

Chapter OCT 5

RAILROAD RATEMAKING

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Note: Chapter TC 5 was renumbered to be chapter OCT 5 effective September 1, 1986.

OCT 5.01 Definitions. For purposes of this chapter:

- (1) "Going concern value" means the worth of the total assets of the business.
- (2) "Intermodal competition" means the competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination.
- (3) "Intramodal competition" means competition between 2 or more railroads transporting the same commodity between the same origin and destination.
- (4) "Keep account" means the rate fund established for use until a determination of the rate reasonableness is made.
- (5) "Limited liability rates" means lower rates for shipment which allow the railroad limited liability for loss and damage.
- (6) "Market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.
- (7) "Office" means the office of the commissioner of transportation.
- (8) "Party" means the protestant, respondent or others permitted or directed by the office to participate in the proceeding.
- (9) "Person" means individuals as well as corporations, companies, associations, firms, partnerships, co-partnerships, societies, joint stock companies or a trustee, receiver assignee, or personal representative of another individual.
- (10) "Pleading" means a protest, reply to protest, a motion, a Statement of Monetary Adjustment, or any other written document relating to the proceeding.
- (11) "Proceeding" means an investigation instituted by the office.

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(12) "Protestant" means a person opposed to any tariff or schedule becoming effective.

(13) "Rate publication" means making public what the railroad charges for shipment.

(14) "Recyclable material" means waste products for recycling or re-use in the furtherance of recognized pollution control programs.

(15) "Respondent" means the railroad or their agent against whom the protest is filed or any other person designated by the office to participate in the proceeding.

(16) "Revenue-variable cost percentage" means the money generated by the services compared to the cost incurred performing the service.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.02 General provisions. (1) JURISDICTION OVER RAIL RATES. The office may not regulate general railroad rate increases, inflation-based railroad rate increases and fuel adjustment surcharges. The office shall not require pre-justification of rate increases. The office shall regulate intrastate contract rates in accordance with 49 U.S.C. s. 10713. The office shall also regulate 2 special classes of rates, limited liability rates and rates on recyclable materials, in a manner consistent with federal law, specifically 49 U.S.C. ss. 10730 and 10731, respectively. Recyclable materials shall be transported at a revenue-variable cost percentage of no more than 146%. Railroads may publish rates under which the liability of the carrier is limited to a value established by a written declaration of the shipper or by written agreement between the shipper and railroad.

(2) RATE SUSPENSIONS. The office shall complete rate investigation and rate suspension cases within 5 months, although a 3-month extension may be applied for in each case. The office may not suspend existing railroad rates on its own motion and may not suspend a proposed railroad rate change unless a protestant shows that he is substantially likely to prevail on the merits of his case; that without suspension the proposed rate will cause him substantial injury; and that an investigation with a refund and keep account provision will afford him insufficient protection. The office shall handle refund requirements in accordance with the provisions of 49 U.S.C. s. 10707.

(3) RAILROAD RATE REASONABLENESS. In determining railroad rate reasonableness, the office shall consider within 90 days whether or not the traffic in question is subject to market dominance. A finding that no market dominance exists shall be conclusive evidence that the rate is reasonable. Should market dominance be found, a reasonableness determination shall be made based on the principle of railroad revenue adequacy, on evaluation of revenue to variable cost for the traffic involved, the revenue contribution of the traffic to the railroad's revenue base, and national energy transportation goals.

(4) ZONE OF RATE FLEXIBILITY. Railroad rates may be altered in accordance with the zone of rate flexibility provisions of 49 U.S.C. s. 10707a.

(5) DISCRIMINATION. The office adopts the applicable provisions of 49 U.S.C. s. 10741 on discrimination. The office may not make a finding of discrimination if differences in rates, classifications, rules and practices

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result from differences in service provided. The office may not investigate or take any other action with regard to claims of discrimination by railroads in the provision of the rates and services which are described in the following enumerated sections of Title 49 of the United States Code:

(a) s. 10713 - Contract rates, other than as provided for in 49 U.S.C. s. 10713(d) (2) (B);

(b) s. 10705a - Surcharges or cancellations;

(c) s. 10728 - Separate rates for distinct rail services;

(d) s. 10705 - Rail rates applicable to different routes; or

(e) s. 10751 - Business entertainment expenses.

(6) INTERSTATE COMMERCE COMMISSION PROVISIONS ADOPTED. The office adopts the following sections of the Interstate Commerce Act, Title 49 of the United States Code, as amended by Staggers Rail Act of 1980:

Section 10505 - Exemption

Section 10701a - Standards for rates for rail carriers

Section 10704(a) (2)-(4) - Adequate revenues

Section 10705 - Authority: through routes, joint classifications, rates, and divisions

Section 10705a - Joint rate surcharges and cancellations

Section 10706 - Rate agreements: exemption from antitrust laws

Section 10707 - Investigation and suspension of rates

Section 10707a - Zone of rail carrier rate flexibility

Section 10709 - Determination of market dominance

Section 10712 - Inflation-based rate increases

Section 10713 - Contracts

Section 10726 - Long and short haul transportation

Section 10730 - Rates and liability based on value

Section 10731(e) - Transportation of recyclable materials

Section 10741 - Rate discrimination

Section 10751 - Business entertainment expenses

Section 10762 - General tariff requirements

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; am. (1), Register, July, 1985, No. 355, eff. 8-1-85.

OCT 5.03 Railroad tariffs. (1) NOTICE PERIOD. The notice period for filing railroad tariffs with the office which contain new or changed rates, classifications, rules, practices or other provisions shall be as follows:

(a) The tariff shall be on file with the office at least 20 days prior to its effective date for rates or provisions published in connection with new service or changes resulting in increased rates or decreased value of service.

(b) The tariff shall be on file with the office at least 10 days prior to its effective date for changes resulting in decreased rates or increased value of service, or changes resulting in neither increases nor reductions.

(c) The tariff shall be on file with the office at least 30 days prior to its effective date for joint rate surcharges and cancellations filed pursuant to the provisions of 49 U.S.C. s. 10705a.

(2) **CONTENT.** Each rate publication filed with the office shall contain the required information including:

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(a) A tariff containing all relevant and material provisions relating to the rate and its application, and

(b) A statement of the effect which the rate shall have on the carrier's revenue.

(3) NOTICE DEFECTS. No rate shall be considered published under the provisions of the Staggers Act unless notice has been given in compliance with this section. However, if a tariff is filed and becomes effective despite some defect, the rates, charges, fares, classifications or rules in that tariff are in effect and will be applied until cancelled or amended or until they are stricken from the files by the office.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.04 Investigation and suspension of proposed railroad rates. (1) COMMENCEMENT OF PROCEEDINGS. When a new individual or joint rate, a new individual or joint classification, or a new rule or practice related to a rate is filed with the office by a rail carrier, the office may:

(a) On its own initiative, commence an investigation proceeding,

(b) Upon protest of an interested party commence an investigation proceeding,

(c) Upon protest of an interested party commence an investigation and suspension proceeding to determine whether the proposed rate, classification, rule or practice is discriminatory, unreasonable, or in any other way violates applicable law, or

(d) Accept published rates based on limited carrier liability without prior approval pursuant to 49 U.S.C. s. 10730. However, such rates will be subject to protest on grounds such as unreasonableness or nonconformance with the tariff publication requirements found in 49 C.F.R. s. 1300.4(i) (11).

