlement to participate in the mediation and to be present at any session at which the mediator requests that the principal be present. Any further directions about the number or type of representatives involved in the mediation will be left to the discretion of the mediator.

DISCOVERY*General Standards*

In proposing to revise our rules regarding discovery standards to include a standard for SAC cases specifically, our intention was to codify the approach we have used in recent rulings addressing discovery disputes in individual SAC cases. There, we have emphasized that a party seeking to compel discovery must show (1) that it needs the information to make its case, (2) that the information cannot be readily obtained through other means, and (3) that the request is not unduly burdensome. We recognize that shippers need substantial discovery to

⁶ WCTL suggests that the parties be permitted to extend the mediation period beyond 60 days by mutual agreement. We will consider such requests on a case-by-case basis.

put together a SAC presentation, and we did not intend to impede shippers from obtaining the information they need. Rather, our intent was, and still is, to continue the approach we have been pursuing on a case-by-case basis to prevent discovery in SAC cases from being used for delay and harassment, and from becoming unduly burdensome and overwhelming the process.

Nevertheless, both shipper and carrier interests viewed our proposal as more far-reaching and restrictive than we had intended. Accordingly, we conclude that it is neither necessary nor appropriate to modify our rules to accomplish our original intent. Our case precedent should continue to serve as a guide to parties regarding the proper parameters of discovery in SAC cases. The record indicates that a better approach to prevent abuses is to increase Board participation at the early stages of discovery, which we will do.

Pre- or Post-Motion Conferences

Consistent with the suggestions made by several commenters, parties should jointly schedule a conference with us, handled by Board staff, at an early stage of discovery (at some time after serving discovery requests but before the motion-to-compel stage). The purpose of such a conference is to identify the issues that may be involved in discovery, and how discovery can be moved forward expeditiously. Such a conference is consistent with the procedures set out in 49 CFR 1111.10(b), under which parties are to discuss discovery and procedural matters and report back to the Board.

As in the past, we encourage parties to resolve discovery disputes themselves, rather than bringing them to the Board in the form of motions to compel. We believe that, as a general rule, these matters can be resolved more efficiently and often more effectively by the parties. Nevertheless, we recognize that there may be situations in which a party may conclude that it must file a motion to compel to obtain needed information that the other party is not willing to provide.

In this regard, we proposed in our NPRM a process under which Board staff could convene informal conferences with the parties promptly after the filing of a motion to compel and reply. If the issues are not resolved voluntarily at the conference, the Board's Secretary would then issue a summary ruling on the dispute, which would be appealable to the entire Board.⁷ All of this would be

⁷ Appeals of a Secretary's ruling here will be handled under 49 CFR 1115.9. We will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

conducted under very tight time constraints. This proposal received strong support from most commenting parties, and we will adopt it.

At the hearing and in testimony, several parties suggested additional ideas for streamlining discovery which may have merit. However, before we can consider implementing any of these ideas, we need further comment on them, as described below.

Standard Discovery Requests

At the hearing, several parties suggested that the discovery phase of SAC cases could be expedited by identifying in advance those elements of discovery that should be provided in all SAC cases at the outset of the case without the need for a specific request for such material. (Additional discovery requests could then be tailored to what a party believes it needs that has not already been produced.) We believe this suggestion holds great promise for expediting the discovery phase of SAC cases, which have usually been quite protracted.

Accordingly, we are asking each party in this proceeding, as well as all other interested parties, to (1) submit lists of all of the information and documents that (a) it believes it should be entitled to obtain as a matter of course in discovery in a SAC case and (b) it would expect to produce to the other party as a matter of course in discovery in a SAC case, and then (2) comment on the lists submitted by other parties in this proceeding. After reviewing the parties' lists and comments, we will decide whether to issue a list of standard information and documents that the parties to a SAC case would be required to produce. We also seek comment on this proposal, including the appropriate timing for such initial disclosures. For example, would it be practical to require the complainant's initial disclosures to be made contemporaneously with the filing of the complaint, and to make the defendant's initial disclosures due at the same time as its answer to the complaint?

Additional Discovery

A suggestion was made to place a limit on the number of discovery requests that each party would be allowed to make, absent permission from the Board. This is the procedure that applies to complex commercial litigation conducted in the federal courts, in Rule 33(a) of the Federal Rules of Civil Procedure (which limits a party to 25 written interrogatories, including all discrete subparts, without leave of court). While this suggestion may have merit, we do not believe that we can impose such a limit at this juncture. We seek additional comment

on this suggestion, including (1) the appropriate number of interrogatories and document requests that could be made without our leave, and why, and (2) whether such a limitation is a necessary and appropriate measure to prevent parties from requesting data in multiple formats or versions. Commenters should address this proposal both as if it were to be adopted alone and as if it were to be adopted in conjunction with a list of standard information and documents that the parties to a SAC case would be required to produce as initial disclosures.

