

STB EX PARTE NO. 556

RAILROAD CONSOLIDATION PROCEDURES --
MODIFICATION OF FEE POLICY

49 CFR Parts 1002 and 1180

Decided February 24, 1997

AGENCY: Surface Transportation Board (Board).
ACTION: Interim rules with a request for comments.
SUMMARY: In this proceeding the Board adopts interim rules relating to the fee policy for proceedings involving major railroad consolidations under the Board's regulations at 49 CFR part 1180 and corresponding modifications in the Board's fee regulations at part 1002. The Board also adopts technical amendments to conform part 1180 to the *ICC Termination Act of 1995*.

DATES: Interim rules are effective on March 4, 1997; comments must be filed by April 3, 1997.

ADDRESSES: Send comments (an original and 10 copies) referring to STB Ex Parte No. 556 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1201 Constitution Avenue, N.W., Washington, DC 20423-0001.¹

FOR FURTHER INFORMATION CONTACT: Kathleen M. King, (202) 927-5249 or David T. Groves, (202) 927-6395 [after March 16, 1997, (202) 565-1551]. [TDD for the hearing impaired: (202) 927-5721. (after March 16, 1997, (202) 565-1695).]

¹ The Board is scheduled to relocate its offices over the weekend of March 15-16, 1997. Its new address will be: Surface Transportation Board, 1925 K Street N.W., Washington, DC 20423-0001. We note that mail will not be received from March 13-18, 1997 (mail delivery will resume thereafter at the new location).

SUPPLEMENTARY INFORMATION: The Independent Office Appropriation Act of 1952, 31 U.S.C. 9701 (IOAA), is the basis for user fees charged by federal government agencies, including this one. Under the IOAA, agencies are required to ensure that " * * * each service or thing of value provided by an agency * * * to a person * * * is to be self-sustaining to the extent possible." 31 U.S.C. 9701(a). Administrative guidance for implementation of the IOAA is provided in the Office of Management and Budget Circular A-25 User Fees, as revised July 8, 1993 (Circular A-25). Circular A-25 states that the general policy of the federal government is as follows: "A reasonable charge should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."

According to our current user fee policy, the filer of a primary application under our merger and consolidation regulations at 49 CFR part 1180 is not required to pay additional filing fees for directly related proceedings that are filed along with the primary application. Recently, in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP-SP Merger*), there were 30 directly related proceedings filed concurrently with the application. Of the 30 transactions, 21 were railroad abandonment or discontinuance of service applications, petitions for exemption, and notices of exemption.² The directly related proceedings in *UP-SP Merger* engendered substantial additional staff work, such as the environmental review process that was required for each abandonment or discontinuance proceeding. Under our current fee policy, no

² In *Regulations Governing Fees For Services*, 1 I.C.C.2d 60 (1984), two proceedings, *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982) (*Union Pacific*), and *Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co.*, 366 I.C.C. 171 (1982) (*Norfolk Southern*), formed the basis for computing the original fees for railroad consolidation proceedings. Those cases did not include nearly as many directly related proceedings as *UP-SP Merger*. In the *Norfolk Southern* proceeding, there were only eight directly related transactions filed concurrently with the primary application. They involved four construction and operation transactions, two railroad abandonments, one issuance of common stock, and one acquisition of a motor carrier. The *Union Pacific* proceeding included thirteen directly related transactions that entailed five trackage rights requests, three poolings of operations, three issuances of common stock, and two motor carrier acquisitions.

additional filing fees were assessed for those proceedings at the time of the their filing.³

The current railroad consolidation fees understate the costs associated with processing directly related proceedings filed by the primary applicant(s). Therefore, to ensure that the costs associated with these directly related proceedings are borne by the primary applicant (the direct beneficiary of the Board's action), we are modifying our fee policy to require a separate fee for each and every directly related application, petition and/or notice that is filed with the primary application. The fee for a directly related proceeding will be the same as it would be if the directly related application, petition and/or notice were filed separately. For example, if the directly related proceeding involves a petition for exemption for abandonment or discontinuance of a rail line, the \$3,800 fee currently set forth at fee item (21)(iii), would be assessed for that proceeding. Appropriate modifications are being made at 49 CFR 1002.2(d) and 1180.4(c) to reflect this fee policy change.