(2) **SUSPENSION PERIOD.** The office shall complete a proceeding under this section within 5 months from the effective date of the proposed rate, classification, rule or practice except that if the office reports to the interstate commerce commission that it cannot make a final decision within that time and explains the reasons for the delay, it may then take an additional 3 months to complete the proceeding and make a final decision.

(a) If the office does not render a final decision within the applicable time period, the rate, classification, rule or practice shall become effective immediately or, if already in effect, shall remain in effect.

(b) If a railroad makes a tariff filing to adjust an intrastate rate, rule or practice under 49 U.S.C. s. 11501(d) to that of similar traffic moving in interstate commerce, and the office investigates or suspends such tariff filing, the carrier may apply to the interstate commerce commission to review the matter if the office has not acted with finality by the 120th day after the tariff was filed. If the carrier elects not to refer the matter to the interstate commerce commission, the office may decide the issue within 5 months.

(3) **GROUND FOR SUSPENSION.** The office may not suspend a proposed rate, classification, rule or practice unless it appears from the specific facts shown by the verified statement of a protestant that:

(a) The protestant is substantially likely to prevail on the merits;

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(b) Without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(c) Because of the peculiar economic circumstances an investigation with a refund and keep account will not protect the protestant.

(4) **MARKET DOMINANCE.** When a new individual or joint rate is alleged to be unreasonably high, the office within 90 days after the commencement of a proceeding under this section, shall determine whether or not the railroad proposing the rate has market dominance over the transportation to which the rate applies.

(a) If the office finds that:

1. The railroad proposing the rate has market dominance over the transportation to which the rate applies, the office shall then proceed to determine whether or not the proposed rate exceeds a maximum reasonable level for that transportation.

2. The railroad proposing the rate does not have market dominance over the transportation to which the rate applies, the office shall not make a determination on the issue of reasonableness.

(b) A rail carrier may meet its burden of proof that the rate falls below the revenue-variable cost threshold by establishing its variable costs in accordance with 49 U.S.C. s. 10705a(m) (1). However, a finding by the office that the proposed rate has a revenue-variable cost percentage which is equal to or greater than the percentages found in 49 U.S.C. s. 10709(d) (2) does not establish a presumption that:

1. The railroad has or does not have market dominance over such transportation, or

2. The proposed rate exceeds or does not exceed a reasonable maximum level.

(5) **REASONABLENESS.** Except for nonferrous recyclables, the office shall evaluate the reasonableness of a rate only after market dominance has been established. In determining whether a rate is reasonable, the office shall consider among other factors, evidence of the following:

(a) The amount of traffic which is transported at revenues which do not contribute to the going concern value and efforts made to minimize such traffic;

(b) The amount of traffic which contributes only marginally to fixed costs and the extent to which the rates on such traffic can be changed to maximize the revenues from such traffic; and

(c) The carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

(d) The interstate commerce commission and the office presume a rate on nonferrous recyclable material to be unreasonable when it is set at a revenue to variable cost ratio greater than 146% 364 ICC 425 (1984). Any future interstate commerce commission changes to this section will be addressed through the administrative rule-making procedure.

(6) **BURDEN OF PROOF.** (a) The burden shall be on the protestant to prove the matters described in sub. (3).

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(b) The following items shall be considered in determination of market dominance:

1. Jurisdiction. The respondent railroad shall bear the burden of showing that the office lacks jurisdiction to review the proposed rate because the rate produces a revenue-variable cost percentage that is less than the percentages found in 49 U.S.C. s. 10709(d) (2). The railroad may meet its burden of proof by showing the revenue-variable cost percentage for that transportation to which the rate applies is less than the threshold percentage cited in 49 U.S.C. s. 10709(d) (2). The protestant may rebut the railroad's evidence with a showing that the revenue-variable cost percentage is equal to or greater than the threshold percentage in 49 U.S.C. s. 10709(d) (2).

2. Intramodal and intermodal competition. The protestant shall bear the burden of demonstrating that there exists no effective intramodal or intermodal competition for the transportation to which the rate applies. Respondent railroad may rebut the protestant's showing with evidence that effective intramodal or intermodal competition exists.

3. Product and geographic competition. If intramodal and intermodal competition is shown not to exist, the respondent railroad shall have the burden of proving that either product or geographic competition for the involved transportation does exist. The protestant shall then have the burden of proving that such competition is not effective.

(7) RATE DECREASES AND RATE INCREASES. The following items shall be considered in determination of rate reasonableness:

(a) A party protesting a rate increase shall bear the burden of demonstrating its unreasonableness if such rate is authorized under 49 U.S.C. s. 10707a and results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of 49 U.S.C. s. 10707a(e) (2) (a).

(b) The respondent railroad shall bear the burden of demonstrating the reasonableness of a rate increase if such rate is greater than that authorized under 49 U.S.C. s. 10707a, or results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of 49 U.S.C. s. 10707a(e) (2) (a) and the office initiates an investigation in accordance with the provisions of 49 U.S.C. s. 10707.

(c) A party protesting a rate decrease shall bear the burden of demonstrating that the rate does not contribute to the going concern value of the railroad, and is therefore unreasonably low. A party may meet its burden of proof by making a showing that the rate is less than the variable cost for the transportation to which the rate applies.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.05 Zone of rate flexibility. A rail carrier may raise any rate pursuant to the limitations described in 49 U.S.C. s. 10707a. Base rates increased by the quarterly rail cost adjustment factor will not be investigated or suspended. Railroads not earning adequate revenues, as defined by the interstate commerce commission, may raise rates 4% per year. Such 4% increase may not be suspended. If the increase results in a revenue-variable cost percentage that equals or exceeds 190%, the office may Register, August, 1986, No. 368

investigate the rate either on its own motion or on complaint of an interested party.

(1) **INVESTIGATION DETERMINATION.** In determining whether or not to investigate the rate the office shall consider:

(a) The amount of traffic which the railroad transports at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(b) The amount of traffic which contributes only marginally to fixed costs and the extent to which rates on such traffic can be changed to maximize the revenues from such traffic;

(c) The impact of the challenged rate on national energy goals;

(d) State and national transportation policy; and

(e) The revenue adequacy goals incorporated in the Interstate Commerce Act.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.06 Monetary adjustments for suspension actions. (1) RATE INCREASES WITH NO SUSPENSIONS. In the event the office does not suspend but investigates a proposed increase under s. OCT 5.04, the office shall require the rail carrier to account for all amounts received under the increase until the proceedings are completed. The accounting shall specify by whom and for whom the amounts are paid. When the office takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield, on the date that the "Statement of Monetary Adjustment" is filed, of marketable securities of the United States government having a duration of 90 days.