Time Periods

Suggestions were also made to limit the number of years for which data would need to be produced for a SAC case, absent permission from the Board, and to establish a cut-off date for discovery after which responses to discovery requests would not need to be updated. We seek comment on (1) the advantages and disadvantages of establishing such limits, (2) whether such limits should be standard or determined on a case-by-case basis at an initial discovery conference, (3) what appropriate limitations would be, and for which types of data, and (4) an appropriate cut-off point in the procedural schedule for making additional discovery requests.

Costs

Finally, a suggestion has been made that the parties share the costs of production of data in response to discovery requests, rather than the responding party alone shouldering what can be substantial costs. We seek comment on (1) our authority to require such cost-sharing, (2) the circumstances, if any, under which parties should be required to share those costs, (3) how the costs of production would be quantified, and (4) how, if at all, the costs should be divided between the parties.

TECHNICAL CONFERENCES

During this proceeding, a broad consensus emerged about the need to bring together the parties to see if they can reach common ground on some or all of the service characteristics associated with the traffic at issue, which are used in

variable cost calculations.⁸ Agreement on these matters would expedite rate cases by narrowing the range of issues that the parties litigate and the Board needs to adjudicate. In past and pending SAC cases, seemingly obvious facts such as the number of miles that the complainant's traffic moves have frequently been in dispute. The parties agree that informal consultation with our staff could help to narrow the range of disputed issues.

Accordingly, we will provide for Board staff to convene a technical conference at the appropriate juncture with the parties to address the following operating characteristics that are common to all variable cost computations:

1. Tons per car
2. Tare per car
3. Cars per train
4. Loaded miles
5. Empty miles
6. Round trip miles
7. Origin loop track miles – loaded
8. Origin loop track miles – empty
9. Destination loop track miles – loaded
10. Destination loop track miles – empty
11. Round trip miles including loop track
12. Locomotives per train
13. Locomotive cycle hours
14. Freight car cycle hours
15. Yard switching minutes per car
16. Road switching minutes per car – non-yard
17. Road switching minutes per car – yard
18. Gross ton-miles per car
19. Train-miles per car
20. Locomotive unit-miles per car

⁸ Variable costs serve two purposes in rail rate cases. If the revenues generated by a challenged rate are less than 180% of the defendant railroad's variable cost of serving the complaining shipper, we do not have authority to examine the reasonableness of the rate. 49 U.S.C. 10707(d). And where we do have regulatory authority over the level of the rate, we cannot require a railroad to reduce its rate below that 180%-of-variable-costs regulatory threshold. *West Texas Util. Co. v. Burlington N.R.R.*, 1 S.T.B. 638, 657 (1996), *aff'd sub nom. Burlington N.R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997).

As part of their initial scheduling responsibilities, the parties should jointly propose a schedule to the Board for this technical conference. The technical conference should be held prior to the filing of any evidence in the case, but after sufficient discovery has occurred.

OTHER MATTERS

Levels of Confidentiality

One of the benefits of holding public hearings is that parties are able to bring to our attention matters that may be related to, but slightly different from, those on our minds when initiating a proceeding. One such matter that has come to our attention here is the restrictions on access by the public, and even by the parties, to materials in rate cases that are designated “confidential” or “highly confidential.”

As we understand it, at the beginning of a rate case, the parties negotiate a proposed protective order and come to us for approval of such order.⁹ Under the protective order, the parties contemplate three categories of materials that may be exchanged and filed during the course of the proceeding: public, “confidential,” and “highly confidential.”¹⁰ The protective order allows outside

⁹ The protective orders governing rate cases have become standardized for the most part, just as they have become standardized in other types of proceedings such as rail mergers.

