DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1111

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

Expedited Procedures for Processing Simplified Rail Rate Reasonableness Proceedings

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rule.

SUMMARY: The Board amends its complaint and investigation regulations at 49 CFR part 1111 to reflect the adoption of *Simplified Rate Guidelines*.[1]

EFFECTIVE DATE: February 17, 1998.

FOR FURTHER INFORMATION CONTACT: Thomas J. Stilling, (202) 565–1567. (TDD for the hearing impaired: (202) 565–1695.)

SUPPLEMENTARY INFORMATION: In a Notice of Proposed Rulemaking (NPR) served September 24, 1997, and published in the **Federal Register** on September 26, 1997 (62 FR 50550), we proposed to include in our regulations a list of the information that a complainant should supply when seeking to challenge the reasonableness of a rail rate using the *Simplified Rate Guidelines*. We also proposed to determine within 50 days of the filing of a complaint whether the *Simplified Rate Guidelines* could be used in a particular case. We indicated, however, that we were not inclined at this time to adopt a general procedural schedule for processing rate complaints under the *Simplified Rate Guidelines* until we gained more experience using those guidelines. The Association of American Railroads (AAR) and the National Industrial Transportation League (NITL) filed comments in response to the NPR.

Evidentiary Factors

Both AAR and NITL support the proposal to list in our regulations the nine evidentiary factors that a complaint seeking to use the *Simplified Rate Guidelines* should address.[2] AAR suggests that the regulations also explicitly require a complainant to provide the assumptions, calculations and workpapers on which the information on factors (6) through (9) is based.[3]

In our proposal, we assumed that a complainant would provide sufficient support for its responses to the evidentiary factors. Without adequate support, it would be difficult for us to determine whether use of the simplified guidelines should be permitted in a particular case. To ensure that adequate information is supplied to enable us quickly to decide the appropriateness of using the simplified guidelines, we will add a tenth factor requiring that ''the assumptions, calculations and any documentation necessary to support the responses to the above listed factors'' also be provided.

Use of Simplified Procedures

In *Simplified Rate Guidelines,* slip op. at 38, we noted that a decision as to whether to apply the simplified guidelines or the more sophisticated constrained market pricing procedures (specifically the stand-alone cost test) for evaluating the reasonableness of a challenged rate needs to be determined at the outset of a case.[4] We also suggested that a reasonable time frame for making such a determination appeared to be within 45 days after the filing of the complaint. In its original comments responding to the Advanced Notice of Proposed Rulemaking (ANPR) in this proceeding, AAR complained that a 45-day time frame would be too tight, as it would provide a defendant railroad only two weeks to respond to a complainant's request to use the simplified guidelines. To afford the railroad more time to prepare its response and to allow that response to be filed together with the answer to the rate complaint, in the NPR we proposed a 50-day period instead. NITL asserts that the initial 45-day schedule is sufficient and that the additional five days are unnecessary.

We adopt the 50-day schedule proposed in the NPR. The additional five days will not unduly prolong the process. As indicated in the NPR, it should also alleviate some administrative burden by allowing a railroad to simultaneously answer the complaint and respond to the request for using the simplified guidelines, rather than requiring the filing of separate pleadings 5 days apart.

Procedural Schedule

NITL expresses concern that, without a general procedural schedule, the processing of cases will be unduly delayed. NITL suggests that cases processed under the simplified guidelines be handled under the basic structure of the procedures used to process stand-alone cost cases.

We appreciate NITL's concern that these cases be expedited, but we believe that expedition can best be accomplished, at least at the outset, on a case-by-case basis. Absent experience processing cases under the *Simplified Rate Guidelines,* we cannot practically establish a general schedule to govern the filing of evidence for all cases. To facilitate the prompt establishment of appropriate procedural schedules in individual cases, the parties are expected to discuss, and if possible agree on, a procedural schedule at the conference of the parties that is to be convened no later than 12 days after the defendant files an answer to the complaint.[5] Under the regulations we are adopting, the parties are to file a report on the issues discussed at the conference within 19 days of the filing of an answer, and this report should include a proposed procedural schedule. Following receipt of this report, we will move quickly to establish the procedural schedule for the filing of evidence.[6]

Waybill Access

In response to the ANPR, NITL suggested that our Rules of Practice governing the filing of a rate complaint cross reference the regulations at 49 CFR 1244.8 concerning access to the Waybill Sample. In its comments on the NPR, NITL repeated its cross-referencing suggestion. In light of NITL's position that a cross reference may ''avoid confusion that may create delays and subsequent difficulties in meeting the procedural schedule,'' we will include a new paragraph (d) in part 1111.1 referencing our regulation regarding access to the Waybill Sample.