(2) RATE INCREASES WITH SUSPENSION. If a rate increase is suspended under s. TC 5.04 and any portion of such rate is later found to be reasonable, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield, on the date that the "Statement of Monetary Adjustment" is filed, of marketable securities of the United States government having a duration of 90 days.

(3) RATE DECREASES WITH SUSPENSION. In the event the office suspends a proposed rate decrease under s. TC 5.04 which is later found to be reasonable, the rail carrier may refund any part of the decrease found to be reasonable, if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.07 Filing procedure. The following procedures shall apply in connection with the filing of a protest against a proposed rail rate, classification, rule or practice and the reply thereto.

(1) **LIBERAL CONSTRUCTION.** The procedures contained in this section shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

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(2) **COMMUNICATIONS.** (a) Pleadings relating to the proceeding will not be considered unless made in writing and filed with the office.

(b) Pleadings shall be addressed to:

Office of the Commissioner of Transportation
Railroad Tariff Bureau
Hill Farms State Transportation Building
4802 Sheboygan Avenue
P.O. Box 7957
Madison, Wisconsin 53707-7957

(c) Pleadings relating to the proceeding must be received for filing at the office in Madison, Wisconsin, within the proper time limits if any for such filing. The date of receipt at the office and not the date of deposit in the mails is determinative.

(d) If, after examination, the office determines that the pleadings relative to the proceeding are not in substantial compliance with the provisions of this chapter, the office may decline to accept the pleadings and return them unfiled if they require complete revision, or may accept the pleadings for filing and advise the party rendering them of the deficiencies and require that they be corrected.

(3) **SIGNATURE AND VERIFICATION.** Pleadings relating to the proceedings shall be signed in ink and the signer's address shall be stated. The facts alleged in a pleading shall be verified by the person on whose behalf it is filed. If a pleading is filed on behalf of a corporation or other organization, the pleading shall be verified by an officer of such corporation or organization.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; am. (2) (b), Register, August, 1986, No. 368, eff. 9-1-86.

OCT 5.08 Service of pleadings. (1) **PLEADINGS.** The original pleading and 2 copies shall be filed with the office and one copy shall be served upon all parties to the proceeding.

(2) **CERTIFICATE OF SERVICE.** When a pleading is filed with the office, the pleading shall include a certificate showing service upon all parties to the proceeding. Such service may be made by delivery in person, or by first-class mail, certified mail, registered mail, or by express or equivalent parcel delivery service, properly addressed with charges prepaid, one copy to each party. Service upon the parties shall be by the same means of communication and class of service employed in making delivery to the office. Provided, however, that when delivery is made to the office in person, and it is not feasible to serve the other parties in person, service shall be made by first-class or express mail. A certificate of service shall be in the following form:

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by (here state the precise manner of making service).

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Dated at _____,
this _____ day of _____, 19_____.

(Signature)

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.09 Content and timing. (1) **PROTEST.** (a) *Identification.* The protested tariff should be identified by making reference to the name of the railroad or its publishing agent, to the office number, to the specific items or particular provisions protested and to the effective date of the protested publication. Reference should also be made to the tariff and specific provisions thereof that are proposed to be superseded.

(b) *Grounds for suspension.* The protest shall incorporate sufficient facts to meet the criteria for suspension and sustain the applicable burdens of proof as set forth in s. OCT 5.04. Further, the protest should include any additional information that would support suspension of the proposed rate.

(c) *Timing.* A protest against or a suspension of a tariff filed by a railroad or its publishing agent shall be received by the office at least:

1. Ten days prior to the effective date when the proposed change is to become effective upon not less than 20 days notice;
2. Five days prior to the effective date when the proposed change is to become effective upon not less than 10 days notice.

(2) **REPLY TO PROTEST.** (a) *Content.* The reply should adequately identify the protested tariff. Further it shall contain sufficient facts to rebut the allegations made in the protest and to sustain the applicable burdens of proof as set forth in s. OCT 5.04.

(b) *Timing.* A reply to a protest must be received by the office not later than:

1. The fourth working day prior to the effective date when the proposed change is to become effective upon not less than 20 days notice;
2. The second working day prior to the effective date when the proposed change is to become effective upon not less than 10 days notice.

(3) **EMERGENCY PROTESTS AND REPLIES.** In emergencies, telegraphic protests and replies are acceptable provided that they are received within the time limits, that the protested tariff is identified and properly supported. Only the telegram and the original signed verified copy need be filed with the office. The telegrams shall include statements to the effect that they are copies of original protests or replies which have been signed, verified and mailed to the office. The telegrams shall also indicate the method of verification. The telegrams shall also include a certification that copies either have been, or will be immediately, telegraphed to the proponent carriers or their publishing agents in the case of protests, or to the protestants in the case of replies.

(4) **NONSUSPENSION OR INVESTIGATION.** Should a protestant desire to proceed further against a tariff which is not suspended or investigated or

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which has been suspended and the suspension vacated and the investigation discontinued, a separate later complaint should be filed.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.10 Refund, collection of freight charges or petitions based on damages. (1) When the office finds that a railroad shall make refunds on freight charges collected or that the railroad is entitled to collect additional freight charges, but the amount cannot be ascertained upon the record before it, the party entitled to the refund or the railroad entitled to collect additional monies, as the case may be, shall immediately prepare a statement showing details of the shipments involved in the proceeding, in accordance with s. OCT 5.11 — Statement of Monetary Adjustment. The statement shall not include any shipment not covered by the office findings. Statements based on damages may also be submitted to the office. Where a liquidated damages provision exists for a contract violation, and a carrier is willing to pay the specified damages, a statement for appropriate authority shall be filed by the carrier with this office.

(a) If the shipments moved over more than one route, a separate statement shall be prepared for each route and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes.

(b) The party entitled to the refund shall submit its statement together with the paid freight bills on the shipments, or true copies, thereof, to the carrier which collected the charges, for verification and certification as to its accuracy.

(c) If railroads are entitled to additional monies, the carrier collecting the initial freight charges shall prepare the statement for and on behalf of the involved carriers.

(d) All discrepancies, duplications, or other errors in the statements shall be adjusted by the parties and a corrected statement shall be submitted to the office.

(e) The certificate shall be signed in ink by a general accounting officer of the carrier and shall cover all of the information shown in the statement.

(f) If the carrier which collected the charges is not a respondent to the proceeding, its certificate shall be concurred in by like signature on behalf of a carrier named as a respondent in the proceeding.

(g) Statements so prepared and certified shall be filed with the office whereupon it shall consider entry of an order awarding refunds or collection of additional freight charges as the case may be.

