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**SURFACE TRANSPORTATION BOARD**

**49 CFR Parts 1011, 1104, 1115, and 1146**

**[Docket No. EP 762]**

**Revisions to Regulations for Expedited Relief for Service Emergencies**

**AGENCY:** Surface Transportation Board.

**ACTION:** Final Rule.

**SUMMARY:** The Surface Transportation Board (STB or Board) adopts a final rule amending its emergency service regulations.

**DATES:** The rule is effective February 23, 2024.

**FOR FURTHER INFORMATION CONTACT:** Jonathon Binet at (202) 245-0368. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

**SUPPLEMENTARY INFORMATION:** Pursuant to its broad statutory mandate, the Surface Transportation Board closely monitors the rail industry's service performance. See 49 U.S.C. 1321, 11145; see also 49 U.S.C. 10101, 11323, 10907. Over the last decade, railroad service challenges impacting a wide range of geographic regions and commodities have occurred with some frequency. See, e.g., U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4) (STB served Dec. 30, 2014); STB Letter to CSX Transp., Inc. Requesting Serv. Reporting (July 27, 2017); Chairman Oberman Letter to Norfolk S. Regarding Serv. Issues (Nov. 23, 2021);[1] Urgent Issues in Freight Rail Serv., EP 770 (STB served Apr. 7, 2022); Oversight Hearing Pertaining to Union Pac. R.R.'s Embargoes, EP 772 (STB served Nov. 22, 2022).

[1] Letters available at www.stb.gov (open tab "News & Communications" and select "Non-Docketed Public Correspondence").

In response to service challenges in recent years, the Board has held a series of public hearings to permit interested persons to report on specific service problems, to hear from rail industry executives on plans to address rail service problems generally, and to explore additional options to improve service. At one such hearing in October 2017, several shippers observed that the Board's regulations at 49 CFR part 1146, which implement 49 U.S.C. 11123 and govern expedited relief for service emergencies, are rarely invoked, even in times of serious rail service challenges. See Pub. Listening Session Regarding CSX Transp., Inc.'s Rail Serv. Issues, EP 742, Hr'g Tr. 89:13-22; 90:1; 150:3-14; 196:11-22; 197:1-16; 199:1-9 (Oct. 17, 2017).

Based on these concerns, and to better understand the reasons for the lack of use of the Board's directed service regulations, the Board announced on March 15, 2018, that Board staff would hold informal meetings with interested persons to discuss and gather feedback on the adequacy of the Board's current regulations regarding emergency service and service inadequacies, and whether and how the current regulations should be modified to offer a more meaningful path to relief. See Press Release, STB, Board to Hold Informal Meetings on Directed Serv. Reguls. Beginning in Apr. (Mar. 15, 2018), www.stb.gov/news-communications/latest-news/archived-press-releases/.[2] As a result, in the second quarter of 2018 Board staff met with representatives of a variety of entities representing carrier and shipper interests. A recurring concern expressed by shipper interests was the amount of time required under the existing procedures to obtain relief for service failures and the difficulty of satisfying certain informational burdens. Although carrier interests acknowledged that very few emergency service petitions had been filed in recent years, they nevertheless generally asserted that the existing procedures were sufficient, and noted that the Board's Rail Customer and Public Assistance program (RCPA) had been helpful in resolving acute service issues informally.

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[2] While these meetings also included discussion of 49 CFR part 1147 (Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies), this proceeding concerns only 49 CFR part 1146 (Expedited Relief for Service Emergencies) pursuant to 49 U.S.C. 11123.

By decision served April 7, 2022, the Board announced that it would hold a hearing on April 26 and 27, 2022, on rail service problems impacting the network and the recovery efforts involving several Class I carriers.[3] As the hearing notice explained, the Board had informally heard from a broad range of stakeholders about inconsistent and unreliable rail service throughout the network and across commodity groups. Urgent Issues in Freight Rail Serv., EP 770, slip op. at 2. These challenges included tight car supply and unfilled car orders, delays in transportation for carload and bulk traffic, increased origin dwell time for released unit trains, missed switches, and ineffective customer assistance. Id.

On April 22, 2022, the Board issued a notice of proposed rulemaking in this docket, proposing to amend its emergency service regulations. Revisions to Reguls. for Expedited Relief for Serv. Emergencies (NPRM), EP 762 (STB served Apr. 22, 2022).[4] The Board explained in the NPRM that if the service issues continue, they could result in an increased need for emergency Board action to meet the needs of the public. NPRM, EP 762, slip op. at 2. Indeed, since the issuance of the NPRM, the Board has issued orders to address service emergencies. See, e.g., Foster Poultry Farms—Ex Parte Pet. for Emergency Serv. Ord., FD 36609 (STB served June 17, 2022) (issuing, just two days after the filing of the petition seeking emergency service relief, an order under 49 U.S.C. 11123 directing Union Pacific to adhere, to the greatest extent possible, to a schedule that Union Pacific itself put forward). In addition, the Board has proposed new regulations that would, if adopted, establish additional procedures to govern reciprocal switching determinations related to service inadequacy. See Notice of Proposed Rulemaking, Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 2) (STB served Sept. 7, 2023).

