

## § 1144.1

AUTHORITY: 49 U.S.C. 721, 10703, 10705, and 11102.

SOURCE: 67 FR 61290, Sept. 30, 2002, unless otherwise noted.

### § 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 estab-

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lishment 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.