

§1144.2

tariff filing in compliance with 49 U.S.C. 10762(c)(3).

(b) *Explanation and justification*—(1) *Request.* After a rail carrier has given notice of a proposed cancellation, any affected party may ask the canceling rail carrier to:

(i) Explain how the proposed cancellation will affect the party, and

(ii) Justify the application of the cancellation to a route or rate actively used by or participated in by the party.

(2) *Reply.* The rail carrier proposing the cancellation must give the party the requested explanation and justification, including pertinent mileage and cost data, within 10 days of the date the request is made.

(3) *Time.* By mutual agreement, the rail carrier proposing the cancellation and the affected party may alter the time frames of paragraph (b)(2) of this section. The 49 CFR part 1132 time periods for protests and replies apply.

(4) *Content.* The content of the request and reply (other than pertinent mileage and cost data) will be left to the parties, though all information pertinent to the individual case should be included. The failure to provide information necessary to analyze the action under the criteria established in §1144.3 may be treated as an admission against interest.

[50 FR 46066, Nov. 6, 1985; 51 FR 18333, May 19, 1986; 56 FR 18532, Apr. 23, 1991]

§1144.2 Negotiation.

(a) *Timing.* At least 5 days prior to challenging a cancellation of a through route or joint rate, or 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 suspension and/or investigation or prescription.

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

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§1144.3 Suspension.

(a) *General.* Under these rules the Board will suspend and investigate, investigate, or not suspend and investigate a proposed cancellation of a through route and/or joint rate. A persuasive presentation under all of the criteria below is sufficient for the Board to determine that the requirements of 49 U.S.C. 10707(c)(1) have been met warranting suspension and investigation of the proposed cancellation. Failure to convince the Board on any one of the criteria may result in either only an investigation (no suspension) or a determination not to investigate. This will be decided on a case-by case basis.

(b) *Statutory factors.* A decision under (a) will be made based on the broad factors in 49 U.S.C. 10707(c)(1). The criteria considered in analyzing the factors in 49 U.S.C. 10707(c)(1) (A and B) are in paragraph (c) of this section. The requirements to keep account under 49 U.S.C. 10707(c)(1)(C) cannot be applied to cancellation cases, and will not be considered.

(c) *Criteria.* The Board will suspend and investigate if a protestant shows:

(1) The cancellations of a through route and/or joint rate would eliminate effective railroad competition for the affected traffic between the origin and destination. Among other evidence, the Board will consider two rebuttable presumptions to show the elimination of effective railroad competition: (i) That the mileage between the origin and destination over the route to be canceled is not more than that of any feasible alternative rail route; and (ii) that the cost of operating via the route to be canceled is not more than that of any feasible alternative rail route; and

(2) Either (i) a protesting shipper has used or would use the through route and/or joint rate proposed to be canceled to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) A protesting carrier has used or would use the affected through route and/or joint rate for a significant amount of traffic.