The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. The rules should result in the

[1] *Rate Guidelines—Non-Coal Proceedings,* Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996), __ S.T.B. __ (1996), *pet. for judicial review pending sub nom. Association of Am. Railroads* v. *Surface Transp. Bd.,* No. 97–1020 (D.C. Cir. filed Jan. 10, 1997).

[2] The evidentiary factors are set forth in *Simplified Rate Guidelines,* slip op. at 37–38.

[3] Factors (6) through (9) are:

(6) The feasibility and anticipated cost of preparing a stand-alone cost presentation in the case.

(7) An estimate of the other costs to be incurred in pursuing the rate complaint, including preparing necessary jurisdictional threshold and market dominance evidence.

(8) The relief sought, including all reparations as well as the level and duration of any rate prescription.

(9) The present value of the relief sought.

[4] Constrained market pricing, including the stand-alone cost test, was adopted in *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).

[5] Both AAR and NITL support the NPR proposal concerning a conference of the parties.

[6] 49 U.S.C. 10704(c)(2) requires us to decide the rate reasonableness issue within months after the close of the administrative record.

more expeditious processing of rail complaints using the simplified procedures.

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

List of Subjects in 49 CFR Part 1111

Administrative practice and procedure, Investigations.

Decided: January 7, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams,

Secretary.

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

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

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

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

2. Section 1111.1 is amended by revising the last two sentences of paragraph (a), adding paragraphs (a)(1) through (a)(10), and adding new paragraph (d) to read as follows:

§ 1111.1 Content of formal complaints; joinder.

(a) * * * In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether, in its view, the reasonableness of the rate should be examined using constrained market pricing or using the simplified standards adopted pursuant to 49 U.S.C. 10701(d)(3). If the complainant seeks to use the simplified standards, it should support this request by submitting, at a minimum, the following information:

(1) A general history of the traffic at issue, including how the traffic has moved in the past, how it currently moves, and how it can and will be moved in the future. This information should address not only the physical movement of the traffic, but the type and level of rates actually used. It should include all carriers (rail and nonrail) that have participated in the transportation of this traffic or could do so.

(2) The specific commodity description(s) for the traffic at issue, the shipping characteristics and requirements of the traffic, and the type of railroad cars required or used for the traffic.

(3) All origins, destinations, and origin-destination (O–D) pairs involved in the complaint, by commodity type.

(4) The amount of traffic involved (by commodity type), including total annual carloadings, average tons per car, number of carloads per shipment, and number of carloads per week or month.

(5) Total or average revenue per carload paid to the defendant railroad(s), by commodity type.

(6) The feasibility and anticipated cost of preparing a stand-alone cost presentation in the case.

(7) An estimate of the other costs to be incurred in pursuing the rate complaint, including preparing necessary jurisdictional threshold and market dominance evidence.

(8) The relief sought, including all reparations as well as the level and duration of any rate prescription.

(9) The present value of the relief sought.

(10) The assumptions, calculations and any documentation necessary to support the responses to the above listed factors.

* * * * *

(d) *Request for access to waybill data.* Parties needing access to the Waybill Sample to prepare their case should follow the procedures set forth at 49 CFR 1244.8.

3. Section 1111.8 is amended by removing the phrase ''section 1111.9(b)'' and adding the phrase ''§ 1111.10(b)'' in its place.

4. Section 1111.9 is redesignated as section 1111.10 and a new section 1111.9 is added to read as follows:

§ 1111.9 Procedural schedule to determine whether to use simplified procedures.

Absent a specific order by the Board, the following procedural schedule will apply in determining whether to grant a request under § 1111.1(a) to use the simplified procedures (with the remainder of the procedural schedule to be determined on a case-by-case basis):

Day 0—Complaint filed, discovery period begins.

Day 20—Defendant's answer to complaint and opposition to use of simplified procedures due.

Day 30—Complainant's response to use of simplified procedures due.

Day 50—Board's determination of whether simplified procedures should be used.

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

§ 1111.10 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 12 days after an answer to a complaint is filed. Within 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case.

* * * * *

[FR Doc. 98–1066 Filed 1–15–98; 8:45 am]

BILLING CODE 4915–00–P