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49 CFR Ch. X (10–1–23 Edition)

(5) The purchaser in an acquisition, and

(6) The grantee of trackage rights in a trackage rights proceeding.

(j) *Transferor*. The transferor is:

(1) The corporation acquired in a control proceeding,

(2) The merging corporation in a merger,

(3) All corporations to be consolidated in a consolidation,

(4) The lessor in a lease,

(5) The seller in an acquisition, and

(6) The grantor of trackage rights in a trackage rights proceeding.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, as amended at 62 FR 9716, Mar. 4, 1997; 62 FR 28376, May 23, 1997; 66 FR 32586, June 15, 2001; 81 FR 8856, Feb. 23, 2016]

§ 1180.4 Procedures.

(a) *General*. (1) The original and 25 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

(2) Each party to a proceeding shall choose a unique acronym of four letters or less for itself. It shall number each document filed in the proceeding consecutively, prefixed by its acronym.

(3) Any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. At any time, the Board may require the submission of additional copies of any document previously filed by any party to the proceeding.

(b) *Prefiling notification*. (1) Between 3 to 6 months prior to the proposed filing of an application in a *major* transaction, and 2 to 4 months prior to the proposed filing of an application in a *significant* transaction, applicant shall file a notice with the Board. The notice shall:

(i) Briefly describe the transaction,

(ii) Indicate the year to be used for the impact analysis,

(iii) Indicate the approximate filing date of the application, and

(iv) Indicate why the transaction is *major* or *significant*.

(2) The Board will publish a notice in the FEDERAL REGISTER within 30 days

of receipt of the applicant's notice. The publication shall contain:

(i) A brief description of the transaction,

(ii) The year to be used for the impact analysis,

(iii) The approximate filing date,

(iv) A determination that the transaction is *major*, *significant*, or *minor*, and

(v) A statement of any additional information which must be filed with the application in order for the application to be considered complete.

(3) A prefiling notice may be amended to indicate a change in the anticipated filing date.

(4) *Prefiling notification*. When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) *A proposed procedural schedule*. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a FEDERAL REGISTER notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) *A proposed draft protective order*. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) *A statement of waybill availability for major transactions*. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must

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explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) *Application.* (1) The fees for filing applications, petitions, or notices under these procedures are set forth in 49 CFR 1002.2.

(2) *Filing requirements.* (i) The original of all applications shall be signed in ink by the applicant, if an individual; by all partners, if a partnership; and if a corporation, association, or other similar form of organization, by its president, or such other executive officer having knowledge of the matters therein contained and duly designated for that purpose by the applicant. Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any person controlling an applicant shall also sign the application.

(ii) The application shall be filed with Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423-0001.

(iii) Each copy of the application shall conform in all respects to the original and shall be complete in itself except that the signature in the copies may be stamped or typed and the notarial seal may be omitted. In like manner, where certified copies of documents are filed with the application, conformed copies thereof, showing certification in stamped or typewritten form, will be sufficient to accompany the additional copies of the application.

(iv) All applications required to be filed with the Board or served on designated persons shall include all exhibits, except as otherwise specifically noted. Information from other documents may be incorporated by reference in the application. However, the documents must have been filed with the Board within three years prior to

filing of the application, the information must be up to date, and applicant must be prepared to supply copies of this information to interested persons on specific request.

(v) The applicant shall submit such additional information to support its application as the Board may require.

(vi) Applicant shall file concurrently all directly related applications, *e.g.*, those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc.

(vii) The application shall contain a certificate of service indicating that all persons designated in § 1180.4(c)(5) have been served with a copy of the application.

(3) In a *major* or *significant* transaction, and in all responsive applications, all of the direct testimony of applicants, in the form of verified statements, shall be filed and served with each application.

(4) The application and all exhibits shall be considered part of the evidentiary record upon acceptance. Any portion of an application and exhibits will remain subject to motions to strike. However, no motion need be made to have the application and exhibits admitted to the evidentiary record. If a *major* or *significant* transaction is designated for oral hearing the presiding Administrative Law Judge shall have discretion in extraordinary circumstances to allow for the presentation of oral or written direct testimony not previously submitted with the application.

(5) Service. The applicant shall serve a conformed copy of an application filed under these procedures by first-class mail upon:

(i) The Governor (or Executive Officer), Public Service Commission, and the Department of Transportation of each State in which any part of the properties of the applicant carriers involved in the proposed transaction is situated;

(ii) The Secretary of the United States Department of Transportation (Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

(iii) The Attorney General of the United States;

(iv) The Federal Trade Commission; and

(v) In *major* or *significant* transactions, all persons requesting a copy after the prefiling notice is published in the FEDERAL REGISTER.

(6) *Application format.* (i) The application shall be in the same sequence as the information is requested in these procedures, and shall be numbered to correspond to the numbering in the procedures.