In addition, under the Board's existing fee policy regulations, the same fee of \$4,700 is applied to any type of responsive application, including an inconsistent application. This policy, however, does not allow us to recover the full cost of handling an inconsistent application. The additional staff work required to review and analyze an inconsistent application is in most cases comparable to the work expended to process the primary application. Consequently, we are adding the regulations at 49 CFR 1180.4(d)(4)(ii) to state that, for fee purposes, a responsive application that is considered an inconsistent application will be classified as a major, significant, or minor transaction under 49 CFR 1180.2(a)-(c), and the fee for an inconsistent application will be based on the classification of the transaction at 49 CFR 1002.2(f)(38)-(41). As an example, under this new policy, an inconsistent application classified as a major transaction for a noncarrier to acquire two or more carriers would require a fee of \$889,500, as currently set forth in fee item (39)(i).

Our existing fee schedule applies a \$4,700 fee to all other types of responsive applications that are filed in railroad consolidation proceedings. The Board's costs for handling the various types of transactions, ranging from trackage rights requests to construction applications, are not accurately reflected

³ Subsequently, however, the Secretary of the Board requested payment from the applicants of filing fees for the 21 abandonment or discontinuance of service proposals in *UP-SP Merger*, and the applicants paid those fees.

by a single-set fee. Therefore, we are modifying our fee policy as set forth at 49 CFR 1180.4(d)(4)(ii) to provide that the fee for all other responsive applications will be whatever fee is set forth in our fee schedule for that particular type of filing submitted as a responsive application. For example, if the responsive application is a petition for exemption involving trackage rights, the \$5,600 fee currently set forth in fee item (40)(vi) would be assessed for that proceeding. We are retaining the general \$4,700 fee for responsive applications in fee items (38)-(41)(v) to cover any type of responsive application that does not currently have a corresponding fee elsewhere in the fee schedule.

In addition to the fee application policy changes outlined above, we also are making some technical changes to part 1180. We are removing the provision at 49 CFR 1180.4(d)(4)(ii) that responsive applications that are not major transactions are presumed to be significant transactions because, under current Board practice, responsive applications may also be found to be minor transactions. We also are revising the statutory references contained in part 1180 to reflect the statutory changes resulting from the passage of the *ICC Termination Act of 1995*, Pub. L. 104-88 (December 29, 1995)(*ICCTA*). And, throughout part 1180, we are changing references to the Interstate Commerce Commission and Commission to the Surface Transportation Board and Board, respectively. Finally, we are removing references in part 1180 to transactions involving the issuance of stock or the acquisition of control of motor carriers, which are matters no longer under the Board's jurisdiction.

Because these fee policy changes involve agency procedure, they are exempt from the notice and comment requirements of the Administrative Procedure Act. *See*, 5 U.S.C. 553(b)(A). With respect to the fee policy changes, we also find that notice and comment are impracticable. *See*, 5 U.S.C. 553(b)(B). The Board expects to receive at least one major rail consolidation application in the immediate future. The application likely will include directly related applications, and generate responsive applications. Under the IOAA, the Board is obligated to ensure that services be self-sustaining to the extent possible. Thus, our fees need to be in place as soon as possible so that appropriate fees are received for services that will be rendered when the application is filed. Other changes are merely technical amendments to reflect the new fee policy or to conform our rules to the *ICCTA*. Therefore, we are adopting these changes as interim rules. However, we are providing an opportunity for public comment on these changes. After review of those

comments, we will consider whether adjustments need to be made to this new policy.

We conclude that the fee and other changes adopted here will not have a significant economic impact on a substantial number of small entities. Our regulations provide for waiver of filing fees for those entities that can make the required showing of financial hardship.

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

Notice of the interim rules adopted here will be transmitted to Congress pursuant to Pub. L. 104-121 (March 29, 1996).

List of Subjects

49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information, User fees.

49 CFR Part 1180

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

By the Board, Chairman Morgan and Commissioner Owen.

APPENDIX

For the reasons set forth in the preamble, title 49, chapter X, parts 1002 and 1180, of the Code of Federal Regulations are amended as follows:

PART 1002 - FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701 and 49 U.S.C. 721(a).

2. Section 1002.2 is amended by revising paragraphs (d)(1) and (f)(38) through (f)(41) to read as follows:

§ 1002.2 *Filing fees.*

- (d) *Related or consolidated proceedings.* (1)(i) Except as provided for in paragraph (d)(1)(ii) of this section, separate fees need not be paid for related applications filed by the same applicant that would be the subject of one proceeding.
- (ii) In proceedings filed under the rail consolidation procedures at 49 CFR part 1180, the applicable filing fee must be paid for each proceeding submitted concurrently with the primary application. The fee for each type of proceeding is set forth in the fee schedule contained in paragraph (f) of this section.