¹⁰ For example, the protective order in *Arizona Public Service Company and PacifiCorp. v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42077 (STB served February 21, 2003) (*Arizona Public Service*) slip op. at 3, distinguishes “confidential” from “highly confidential” materials as follows:

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals *proprietary or confidential* information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material * * * may be disclosed only to employees, counsel, or agents of the party receiving such material * * * *
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate and stamp *particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information*, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to another party’s outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not regular employees of the party * * * *

(Emphasis added.) The distinction between the two levels of confidential materials, and the
(continued...)

counsel and consultants full access to all information, provided they agree to be bound by the terms of the protective order. It prevents in-house counsel and other employees from reviewing the most sensitive commercial information, and allows them access only to the smaller subset of “confidential” information, again, provided these personnel agree to abide by the terms of the protective order. The record from our hearing in this proceeding revealed that parties have either been unwilling altogether, or unwilling promptly, to produce a version of their filing that redacts their own “highly confidential” material so that their opponent’s in-house personnel can review the submission in a timely manner after it is filed.

We appreciate the need to protect commercially sensitive information from the public. However, we view the inability of in-house personnel to quickly review these submissions as problematic, because we believe that in-house personnel have an important role to play in rail rate proceedings, as well as a right to actively participate in any litigation to which their employer is a party.

While we recognize the importance of confidential information, we believe the public interest requires that each party to a SAC case prepare a partially redacted version (the Confidential Version) of each submission that contains its own “highly confidential” material. The Confidential Version must be prepared and served on the reviewing party by the other side at the same time as the complete, highly confidential version (the Highly Confidential Version) is filed with the agency (typically under seal). The Confidential Version may be served on the reviewing party in electronic format only. As we envision the process, this would require a party to redact only its own “highly confidential” material and serve this partially redacted version on the other side.¹¹

We recognize that it could be burdensome for the filing party to go through many volumes of material to make the appropriate redactions for the reviewing party’s in-house personnel. Therefore, we are providing an alternative under which, in lieu of preparing the Confidential Version, the filing party may provide to outside counsel for the reviewing party a list of all “highly confidential”

¹⁰(...continued)

restrictions placed on reviewers of these materials, is similar to the distinction and restrictions imposed through protective orders in rail merger proceedings.

¹¹ We note that the protective order recently adopted in *Arizona Public Service* provided (slip op. at 6) that:

Each party has a right to view its own data, information, and documentation, even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party.

information that must be redacted from its Highly Confidential Version prior to review by in-house personnel. If the filing party chooses this option, it must provide the list contemporaneously with its filing of the Highly Confidential Version, and outside counsel must then redact that material to enable its client to review the submission.

We will not approve any future proposed protective order that does not incorporate these provisions, and we will review (and modify if necessary) existing protective orders in all pending SAC cases to ensure that they comply with our expectations. If parties to SAC cases determine to discontinue their use of the “highly confidential” designation, there will be no further need for these requirements.

Additionally, we note that in rate cases, for convenience, the parties typically treat as confidential virtually their entire case. They therefore file their entire case under seal and do not file anything in the public docket. This practice is contrary to our regulations,¹² our practice in other types of proceedings,¹³ and the spirit of open government. In the future, parties to a SAC case must adhere to our rules and file a public version of their submissions simultaneously with any Highly Confidential or Confidential Version they might also choose to file.

Standardized Evidence

Finally, suggestions were made to standardize in certain respects the evidence to be submitted in rate cases, both with regard to the variable cost calculation and the stand-alone cost analysis, to simplify these cases and make them more predictable. While there may be some merit to such an effort, these proposals are beyond the procedural focus of this proceeding. We will give

¹² Our existing rules require the filing of a public version at the same time as a confidential submission. Our regulation at 49 CFR 1104.14(a) provides:

(a) *Segregation of confidential material.* A party submitting materials which it believes are entitled to be kept confidential and not made part of the public docket should submit these materials as a separate package, clearly marked on the outside “Confidential materials subject to a request for a protective order.”

And our regulation at 49 CFR 1104.3(b)(4) provides that diskettes or compact discs filed with the Board be labeled “confidential” or “redacted” as appropriate.

¹³ For example, parties in recent rail merger proceedings have filed public versions of their submissions contemporaneous with their confidential filings made under seal.

these suggestions more thought before deciding whether to seek further comment in this area.

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

We conclude that our action will not have a significant effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act because small entities are not litigants in the rail rate cases that are the subject of this proceeding.

Commissioner Morgan, commenting:

We began this proceeding last September in response to continued concerns that rail maximum rate cases were burdensome for the parties and not moving to resolution quickly enough. The issues raised in this regard mattered to me, as a key objective of the Board since its establishment in 1996 has been to be a model of good government, government that gets its work done fairly and efficiently and that is not afraid to bring difficult issues to resolution when called upon to do so. That is why, over the course of the last several years, the Board took important steps to expedite rail rate cases by streamlining and simplifying the complaint process as never before. For major rate cases, we issued processing guidelines, put limits on discovery, developed a standardized procedure for submitting SAC evidence, simplified the market dominance procedure, and, as with the other matters before the agency, met our statutory deadlines.