(h) If a carrier is unable to file a statement within the period prescribed in s. 195.37(3), Stats., and the claim is not already protected from the operation of the statute, a letter may be submitted to the office by the carrier within the statutory period. Such letter shall set forth all relevant facts including pertinent freight bill information and act to toll the statute of limitations. Receipt of such letter by the office will be deemed the equivalent of a complaint filed on behalf of the shipper or consignee and act to toll the statute of limitations with respect to their claims. Within one year of receipt of such letter by the office, the carrier shall submit to

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the office a letter which indicates the intention to waive collection of freight charges or an appropriate statement.

(2) COMMUNICATIONS. All communications shall be in writing and shall be addressed to:

Office of the Commissioner of Transportation
Railroad Tariff Bureau
Hill Farms State Transportation Building
4802 Sheboygan Avenue
P.O. Box 7957
Madison, WI 53707-7957

(3) PETITION TO WAIVE COLLECTION OF FREIGHT CHARGES. (a) *Freight charges of more than \$2,000.00.* If a railroad wishes to waive collection of amounts due when such amounts are more than \$2,000.00, a petition for appropriate authority may be filed by the railroad with the office in the form of a letter stating the intent to waive freight charges. The petition should contain the following information:

1. The name and address of the customer for whom the railroad wishes to waive collection;
2. The names and addresses of the railroads involved in the intended waiver and a statement certifying that all railroads concur in the action;
3. The amount intended to be waived;
4. The number of the investigation and suspension docket involved, the beginning and ending dates of the suspension period, and any other pertinent tariff information;
5. The points of origin and destination of the shipments and the routes of movement, if relevant;
6. A brief statement of justification for the intended waiver, including the anticipated costs of billing, collecting and litigating if the waiver is not permitted; and
7. When certification is necessary pursuant to subd. 2 it should be in the following format:

The (name of petitioning railroad) hereby certifies that it holds the written concurrence of all of the railroads named in this petition.

By its (petitioner's title)

Dated at _____

this _____ day of _____, 19_____.

(petitioner's signature)

(b) *Freight charges of \$2,000.00 or less.* If the amount to be waived is \$2,000.00 or less, no petition need be filed prior to waiver of monies due, provided that this exception may be invoked by the railroad only once for any person who uses the original rate during the suspension period. However, a letter informing the office of the investigation and suspension docket number, the action taken, the date of the action and the amount

of monies due that were waived shall be submitted to the office within 30 days of the waiver.

(4) PUBLIC RECORD. Petitions based on damages, reparations, waiver of collection of undercharges and waiver of collection of freight charges will be made available by the office for public inspection 5 days after receipt in the railroad tariff bureau.

(5) CONTESTED PETITIONS. Any interested person may protest the waiver of monies due and such protest shall be filed with the office within 30 days of the receipt of the railroad's letter stating the intent to waive freight charges. If the protest is not filed within the 30 day period, it will not be considered as being timely filed.

(a) *Objection letter.* The protest should be in the form of an objection letter and shall identify the investigation and suspension docket number, shall clearly state the reasons for objection and shall certify according to s. OCT 5.08 that a copy of the letter stating the objection has been served on all parties named in the letter stating the intent to waive freight charges.

(b) *Replies to an objection letter.* Replies to an objection letter shall be filed no later than the 45th day after the office's receipt of the letter stating the intent to waive freight charges. If the reply to the protest is not filed within the 45 day period, it will not be considered as being timely filed. If the objection letter is timely filed, the office will consider the letter stating the intent to waive freight charges as being contested. The office will notify all parties to the proceeding that the petition is contested and the railroad shall not be allowed to take any further action until the office makes its findings and enters an appropriate order granting or denying the petition to waive monies due.

(6) UNCONTESTED PETITIONS. A petition which is not contested will be considered an order of the office authorizing the action contemplated in the petition 45 days after office receipt of the petition. Within 30 days after the expiration of the 45-day period, the carrier filing the petition shall file a letter informing the office of the action taken, the date of the action, and the amount paid or waived.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; am. (2), Register, August, 1986, No. 368, eff. 9-1-86.

OCT 5.11 Content of statement of monetary adjustment.

Statement of Monetary Adjustment

Claim of _____ under decision of the Office of the Commissioner of Transportation, State of Wisconsin in Docket No. _____.

- _____ Date of shipment
- _____ Date of delivery or tender of delivery
- _____ Date charges were paid
- _____ Car initials
- _____ Car number
- _____ Origin
- _____ Destination
- _____ Route

_____ Commodity
 _____ Weight
 _____ Rate
 _____ Amount
 _____ Rate
 _____ Amount
 _____ Refund (or monies due) on basis of Office of the Commissioner of Transportation decision
 _____ Charges paid by (1)

Claimant hereby certifies that this statement includes claims only on shipments covered by the findings in the docket above described and contains no claim for refund (or monies due) previously filed with the Office of the Commissioner of Transportation or on behalf of claimant or, so far as claimant knows, by or on behalf of any person, in any other proceedings, except as follows: (here indicate any exceptions and explanation thereof)

 (Claimant)
 By _____

 (address)

 (date)

Total amount of refund (or monies due) \$_____. The undersigned hereby certifies that this statement has been checked against the records of this Company and found correct.

Date _____ Concurred (2) in: _____ Company
 _____ Company, Defendant Collecting Carrier, Defendant
 (3) _____ By _____, Auditor. By _____,
 Auditor.

(1) Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in other capacity.

(2) For concurring certificate in case the collection carrier is not a defendant.

(3) If not a defendant, strike out the word "defendant."

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.12 Market dominance guidelines. (1) INTRAMODAL COMPETITION. Intramodal competition refers to competition between 2 or more railroads transporting the same commodity between the same origin and destination. A shipper has rail alternatives when, for a given purpose, the shipper can be served by more than one railroad or combination of different railroads. The degree to which these alternatives compete with one another depends on such factors as:

- (a) The number of rail alternatives;
- (b) The feasibility of each alternative as evidenced by:

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1. Physical characteristics of the route associated with each alternative that are indicative of the feasibility of using that alternative for the traffic in question; and

2. The direct access of both the shipper and the receiver to each of the rail alternatives as evidenced by individual rail sidings, neutral terminal companies or reciprocal switching; or if direct access is not available, then the feasibility of using local trucking to transport the commodity to or from terminals;

(c) The transportation costs associated with each alternative to determine if actual use of alternatives is due to excessive rates charged by the rail carrier in question;

(d) Collective ratemaking among the railroads in question as evidenced by the office rate bureau information; and

(e) Evidence the substantial rail-related investment or long-term supply contracts with more weight being given to contracts if made prior to October 1, 1980.

(f) These factors should be considered in connection with the preparation and submission of evidence pertaining to the presence or absence of effective intramodal competition. This list is neither exhaustive nor mandatory, but provides a general indication of the type of evidence that would be appropriate.