(f) *Schedule of filing fees.*

Type of Proceeding	Fee
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Part IV ***

- (38) An application or inconsistent application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:
- | | |
|------------------------------------|------------|
| (i) Major transaction | \$889,500. |
| (ii) Significant transaction | \$177,900. |
| (iii) Minor transaction | \$4,700. |

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(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	\$1,000.
(v) Responsive application for which a fee is not otherwise provided in this schedule	\$4,700.
(vi) Petition for exemption under 49 U.S.C. 10502 ..	\$5,600.
(39) An application or inconsistent application of a noncarrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	\$889,500.
(ii) Significant transaction	\$177,900.
(iii) Minor transaction	\$4,700.
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	\$850.
(v) Responsive application for which a fee is not otherwise provided in this schedule	\$4,700.
(vi) Petition for exemption under 49 U.S.C. 10502 ..	\$5,600.
(40) An application or inconsistent application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:	
(i) Major transaction	\$889,500.
(ii) Significant transaction	\$177,900.
(iii) Minor transaction	\$4,700.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	\$750.
(v) Responsive application for which a fee is not otherwise provided in this schedule	\$4,700.
(vi) Petition for exemption under 49 U.S.C. 10502 ..	\$5,600.
(41) An application or inconsistent application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	\$889,500.
(ii) Significant transaction	\$177,900.
(iii) Minor transaction	\$4,700.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	\$850.
(v) Responsive application for which a fee is not otherwise provided in this schedule	\$4,700.
(vi) Petition for exemption under 49 U.S.C. 10502 ..	\$3,900.

PART 1180-RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT,
TRACKAGE RIGHTS, AND LEASE PROCEDURES

3. The authority citation for part 1180 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

4. Section 1180.0 is amended by removing the words "49 U.S.C. 11343" and adding in its place the words "49 U.S.C. 11323", removing the word "Commission" and adding in its place the word "Board" and removing the words "Commission's Rules" and adding in their place the words "Board's Rules".

5. Section 1180.1 is amended as follows:

a. In paragraph (a) remove the words "Interstate Commerce Commission" and add in their place the words "Surface Transportation Board" and remove the word "Commission" wherever it appears and add in its place the word "Board".

b. In the introductory text of paragraph (b) remove the word "Commission's" and add in its place the word "Board's", remove the words "49 U.S.C. 11344" and add in their place the words "49 U.S.C. 11324" and remove the words "49 U.S.C. 10101a" and add in their place the words "49 U.S.C. 10101".

c. In the introductory text of paragraph (b)(1) remove the words "Section 11344" and add in their place "Section 11324" and remove the word "Commission" wherever it appears and add in its place the word "Board".

d. In paragraph (b)(2) remove the word "Commission" and add in its place the word "Board".

e. In paragraph (c) remove the word "Commission" wherever it appears in that paragraph and add in its place the word "Board" and remove the word "Commission's" wherever it appears in that paragraph and add in its place the word "Board's".

f. In paragraphs (d) and (e) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

g. In paragraph (f) remove the word "Commission" wherever it appears in that paragraph and add in its place the word "Board" and remove the words "(49 U.S.C. 11347)" and add in their place the words "(49 U.S.C. 11326)".

h. In paragraphs (g) and (h) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

6. Section 1180.2 is amended as follows:

a. In the introductory text of this section remove the words "49 U.S.C. 11343" and add in their place the words "49 U.S.C. 11323".

b. In the introductory text of paragraph (b) remove the words "49 U.S.C. 11345(a)(2) and (c)" and add in their place the words "49 U.S.C. 11325(a)(2) and (c)".

c. In the introductory text of paragraph (d) remove the word "Commission" and add in its place the word "Board", remove the words "49 U.S.C. 10101a" and add in their place the words "49 U.S.C. 10101", remove the words "49 U.S.C. 10505" and add in their place the words "49 U.S.C. 10502", remove the words "49 U.S.C. 10505(g)(2) and 11347" and add in their place the words "49 U.S.C. 10502(g) and 11326".

d. In paragraphs (d)(1) and (d)(4) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

7. Section 1180.3 is amended as follows:

a. In paragraphs (d) and (e) remove the word "Commission" where it appears in those paragraphs and add in its place the word "Board".

b. In paragraph (f) remove the words "49 U.S.C. 11343" and add in their place the words "49 U.S.C. 11323" and remove the word "Commission" and add in its place the word "Board".

c. In paragraph (g) remove the words "49 U.S.C. 10102(18)-(19)" and add in their place the words "49 U.S.C. 10102(5)-(6)".

d. Section 1180.3 is further amended by revising paragraph (h) to read as follows:

§ 1180.3 *Definitions.*

(h) *Responsive applications.* Applications filed in response to a primary application are those seeking affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). For fees for responsive applications, see 49 CFR 1002.2(f)(38)-(41) and 1180.4(d)(4)(ii).