(ii) If any material required in the application would lend itself to being placed in an appendix, this should be done. The appendix and application shall be tabulated and cross-referenced in an index for ease in locating and referring to the information. The appendices shall be in the same sequence as the information required by these procedures. If certain information required in the application is not applicable, provide an explanation. The application should be bound, and it may be bound in more than one volume. If an application is more than one volume, the cover of each volume should be in a different color. The pages in each volume shall begin with 1, and be sequentially numbered.

(iii) The Board's Office of Proceedings will provide informal opinions and interpretations, which are not binding on the Board, regarding the format of or information to be included in the application.

(iv) All filing, service, or other requirements of these procedures must be complied with when filing the application. Copies of the application filed with the Board shall be marked in red "Railroad Consolidation Application" on the transmittal envelope or package.

(v) The application shall conform to the typographical specifications of § 1104.2.

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(7) Acceptance or rejection of an application.

(i) The Board shall accept a complete application no later than 30 days after the application is filed with the Board by publishing a notice in the FEDERAL

REGISTER. A complete application contains all information for all applicant carriers required by these procedures, except as modified by advance waiver. The publication shall indicate the applicable time limits for processing the application. (These are the time limits of 49 U.S.C. 11325(b) for a *major* transaction, 49 U.S.C. 11325(c) for a *significant* transaction, and 49 U.S.C. 11325(d) for a *minor* transaction.)

(ii) The Board shall reject an incomplete application by serving a decision no later than 30 days after the application is filed with the Board. The decision shall explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference. The resubmission or refile of an application shall be considered a *de novo* filing for the purpose of computation of the time periods, provided that the resubmitted application is accepted as complete.

(8) The application must present a *prima facie* case. Applicants can fail to meet their burden of proof and thus not present a *prima facie* case either by (i) disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest, or by (ii) disclosing facts that affirmatively demonstrate that the proposal is not in the public interest. See *Railroad Consolidation Procedures*, 363 I.C.C. 767 (1980).

(d) *Responsive applications.* (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) *Evidentiary proceeding.* (1) The Board may order an oral public hearing, a hearing by written submissions,

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or another kind of evidentiary proceeding. The determination will generally be made on the basis of the needs indicated by the written comments.

(2) The evidentiary proceeding will be completed:

(i) Within 1 year after the primary application is accepted for a *major* transaction;

(ii) Within 180 days for a *significant* transaction; and

(iii) Within 105 days for a *minor* transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) Within 90 days after the conclusion of the evidentiary proceeding for a *major* transaction;

(ii) Within 90 days for a *significant* transaction; and

(iii) Within 45 days for a *minor* transaction.

(4) The Secretary of Transportation may propose modifications to any transaction and shall have standing to appear before the Board in support of any such proposed modification.

(f) *Waiver or clarification.* (1) Upon petition of a prospective applicant, the Board may waive or clarify a portion of these procedures. A petition to waive all of the procedures will not be entertained.

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

(3) No replies to a petition for waiver will be permitted, except where a proceeding involving the same parties and a related transaction is pending before us.¹ When a reply is permitted, the petition shall be served by first-class mail on all parties to the pending proceedings, with a reply due within 10 days of service. Replies to a petition for clarification shall be permitted within 10 days of the petition's filing.

(4) A waiver or clarification granted to any applicant in a proceeding shall apply to any other party to the proceeding unless otherwise indicated.

(5) All petitions for waiver or clarification must specify the sections for which waiver or clarification is sought and give the specific reasons why each waiver or clarification is necessary.

(g) *Notice of exemption.* (1) To qualify for an exemption under § 1180.2(d), a railroad must file a verified notice of the transaction with the Board. Except for verified notices filed under § 1180.2(d)(9), all verified notices under § 1180.2(d) must be filed at least 30 days before the transaction is consummated, indicating the proposed consummation date. Verified notices filed under § 1180.2(d)(9) will become effective upon service of notice of the transaction by the Board. Before a verified notice is filed, the railroad shall obtain a docket number from the Board's Section of Administration, Office of Proceedings.

(i) All notices filed under § 1180.2(d) shall contain the information required in § 1180.6(a)(1)(i) through (iii), (a)(5) and (6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) Notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9) shall also contain the following information:

(A) The name of the tenant railroad;

(B) The name of the landlord railroad;

(C) A description of the trackage rights, including a description of the track. For notices under § 1180.2(d)(8) and (9), the notice must state that the trackage rights are overhead rights. For notices under § 1180.2(d)(7), the notice must state whether the trackage rights are local or overhead;

(D) The date the trackage rights transaction is proposed to be consummated;

(E) The date temporary trackage rights will expire, if applicable; and

(F) For notices under § 1180.2(d)(9), a description of the situation resulting in the outage in sufficient detail to allow the Board to determine an emergency exits, including, to the extent possible, the nature of the event that caused the unforeseen outage, the location of the outage, the date that the emergency situation occurred, the date the outage was discovered, and the expected duration of the outage.