(2) **INTERMODAL COMPETITION.** Intermodal competition refers to competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination. Motor and water carriage are the main sources of intermodal competition for railroads.

(a) *Water carriage.* Water carriage is restricted to certain geographic areas and is generally used for commodities moving in bulk. The evidence required to demonstrate effective competition between rail and water alternatives is in many respects similar to that required for intramodal competition among rail carriers. Parties in a rate case should provide evidence of the following:

1. The number of alternatives involving different carriers;

2. The feasibility of each alternative as evidenced by:

a. Pertinent physical characteristics, for the product in question, of the transportation or routing associated with each alternative;

b. The access of both the shipper and receiver to each alternative; and

3. The transportation costs of each alternative.

(b) *Motor carriage.* Unlike rail or water alternatives, the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted. Therefore, the feasibility of using motor carriage as an alternative to rail may be viewed as depending exclusively on the nature of the product and the needs of the shipper or receiver. Effective competition from motor carriage may be deduced from the following types of evidence:

1. The amount of the product in question that is transported by motor carrier where rail alternatives are available;
2. The amount of the product that is transported by motor carrier under transportation circumstances similar to rail;
3. Physical characteristics of the product in question that may preclude transportation by motor carrier; and
4. The transportation costs of the rail and motor carrier alternatives.

(3) GEOGRAPHIC COMPETITION. (a) Geographic competition may be described as a restraint on rail pricing stemming from a shipper's or receiver's ability to get the product to which the rate applies from another source, or ship it to another destination. Because shippers and receivers can do this, the railroad must compete with the railroad serving the alternate source or destination. Geographic competition among rail carriers is nontrivial for commodities in which transportation costs account for a substantial portion of the delivered price. To establish the potential for geographic competition, evidence should be submitted concerning the following:

1. The number of alternative geographical sources of supply or alternative destinations available to the shipper or receiver for the product in question;
2. The number of these alternative sources or destinations served by different carriers; and
3. That the product available from each source or required by each destination is the same.

(b) Evidence submitted under par. (a) is sufficient only to indicate whether effective geographic competition is possible. To determine whether effective geographic competition actually exists, evidence showing the feasibility of each source or destination and the likelihood of competition should be presented. This evidence may include the following:

1. The distance associated with each alternative source or destination;
2. Relevant physical characteristics of the route associated with each alternative;
3. The access of the shipper or receiver to each transportation alternative;
4. The capacity of each source to supply the product in question or the capacity of each destination to absorb the product in question;
5. The transportation costs associated with each alternative;
6. Collective ratemaking among the railroads in question as evidenced by rate bureaus; and
7. Evidence of substantial rail-related investment or long-term supply contracts with more weight being given to contracts if made prior to October 1, 1980.

(4) PRODUCT COMPETITION. Product competition occurs when a receiver or shipper can use a substitute for the product covered by the rail rate. In that case, the railroad must compete with the railroad or other

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mode which carries that other product, and again, must keep its rate competitive if it wants the traffic. Evidence as to the existence of product competition should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost. To demonstrate whether a feasible substitute exists, the following types of evidence, among others, may be submitted:

- (a) The prices of the substitute product relative to the product in question;
- (b) The efficiency of the substitute product relative to the product in question; and
- (c) The explicit and implicit transportation costs of the substitute product and the product in question.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.13 Complaints alleging unreasonable railroad rates. (1) FORMAL COMPLAINTS - GENERAL ALLEGATIONS. A formal complaint shall be so drawn as to fully and completely advise the parties and the office in what respects the provisions of this chapter have been or are being violated or will be violated, and shall set forth briefly and in plain language the facts claimed to constitute such violations. If 2 or more sections or subsections of this chapter are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement shall be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

(2) FORMAL COMPLAINTS - WHEN DAMAGES SOUGHT. A formal complaint seeking damages, when permitted, shall be filed within the statutory period, and shall contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint shall state:

- (a) That complainant makes claim for damages;
- (b) The name of each individual seeking damages;
- (c) The names of defendants against which claim is made;
- (d) The commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne;
- (e) The period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery;
- (f) The points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if known, the routes of movement;
- (g) The nature and amount of the injury sustained by each claimant; and
- (h) If a complaint seeking the award of damages contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the office, reference to such complaint shall be given.

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(3) **FORMAL COMPLAINTS - COPIES.** The original of each formal complaint, amended or supplemental formal complaint, or cross complaint, shall be accompanied by copies in sufficient number to enable an office staff person to serve one upon each defendant, including each receiver or trustee, and retain 2 copies in addition to the original.

(4) **FORMAL COMPLAINTS - TARIFF OR SCHEDULE REFERENCES.** The several rates, charges, schedules, classifications, regulations, or practices on which complaint is made shall be set out by specific reference to the tariffs or schedules in which they appear, whenever that is feasible.

(5) **FORMAL COMPLAINTS - PRAYERS FOR RELIEF.** (a) A formal complaint in which relief for the future is sought should contain a detailed statement of the relief desired. Relief in the alternative or of several different types may be demanded.

(b) Except under unusual circumstances, and for good cause shown, damages will not be awarded upon a complaint unless specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

(6) **AMENDED AND SUPPLEMENTAL FORMAL COMPLAINTS.** An amended or supplemental complaint may be tendered for filing by a complainant against the defendants named in the original complaint, stating a cause of action alleged to have occurred within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendants.

(7) **ANSWERS AND CROSS COMPLAINTS TO FORMAL COMPLAINTS.** (a) An answer may simultaneously be responsive to a formal complaint and to any amendment or supplement thereof. It shall be drawn so as to fully and completely advise the parties and the office of the nature of the defense and shall admit or deny specifically and in detail each material allegation of the pleading answered. An answer may embrace a detailed statement of any counterproposal which a defendant may desire to submit. Unless the issue is such that separate answers are required, answer for all defendants may be filed on their behalf by one defendant in one document, in which event the answer must show clearly the names of all defendants joining therein, and their concurrence.

(b) A defendant's cross complaint alleging violations and seeking relief against other persons or parties to the proceeding may be tendered for filing with its answer.

(c) Unless otherwise directed by the office, an answer to a complaint shall be filed within 20 days after the day on which the complaint was served. The original and two copies of an answer shall be filed with the office.

(d) If any defendant answers or fails to file and serve an answer within the period specified in par. (c), issue thereby is joined as to such defendant.

(8) **SATISFACTION OF COMPLAINT.** If a defendant satisfies a formal complaint, either before or after answering, the original statement to that effect signed by the opposing parties shall be filed setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

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(9) **SIGNATURE AND VERIFICATION.** The complaint, answer and other pleadings relating to a complaint proceeding shall be signed in ink and the signer's address shall be stated. The facts alleged in a complaint, answer or other pleadings shall be verified by the person on whose behalf it is filed. If a complaint, answer or other pleading is filed on behalf of a corporation or other organization, it shall be verified by an officer of such corporation or organization.