8. Section 1180.4 is amended as follows:

a. In paragraphs (a)(3) and (a)(4) and (b)(1) and (b)(2) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

b. In paragraph (c)(2)(ii) remove the words "Interstate Commerce Commission" and add in their place the words "Surface Transportation Board".

c. In paragraphs (c)(2)(iv) and (c)(2)(v) remove the word "Commission" and add the word "Board" in its place.

d. In paragraph (c)(6)(iii) remove the word "Commission's" and add in its place the word "Board's" and in paragraphs (c)(6)(iii) and (c)(6)(iv) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

e. In paragraph (c)(7)(i) remove the word "Commission" wherever it appears and add in its place the word "Board", remove the words "49 U.S.C. 11345(b)" and add in its place the words "49 U.S.C. 11325(b)", remove the words "49 U.S.C. 11345(c)" and add in their place the words "49 U.S.C. 11325(c)" and remove the words "49 U.S.C. 11345(d)" and add in their place the words "49 U.S.C. 11325(d)".

f. In paragraph (c)(7)(ii) remove the word "Commission" wherever it appears and add in its place the word "Board".

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g. In paragraphs (d)(1)(ii)(D), (d)(1)(iii)(G), (d)(1)(iii)(I)(3), (d)(2), (d)(3), and (d)(4)(iii) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

h. In paragraphs (e)(1) and (e)(4) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

i. In paragraph (f)(1) remove the word "Commission" add in its place the word "Board".

j. In paragraph (g) remove the words "INTERSTATE COMMERCE COMMISSION" and add in its place the words "SURFACE TRANSPORTATION BOARD", and remove the words "49 U.S.C. 10505(d)" wherever they appear and add in their place the words "49 U.S.C. 10502(d)", remove the word "Commission" and add in its place the word "Board" and remove the word "Commission's" wherever its appears and add in its place the word "Board's".

k. In paragraph (h) remove the word "Commission" and add in its place the word "Board" and remove the word "ICC" wherever it appears and add in its place the word "STB".

l. Paragraph (i) is removed.

m. Section 1180.4 is further amended by revising paragraphs (c)(1), (c)(2)(vi) and (d)(4)(ii) and (g)(1)(iii) to read as follows:

§ 1180.4 *Procedures.*

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

(2) ***

(i) ***

(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.

(d)***

(4)***

(ii) For filing fee purposes, a responsive application that is an inconsistent application will be classified as a major, significant, or minor transaction as provided for in § 1180.2(a)-(c). The fee for an inconsistent application will be the fee for the type of transaction involved. *See*, 49 CFR 1002.2(f)(38)-(41). The fee for any other types of responsive applications is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(g) ***

(l) ***

(iii) 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.

9. Section 1180.6 is amended as follows:

a. In the introductory text of paragraph (a) remove the words "49 U.S.C. 11343" and add in their place the words "49 U.S.C. 11323".

b. In paragraph (a)(2)(vi) remove the words "49 U.S.C. 11344" and add in their place the words "49 U.S.C. 11324".

c. In paragraphs (a)(4) and (a)(6) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board".

d. In paragraph (a)(8) remove the words "Commission's Section of Energy and Environment" and add in their place the words "Board's Section of Environmental Analysis".

e. In paragraph (b)(6) remove the word "Commission" wherever it appears and add in its place the word "Board".

10. Section 1180.7 is amended as follows:

In the introductory text of this section remove the words "(49 U.S.C. 11344(b) or (d)," and add in their place the words "(49 U.S.C. 11324(b) or (d)," and remove the word "Commission" wherever it appears and add in its place the word "Board".

11. Section 1180.9 is amended as follows:

In the introductory text of this section remove the word "Commission's" and add in its place the word "Board's" and in paragraph (e) remove the word "Commission" wherever it appears and add the word "Board".

12. Section 1180.20 is amended as follows:

a. In paragraph (a)(2)(ii) remove the words "49 U.S.C. 11343, *et seq.*" and add in their place the words "49 U.S.C. 11323, *et seq.*".

b. In paragraphs (b), (c), and (d) remove the word "Commission" wherever it appears in those paragraphs and add in its place the word "Board" and in paragraph (c) remove the words "49 U.S.C. 11347" and add in its place the words "49 U.S.C. 11326".

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