## Background

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[3] Press Release, STB, STB Issues Hearing Notice for Urgent Issues in Freight Rail Serv. (Apr. 7, 2022), www.stb.gov/news-communications/latest-news/pr-22-21/.

[4] The NPRM was published in the Federal Register, 87 FR 25609 (May 5, 2022).

Emergency service orders are designed to preserve rail service where there has been a substantial rail service issue or failure that requires immediate relief. Under 49 U.S.C. 11123(a), the Board may issue an emergency service order when it determines that there exists "an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public."[5] When the Board determines that such a situation exists, it may: "(1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines; (2) require joint or common use of railroad facilities; (3) prescribe temporary through routes; [and] (4) give directions for—
(A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits;" or, when the service failure is caused by a cessation of service by Amtrak, direct the continuation of operations and related functions. 49 U.S.C. 11123(a). The Board may act on its own initiative or pursuant to a petition, and emergency service may be ordered summarily (i.e., without regard to the Administrative Procedure Act, 5 U.S.C. 551-559). 49 U.S.C. 11123(b)(1). Board orders under 49 U.S.C. 11123 are subject to an initial time limit of 30 days, but they may be extended up to an additional 240 days if the Board finds that emergency conditions continue to exist. 49 U.S.C. 11123(a), (c).[6]

The current regulations at 49 CFR 1146.1(a) require that a petitioner seeking relief show a substantial, measurable deterioration or other demonstrated inadequacy in rail service by the incumbent carrier over an identified period of time. Any petition for relief must demonstrate that the standard in 49 CFR 1146.1(a) is met, provide a summary of discussions the petitioner has had

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[5] Under the statute, an emergency situation can be created by "shortage of equipment, congestion of traffic, unauthorized cessation of operations, failure of existing commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation, or other failure of traffic movement." 49 U.S.C. 11123(a).

[6] In the case of an alternative carrier providing service over an incumbent carrier's lines, the carriers themselves may establish the terms of compensation and operations, with the Board available to resolve disputes, including disputes about compensation, if any arise. 49 U.S.C. 11123(b)(2).

with the incumbent carrier regarding the service problems and the reasons why the incumbent is unlikely to restore adequate rail service within a reasonable period of time, and include a commitment from an alternative carrier to provide service that can be performed safely without degrading service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service. 49 CFR 1146.1(b). A reply to the petition must be filed by the incumbent carrier within five business days, and a rebuttal by the party requesting relief may be filed within three business days following submission of the reply. 49 CFR 1146.1(b)(2) and (3).

In the NPRM, the Board proposed to amend part 1146 by (1) modifying the procedures for parties seeking a Board order directing an incumbent carrier to take action to remedy a service emergency, (2) indicating that the Board may act on its own initiative to direct emergency service, (3) modifying the informational requirements for parties in emergency service proceedings, (4) shortening the filing deadlines in emergency service proceedings and establishing a timeframe for Board decisions, and (5) establishing an accelerated process for certain acute service emergencies. In response to the NPRM, the Board received 18 opening comments and five reply comments.[7] Below, the Board addresses the comments submitted and

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[7] Opening comments were filed by the Association of American Railroads (AAR); the American Chemistry Council, the Corn Refiners Association, and The Fertilizer Institute (collectively, the Coalition Associations); American Fuel & Petrochemical Manufacturers (AFPM); Agricultural Retailers Association (ARA); the Brotherhood of Locomotive Engineers and Trainmen (BLET); CSX Transportation, Inc. (CSXT); Industrial Minerals Association – North America (IMA); the Military Surface Deployment and Distribution Command (SDDC); the National Association of Chemical Distributors (NACD); the National Mining Association (NMA); the National Grain and Feed Association (NGFA); Norfolk Southern Railway Company (NS); Private Railcar Food and Beverage Association (PRFBA); the Renewable Fuels Association (RFA); the Transportation Trades Department, AFL-CIO (TTD); the U.S. Department of Agriculture (USDA); the West Virginia Coal Association (WVCA); and the Western Coal Traffic League, Freight Rail Customer Alliance, National Coal Transportation Association, and Portland Cement Association (collectively, Shipper Groups).

Reply comments were filed by AAR, the Coalition Associations, NGFA, the National Industrial Transportation League (NITL) and the Institute of Scrap Recycling Industries (ISRI), and the Shipper Groups.

discusses the clarifications and modifications being adopted in this final rule. The text of the final rule is appended to this decision.