(10) **CERTIFICATE OF SERVICE.** Proof of service of any complaint, answer or other pleading shall be by certificate of attorney affidavit or acknowledgment. A certificate of service shall be in the following form:

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by (here state the precise manner of making service).

Dated at _____
this _____ day of _____, 19____.

(Signature)

(11) **STATEMENTS OF CLAIMED DAMAGE BASED ON OFFICE FINDINGS.** (a) When the office finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with s. TC 5.14. The statement shall not include any shipment not covered by the office's findings, or any shipment on which complaint was not filed with the office within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shipments move over more than one route, a separate statement shall be prepared for each route, and separately numbered, except that shipments, as to which the collecting carrier is in each instance the same, may be listed in a single statement if grouped according to routes.

(b) The statement, together with the paid freight bills on the shipments, or true copies thereof, shall be forwarded to the carrier which collected the charges, for verification and certification as to its accuracy. All discrepancies, duplications, or other errors in the statements shall be adjusted by the parties and corrected agreed statements submitted to the office. The certificate shall be signed in ink by a general accounting officer of the carrier and shall cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case, its certificate shall be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the office whereupon it will consider entry of an order awarding damages.

(12) **ZONE OF RATE FLEXIBILITY.** Base rates increased by the quarterly rail cost adjustment factor may not be found to exceed a reasonable maximum for the transportation involved. Complaints against rate increases effected under 49 U.S.C. s. 10707a(c) and (d) shall be considered pursuant to 49 U.S.C. s. 10707a(e).

(13) **MARKET DOMINANCE.** The office shall determine within 90 days of the commencement of a complaint proceeding whether the carrier has market dominance over the transportation to which the rate applies. If

the office finds that the carrier has market dominance, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. In making a determination of market dominance, the office shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applied if the rail carrier proves that the rate charged results in a revenue-variable cost percentage which is less than that stated in 49 U.S.C. s. 10709(d) (2). Evidentiary guidelines for the determination of whether or not the railroad has market dominance over the transportation to which the rate applies shall be found in s. TC 5.12. If the office determines that a rail carrier does not have market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation shall be deemed reasonable.

(14) **REASONABLE RATES.** (a) Rail rates shall not be established below a reasonable minimum. Any rate for transportation by a rail carrier that does not contribute to the going concern value for such carrier is presumed to be not reasonable.

(b) Rail rates which equal or exceed the variable cost of providing the transportation are conclusively presumed to contribute to the going concern value of that rail carrier, and are therefore presumed not to be below a reasonable minimum.

(c) In determining whether a rate is reasonable, the office shall consider the policy that railroads earn adequate revenues as well as evidence the following:

1. The amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

2. The amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

3. The carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

(15) **BURDEN OF PROOF.** (a) *Jurisdiction.* The defendant railroad shall bear the burden of showing that the office lacks jurisdiction to review a rate because the rate produces a revenue-variable cost percentage that is less than the percentages found in 49 U.S.C. s. 10709(d) (2). The railroad shall meet its burden of proof by showing the revenue-variable cost percentage for the transportation to which the rate applies is less than the threshold percentage cited in 49 U.S.C. s. 10709(d) (2). A complainant may rebut the railroad's evidence with a showing that the revenue-variable cost percentage is equal to or greater than the threshold percentage cited in 49 U.S.C. s. 10709(d) (2).

(b) *Reasonableness of existing rates.* 1. A party complaining that an existing rate is unreasonably high shall bear the burden of proving that such rate is not reasonable.

2. A party complaining that an existing rate is unreasonably low shall bear the burden of demonstrating that the rate does not contribute to the going concern value of the carrier, and is therefore unreasonably low.

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3. Savings provisions. - Any interested party may file a complaint alleging that an intrastate railroad rate which was in effect on the effective date of the Staggers Act (October 1, 1980) is subject to market dominance under the provisions of 49 U.S.C. s. 10709 and is not reasonable under the provisions of 49 U.S.C. s. 10701a. The complaint shall have been filed with the Office within 180 days of the effective date of the Staggers Act, i.e. by March 30, 1981.

(16) NONAPPLICABILITY. Complaints shall not be entertained by the office to the extent that they challenge the reasonableness of the following rate adjustments:

- (a) General rate increases;
- (b) Inflation-based rate increases; and
- (c) Fuel adjustment surcharges.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; cr. (15) (b) 3., Register, July, 1985, No. 355, eff. 8-1-85.

OCT 5.14 Reparation statement

Claim of _____ under decision of
the Office of the Commissioner of Transportation in Docket No.
_____.

_____ Date of shipment
 _____ Date of delivery or tender of delivery
 _____ Date charges were paid
 _____ Car initials
 _____ Car number
 _____ Origin
 _____ Destination
 _____ Route
 _____ Commodity
 _____ Weight
 _____ Rate
 _____ Amount
 _____ Reparation on basis of Office of the Commissioner of
 Transportation decision
 _____ Charges paid by (1)

Claimant hereby certifies that this statement includes claims only on shipments covered by the findings in the docket above described and contains no claim for reparation previously filed with the Office of the Commissioner of Transportation or on behalf of claimant or, so far as claimant knows, by or on behalf of any person, in any other proceedings, except as follows: (here indicate any exceptions, and explanation thereof)

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(Claimant)
By _____

(address)

(date)

Total amount of reparation \$_____. The undersigned hereby certifies that this statement has been checked against the records of this Company and found correct.

Date _____ Concurred (2) in: _____ Company
_____ Company. Defendant Collecting Carrier, Defendant
(3) _____ By _____, Auditor. By _____,
Auditor.

(1) Here insert name of person paying charges in the first instance and state whether as consignor, consignee, or in what other capacity.

(2) For concurring certificate in case collecting carrier is not a defendant.

(3) If not a defendant, strike out the word "defendant."

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.15 Contracts. (1) **DEFINITIONS.** (a) "Contract" for purposes of this section means a written agreement including any amendment entered into by one or more rail carriers with one or more purchasers of rail services, to provide specified services under specific rates, charges and conditions. A contract filed under this section shall specify that the contract is made pursuant to 49 U.S.C. s. 10713 and shall be signed by duly authorized parties.

(b) "Amendment" for purposes of this section includes written contract modifications signed by the parties. An amendment is treated as a new contract and is lawful only if it is filed and approved in the same manner as a contract. To the extent terms affecting the lawfulness of the underlying contract are changed, remedies are revived and review is again available.

(2) **CONTRACT IMPLEMENTATION DATE.** Transportation or service performed under a contract or amendment may begin, without specific office authorization, on or after the date the contract and contract summary or contract amendment and supplement are filed and before the office approval as defined at 49 C.F.R. s. 1039.3 (f), subject to the following conditions:

(a) The contract or contract amendment shall specifically state that the transportation or service may begin on the date of filing and that performance is subject to the conditions of 49 C.F.R. s. 1039.2, and this subsection. The contract summary or supplement shall separately reflect the date of commencement of service under this provision under "duration of the contract," as prescribed in 49 C.F.R. s. 1300.313 (a) (4), s. OCT 5.16 (4).