(iii) Except for notices filed under § 1180.2(d)(9), the Board shall publish a notice of exemption in the FEDERAL

¹ See *Itel Corp.—Control-Green Bay and W. R. Co.*, 354 I.C.C. 232, 233 (1978).

REGISTER within 16 days of the filing of the notice. For notices filed under § 1180.2(d)(9), the Board shall serve a notice of exemption on parties of record within 5 days after the verified notice of exemption is filed and shall publish that notice in the FEDERAL REGISTER. The publication of notices under § 1180.2(d) will indicate the labor protection required.

(iv) If the notice contains false or misleading information that is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(v) The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption. Except for notices filed under § 1180.2(d)(9), stay petitions must be filed at least 7 days before the exemption becomes effective. For notices filed under § 1180.2(d)(9), stay petitions should be filed as soon as possible before the exemption becomes effective.

(vi) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

(2) Some transactions may be subject to environmental review pursuant to the Board's environmental rules at 49 CFR part 1105.

(3)(i) Except for notices filed under §§ 1180.2(d)(7), 1180.2(d)(8), or 1180.2(d)(9), the filing party must certify whether a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment"). If such a provision or agreement exists, the following additional information must be provided (the information in paragraphs (g)(4)(i)(B), (D), and (G) of this section may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b)):

(A) The existence of that provision or agreement and identification of the affected interchange points; and

(B) A confidential, complete version of the document(s) containing or addressing that provision or agreement;

(C) A list of shippers that currently use or have used the line in question within the last two years;

(D) The aggregate number of carloads those shippers specified in paragraph (g)(4)(i)(C) of this section originated or terminated (confidential);

(E) A certification that the filing party has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (g)(4)(i)(C) of this section;

(F) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(G) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential);

(H) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

(ii) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to § 1180.4(g)(4)(i) of this section by filing, and serving upon the petitioner, a "Motion for Access to Confidential Documents," containing:

(A) An explanation of the party's need for the information; and

(B) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(iii) *Deadlines.* (A) Replies to a Motion for Access are due within 5 days after the motion is filed.

(B) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(C) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

(h) *Official notice.* In connection with any application or request for relief under these procedures, the Board may take official notice of any or all of the following information. These data will be presumed valid unless discredited by

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any party. A party relying on information to be noticed officially shall list the information. Upon request, the party shall make the official notice material available. Any party is free to challenge the relevance or application of any such data, or the weight that should be accorded it.

(1) Annual STB Form R-1 Reports submitted by rail carriers.

(2) Quarterly Commodity Statistics submitted by rail carriers.

(3) STB Monthly Labor Statistics.

(4) Quarterly Financial Statements of Rail Carriers.

(5) All other reports submitted to the STB under oath.

(6) Annual 1-percent Waybill Sample.

(7) Federal Reserve Board Production Statistics.

(8) AAR compilations of bad order ratios, equipment ownership and repair statistics, and freight car order figures.

[47 FR 9844, Mar. 8, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1180.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 1180.5 [Reserved]

§ 1180.6 Supporting information.

(a) All applications filed under 49 U.S.C. 11323 shall show in the title the names of the applicants and the nature of the proposed transaction. Beneath the title indicate the name, title, business address, and telephone number of the person(s) to whom correspondence with respect to the application should be addressed. The following information shall be included in all applications:

(1) A description of the proposed transaction, including appropriate references to any supporting exhibits and statements contained in the application and discussing the following:

(i) A brief summary of the proposed transaction, the name of applicants, their business address, telephone number, and the name of the counsel to whom questions regarding the transaction can be addressed.

(ii) The proposed time schedule for consummation of the proposed transaction.

(iii) The purpose sought to be accomplished by the proposed transaction, e.g., operating economies, eliminating excess facilities, improving service, or improving the financial viability of the applicants.

(iv) The nature and amount of any new securities or other financial arrangements.

(2) A detailed discussion of the public interest justifications in support of the application, indicating how the proposed transaction is consistent with the public interest, with particular regard to the relevant statutory criteria, including

(i) The effect of the transaction on inter- and intramodal competition, including a description of the relevant markets (see § 1180.7). Include a discussion of whether, as a result of the transaction, there is likely to be any lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.

(ii) The financial consideration involved in the proposed transaction, and any economies, to be effected in operations, and any increase in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

(iii) The effect of the increase, if any, of total fixed charges resulting from the proposed transaction.

(iv) The effect of the proposed transaction upon the adequacy of transportation service to the public, as measured by the continuation of essential transportation services by applicants and other carriers.

(v) The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.

(vi) The effect of inclusion (or lack of inclusion) in the proposed transaction of other railroads in the territory, under 49 U.S.C. 11324.

(3) Any other supporting or descriptive statements applicants deem material.