Nevertheless, concern about the burdens and delays in getting large rate cases resolved has continued to be a topic of discussion before both the Board and Congress. Therefore, we took comments and oral testimony on additional ways to move the cases along more expeditiously, focusing in particular on the use of mediation and on facilitating discovery. The exchange has been productive, and this decision, taking many of the suggestions of the parties, refines some of the ideas on which we initially sought comment.

To me, the best way to move these cases along is by bringing the parties together before they get very far into the process, and that is why we have focused much attention on finding the right time for mediation and the type of mediation to require. In my view, our requirement that the parties go to Board-sponsored mediation just after the complaint is filed should encourage productive discussion that can, within a reasonable amount of time, help the parties determine whether there is hope for settlement. Mediation may not work in every case, but if it works in any case then it will have been worth it.

Where mediation does not work, SAC rate cases can be expected to be long and arduous affairs. Consistent with our intent in issuing our NPRM, we are moving to minimize discovery disputes, to identify them as soon as possible, and to use our staff to facilitate early resolution. I am pleased that we are adopting the suggestion of several parties at the hearing that we move to develop standard information and documents that must be produced as a matter of course. I am also pleased that we are initiating, again at the suggestion of the parties, technical conferences to narrow disputes over service characteristics that, it would seem, can be nipped in the bud.

Of course, rate cases will continue to be difficult and time-consuming, and I will repeat what I have said many times before: the parties would be better off resolving differences in the private sector than bringing them to the agency. But given that we will continue to see at least some of these cases, we must do our part to move them along quickly and fairly. This decision goes a long way to that end.

It is ordered:

1. Parts 1109, 1111 and 1114 of title 49 of the *Code of Federal Regulations* are amended as set forth in the Appendix.
2. All interested parties should submit comments on the issues set forth in this decision by June 9, 2003, and replies to those comments by June 19, 2003. All submissions to the Board should include an original and 10 copies and should be served on all parties to this proceeding.
3. Notice of this decision shall be published in the *Federal Register*.
4. This decision is effective May 9, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

APPENDIX

The Surface Transportation Board amends 49 CFR parts 1109, 1111 and 1114 of the *Code of Federal Regulations* as follows:

PART 1109 — USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

1. 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

§1109.4 [Add]

2. Add new section 1109.4, to read as follows:

§1109.4 Mandatory Mediation in Rate Cases to be Considered Under the Stand-Alone Cost Methodology.

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111.

(b) Within 10 business days after the shipper files its formal complaint, the Board will assign a mediator to the case. Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party.

(e) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(f) Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in stand-alone cost rate cases, set forth at 49 CFR 1111.8(a).

PART 1111 — COMPLAINT AND INVESTIGATION PROCEDURES

1. 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

§ 1111.8 [Amended]

2. Redesignate the current text in section 1111.8 as section 1111.8(a) with a new paragraph heading to (a) and add new paragraph (b) to read as follows:

§ 1111.8 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* * * *

(b) *Conferences with parties.* (1) The Board will convene a technical conference of the parties with Board staff prior to the filing of any evidence in a stand-alone cost rate case, for the purpose of reaching agreement on the operating characteristics that are used in the variable cost calculations for the movements at issue. The parties should jointly propose a schedule for this technical conference.

(2) In addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served but before any motions to compel may be filed, to discuss discovery matters in stand-alone cost rate cases. The parties should jointly propose a schedule for this discovery conference.

PART 1114 — EVIDENCE; DISCOVERY

1. 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

§ 1114.31 [Amended]

2. Amend section 1114.31(a) to read as follows:

§1114.31 Failure to respond to discovery.

(a)(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology, the time for filing a reply to a motion to compel is governed by section 1104.13.

(2) *Reply to motion to compel in stand-alone cost rate cases.* A reply to a motion to compel must be filed with the Board within 10 days thereafter in a rate case to be considered under the stand-alone cost methodology.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost rate cases.* Within 5 business days after a conference with the parties convened pursuant to subparagraph (a)(3) of this section, the Secretary will issue a summary ruling on the motion to compel discovery in a stand-alone cost rate case. If no conference is convened, the Secretary will issue this summary ruling within 10 business days after the filing of the reply to the motion to compel. Appeals of a Secretary's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

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