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(b) If the rail equipment standards of 49 U.S.C. s. 10713 (k) are exceeded, prior relief shall be obtained from the office and shall be specifically identified in the contract summary.

(c) If the office disapproves or rejects the contract or amendment, the appropriate noncontract tariffs or the contract provisions otherwise in effect under previously approved contracts and amendments will be applicable.

(3) FILING AND APPROVAL. (a) *Filing.* Rail carriers providing transportation subject to Subchapter 1 of Chapter 105 of Title 49, United States Code, shall file with the office an original and one copy of a contract entered into with one or more purchasers of rail service. The contract shall be accompanied by 3 copies of a summary of the nonconfidential elements of the contract in the format specified in 49 C.F.R. ss. 1300.300 - 1300.315, and s. OCT 5.16 (1)-(4). A contract, amendment or supplement may be rejected for noncompliance with applicable statutes and regulations.

(b) *Review.* Within 30 days of the filing date of a contract, the office may, on its own motion or on complaint, begin a proceeding to review it. A contract may be reviewed only on the following grounds:

1. In the case of a contract other than a contract for the transportation of agricultural commodities including forest products and paper, a complaint may be filed;

a. By a shipper only on the grounds that the shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet common carrier obligations under 49 U.S.C. s. 11101; or

b. By a port only on the grounds that the port individually will be harmed because the proposed contract will result in unreasonable discrimination against that port.

2. In the case of contract for the transportation of agricultural commodities including forest products and paper, in addition to the grounds for a complaint described in this subsection, a complaint may be filed by the shipper on the grounds that the shipper individually will be harmed because:

a. The rail carrier unreasonably discriminated by refusing to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue and the shipper was ready, willing and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract was offered; or

b. The proposed contract constitutes a destructive competitive practice.

3. "Unreasonable discrimination," as used in this section, means, when applied to agricultural shippers, that the railroad has refused to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the per-

iod during which the contract at issue was offered, and when applied to a port, has the same meaning as the term has under 49 U.S.C. s. 10741.

4. What constitutes "agricultural commodities," "forest products," and "paper" will be decided on a case by case basis.

(c) *Filing and service of complaints.* A complaint shall be filed with the office by the 18th day after the filing date of the contract. A reply shall be filed by the 23rd day after the filing date of the contract. An original and 1 copy of each shall be filed with the office. A copy of the complaint shall be served on each railroad participating in the contract and replies shall be served on complainant. Complaints shall be served by hand, express mail, or other overnight delivery service.

(d) *Office decision upon review of contract.* 1. Within 30 days after the date a proceeding is commenced to review a contract upon the grounds specified in par. (b), the office shall decide whether the contract violates the provision of 49 U.S.C. s. 10713. If the office finds that the contract violates the provision of 49 U.S.C. s. 10713, it will:

a. Disapprove the contract, or

b. In the case of agricultural contracts where the office finds unreasonable discrimination by a carrier in accordance with par. (c), allow the carriers the option to provide rates and services substantially similar to the contract at issue, with such differences in terms and conditions as are justified by the evidence or cancel the contract.

2. An appeal of an office decision shall be made in accordance with 49 C.F.R s. 1100.200 (c), subject to the following exception:

a. An appeal must be made at least 2 work days prior to the contract approval date as set out in pars. (e) and (f).

(e) *Approval date of contract.* 1. If the office does not institute a proceeding to review the contract, it shall be approved on the 30th day after the filing of the contract. The contract shall be considered "expressly approved" by the office.

2. If the office institutes a proceeding to review a contract, the contract is approved:

a. On the date the office approves the contract if the date of approval is 30 or more days after the filing date of the contract;

b. On the 30th day after the filing of the contract, if the office denies the complaint against the contract prior to the 30th day after the filing date of the contract; or

c. On the 60th day after the filing date of a contract, if the office fails to disapprove the contract.

(f) *Limitation of rights of a rail carrier to enter into future contracts.* The office may limit the right of a rail carrier to enter into future contracts if the office determines that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under 49 U.S.C s. 11101. The office will handle these determinations on a case-by-case basis and may investigate either on its own initiative or upon the filing of a verified complaint by a shipper which demonstrates that it individually

had been or will be harmed by a carrier's inability to fulfill its common carrier obligations as a result of existing contracts.

(4) **COMMON CARRIER RESPONSIBILITY.** (a) The terms of a contract approved by the office determine completely the duties and service obligations of the parties to the contract with respect of the services provided under the contract. The contract does not affect the parties' responsibilities for any services which are not included in the contract.

(b) Service under a contract approved by the office is deemed a separate and distinct class of service and the equipment used to fulfill the contract shall not be subject to car service decisions under 49 U.S.C. s. 11123.

(5) **ENFORCEMENT.** (a) The exclusive remedy for an alleged breach of a contract approved by the office shall be an action in an appropriate state court or United States district court, unless the parties otherwise agree in the contract.

(b) The office may not require a rail carrier to violate the terms of a contract that has been approved under 49 C.F.R. s. 1039.3 (f), sub. (3) (f), except to the extent necessary to comply with 49 U.S.C. s. 11128.

(6) **LIMITATION ON AGRICULTURAL EQUIPMENT AND RELIEF.** (a) A rail carrier may enter into contracts for the transportation of agricultural commodities including forest products but not including wood pulp, wood chips, pulpwood or paper that involve the use of carrier owned or leased equipment not in excess of 40% of the total number of the carrier's owned or leased equipment by major car type, except as provided in par. (b).

(b) In the case of a proposed contract between a class 1 carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40% of carrier owned or leased equipment used on the average during the prior 3-year period may be used for the contract without prior authorization by the office.

(c) The office may grant relief from the limitations of pars. (a) and (b) if a rail carrier or other party requests such relief, or if the office on its own initiative considers granting such relief. Relief may also be given if the office determines that making additional equipment available does not impair the rail carrier's ability to meet its common carrier obligations under 49 U.S.C. s. 11101.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.

OCT 5.16 Special tariff rules. Contracts entered into by one or more rail carriers with one or more purchasers of railroad transportation services and contract summaries shall be filed with the office in accordance with the rules prescribed in this section. All contracts and amendments shall be of a size not less than 8 by 10½ inches nor greater than 8½ by 14 inches; all contract summaries and supplements shall be of a size not less than 8 by 10½ inches nor greater than 8½ by 11 inches; any amendment to a contract shall be the same size as the contract and any supplement to a summary shall be the same size as the summary; all shall be clear, legible, and on durable paper.

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(1) FILING AND AVAILABILITY OF CONTRACT. (a) A railroad entering into a contract for railroad transportation services with one or more purchasers of rail service shall file with the office the original and one copy of the contract and 2 copies of the contract summary. Copies of contract summaries shall be available from the office railroad tariff bureau. Copies of contract summaries shall also be available from carriers participating in the contract.

1. Contracts and contract summaries shall not be filed in the same package with standard tariff filings.

2. The confidential contract shall not be attached to the contract summary.

3. The envelope or wrapper containing the contract and summary shall be marked "Confidential, Rail Contract".

4. A contract and summary shall be accompanied by a transmittal letter identifying the submitted documents, and the name and telephone number of a contact person.

(b) The contract filed under this section will not be available for inspection by persons other than the parties to the contract and authorized office personnel, except by petition demonstrating a likelihood of succeeding on the merits of the complaint and that the matter complained of could not be proven without access to additional contract information. The office's action in any contract-disclosure matter, including a petition filed under this subparagraph is subject to the limitations imposed by U.S.C. s. 552 (b) and the Trade Secrets Act, 18 U.S.C. s. 1905.

1. A contract and its summary filed under 49 U.S.C s. 10713 may be labeled "Nonconfidential." Such a designation will permit the general public to inspect the entire contract.

2. The contract summary filed under these rules shall include the information specified in this section and 49 U.S.C s. 1300.313. The contract summary shall be made available for inspection by the general public. All filed contracts and amendments and contract summaries and supplements shall provide 30-day notice to the public as required by 49 U.S.C s. 10713 (e).

3. The contract summary filed under these rules shall not be required to be posted in any stations, but shall be made available for carriers participating in the contract upon reasonable request.

(2) CONTRACT AND CONTRACT SUMMARY TITLE PAGES. (a) The title page of every contract and amendment should contain the contract number in the upper right corner, the issuing carrier's name placed in the center of the page followed by the word CONTRACT in large print. All amendments to contracts shall contain the amendment number in the upper right corner. A solid one inch block border shall run down the right side of the title page. The date the contract is issued and the date it is effective should also be included on the title page.

(b) The title page of every contract summary and supplement shall contain the contract summary number, the issuing carrier's name should be followed by the words "CONTRACT SUMMARY" in large print. The date issued and the date to be effective shall also be included on the title page. The issuing individual's name and address shall be placed in

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the center lower portion of the page. Any supplement to contract summaries shall show the supplement number in the upper right corner.

(3) **CONTRACT AND CONTRACT SUMMARY NUMBERING SYSTEM.** (a) Each issuing carrier shall sequentially number the contract and contract summary it issues. The contract and contract summary identification number shall include the word "ICC," the abbreviation for interstate commerce commission, and "OCT," the abbreviation for the office of the commissioner of transportation, the industry standard alphabet code for the issuing railroad (limited to four letters), the letter "C," and the sequential number with each separated by a hyphen.

(b) Any amendment to a contract shall be reflected in a corresponding supplement to the contract summary. If the change in the contract is only in confidential matter, a statement to that effect will be made in the supplement. Contract amendments and contract summary supplements shall be sequentially numbered.

(c) At the carrier's option, the carrier's tariff publishing officer may reserve blocks of numbers if tariffs are used from different departments. An index to the blocks of reserved numbers shall be filed with the office.

(4) **CONTENT OF CONTRACT SUMMARY, FORMAT.** (a) Contract summaries for agricultural commodities, forest products or paper shall contain the following information:

1. Names of the participating carriers. A list alphabetically arranged, of the corporate names of all carriers that are parties to the contract plus their addresses for service of complaints.

2. The commodity or commodities to be transported under the contract.

3. The origin station and destination station including the specific port if applicable.

4. The duration of the contract.

5. Rail car data, by major car type, the number of dedicated cars, or, at the carrier's option, the number of car days used to fulfill the contract or contract options. The data should state the number of cars available and owned by the carrier and those available and leased by the carriers. In both the leasing and the ownership situation, the number of bad order cars should be identified.

6. In the event a complaint is filed involving common carrier obligations and carrier furnished cars, the carrier shall immediately submit to the office and the complainant additional data on cars used to fulfill the challenged contract. Data shall include by major car type used to fulfill the contract the total bad car orders, assigned car obligations and free running cars.

7. If a carrier transports agricultural commodities including forest products but not including wood pulp, wood chips, pulpwood or paper, a certified statement as to the following shall be filed:

a. If cumulative equipment total for all contracts does not exceed 40% of the capacity of the rail carrier's owned and leased cars by applicable major car type; and

b. In the case of an agricultural shipper which originated an average 1,000 cars or more per year during the prior 3-year period by major car type, that the equipment used does not exceed 40% of the rail carrier's owned or leased cars used on the average by that shipper during the previous 3 years.

8. An identification shall be made of base rates or charges and movement type (e.g. single car, multiple car, unit train), the minimum annual volume, and summary of escalation provisions.

9. An identification of the existence of special features but not the terms or amounts of the special features including, but not limited to, transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms and discount.

(b) Contract summaries for other commodities or services not involving a port shall contain the information required in par. (a) 1, 2, 4 and 5. Identification of special features, as required in par. (a) 9, shall be applicable to the extent that service requirements are placed in the contract.

(c) Contract summaries for other commodities or services involving a port shall contain the information required in par. (a) 1, 2, 4, 5, 8 and 9. In addition, the port shall be named and the tariff mileage rounded to the nearest 50 miles shall be disclosed or, at the contracting parties option, the origin and destination shall be specified. The required information shall be disclosed for each movement involving multiple origins and destinations.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84; am. (4) (b), Register, July, 1985, No. 355, eff. 8-1-85.

OCT 5.17 Exemption of rail carrier transportation. (1) **ICC EXEMPTIONS.** The interstate commerce commission, pursuant to 49 U.S.C. s. 10505, may exempt certain classes of rail traffic from interstate regulation. The office shall follow all ICC exemptions.

(2) **EXEMPTIONS.** In addition to those exemptions approved by the ICC, the office may conduct exemption proceeding initiated pursuant to a petition. These proceedings are used to consider the exemption of traffic which has not been considered by the interstate commerce commission. The process for considering exemptions shall be through notice and hearing as provided for in ch. OCT 1.

(3) **CONSIDERATION OF EVIDENCE.** (a) In deciding whether or not to initiate an exemption proceeding the office shall consider, among other factors, whether the interstate commerce commission has exempted the same class of traffic and whether sufficient data is or will be available to permit the office to render a reasonable decision. The office shall exempt a person, class of persons, or a transaction of service when it finds that further regulation:

1. Is not necessary to carry out state and national transportation policy; and

2. Either the transaction or service is of limited scope, or further regulation is not needed to protect shippers from the abuse of market power.

(b) The office may specify the period of time during which an exemption granted pursuant to this rule is effective. The office may revoke entirely or in part an exemption which it has previously granted if it deter-

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mines that such action is necessary to carry out state and national transportation policy.

History: Cr. Register, November, 1984, No. 347, eff. 12-1-84.