Final Rule

Several commenters express support for the Board's proposal.[8] For example, ARA comments that the proposal would reduce barriers and provide more certainty for both shippers and railroads, as well as enable the Board to better address emergency service situations, thus helping to prevent localized service issues from impacting the entire network. (ARA Comment 1.) NACD points to the efficiencies the proposal would bring, (NACD Comment 2), and emphasizes that such "[a]ccessible and efficient relief mechanisms are especially needed now in this unprecedented time of supply chain problems," (id. at 4). Shipper Groups argue that the proposed changes would clarify substantive standards and improve the emergency service relief procedures, (Shipper Grps. Comment 1-2), as well as encourage carriers to act more responsibly to avoid emergency service issues in the first place, (id. at 8). USDA agrees that the proposal would "improve rail service in times of disruption and incentivize railroads to maintain better service overall." (USDA Comment 1.)

AFPM, IMA, NACD, and PRFBA each note how infrequently the Board's emergency service regulations have been utilized and argue that this lack of use justifies review of the provisions. (AFPM Comment 6; IMA Comment 7; NACD Comment 2-3; PRFBA Comment 7.) According to AFPM, rather than pursuing emergency relief from the Board, refiners simply accept the temporary disruptions, often adjusting production, storage, or fleet size. (AFPM Comment 6-7; see also NACD Comment 2-3.) IMA similarly states that its member companies have not petitioned the Board for emergency service because the existing process requires information unavailable to them and does not provide a timely result. (IMA Comment 3.)

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[8] (See, e.g., AFPM Comment 2; ARA Comment 1; IMA Comment 2; NACD Comment 2; NGFA Comment 1-2; PRFBA Comment 2; RFA Comment 2; Shipper Grps. Comment 1-2; SDDC Comment 1; USDA Comment 1.)

Several commenters note that shippers choose not to petition the Board for emergency relief because they fear retribution from railroads. (AFPM Comment 6-7; PRFBA Comment 8 n.6; IMA Comment 8 n.6.)[9]

Other commenters support the proposal but assert that the Board should take further action. The Coalition Associations, for example, express strong support for the proposal, stating that it provides "critical improvements that will enhance the utility of emergency service orders for some circumstances," but caution that the rulemaking will not solve all, or even most, service problems. (Coalition Ass'ns Comment 1-2; see also NMA Comment 2-3; NITL & ISRI Reply 1.) TTD likewise supports the proposal but also argues that the provisions in this rulemaking will not fully address the current rail service problems, which it claims stem primarily from the railroads' staffing, equipment, and scheduling decisions. (TTD Comment 1.) WVCA states it supports the NPRM and encourages the Board to continue its rail service oversight efforts. (WVCA Comment 2, 12.)

AAR, CSXT, and NS each express their support of the Board's efforts to ensure the accessibility of service relief when necessary in times of emergency. (AAR Comment 1; CSXT Comment 2; NS Comment 2.) AAR supports "the Board's effort to properly structure expedited relief where appropriate and necessary to resolve emergency situations," and proposes several modifications and additional clarifications. (AAR Comment 1-2.) CSXT expressly supports certain aspects of the proposed rule and expresses "serious concerns" about others. (CSXT Comment 2-3.) NS "supports review and appropriate updates based on sound policy and evidence," but it notes that the Board has "existing tools at its disposal . . . that remain useful and

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[9] AFPM requests that the Board investigate retribution by railroads toward shippers through rate increases, reduction in service days, and more. (AFPM Comment 6.) Similarly, WVCA asks the Board to "convene a specific examination and proceeding regarding rail service and the movement of coal." (WVCA Comment 12.) While these requests are outside the scope of this proceeding, stakeholders may share information about these concerns through the Board's RCPA program or request informal meetings with the Board, as appropriate.

effective to address service issues in an expedited manner," and it offers "three suggestions and minor modifications" to the proposed rule. (NS Comment 2.)

Clarifying Remedial Pathways. In the NPRM, the Board proposed adding language to 49 CFR 1146.1(a) to clarify that it may direct an incumbent carrier or alternative carrier to provide service and that it can act on its own initiative as well as pursuant to a petition. NPRM, EP 762, slip op. at 5. The Board noted these changes would better align the Board's regulations with its statutory authority and provide clarity to stakeholders. Id. Several commenters express support for one or both of these clarifications, which merely codify the Board's existing statutory authority.[10]

Other commenters request additional modifications and clarifications to other aspects of part 1146.1(a). Specifically, the Coalition Associations request that the Board remove the phrase "over an identified period of time," arguing that service emergencies can arise in short order and that this language suggests a shipper must wait for some time to pass before petitioning the Board for emergency service relief. (Coalition Ass'ns Comment 2.) NGFA and Shipper Groups ask the Board to address the Board's authority to issue emergency service orders on an ex parte basis. (NGFA Comment 3; Shipper Grps. Comment 9 (citing Hasa, Inc. v. Union Pac. R.R., NOR 42165 (STB served Aug. 21, 2019)).) According to Shipper Groups, the reply and rebuttal filings permitted in 49 CFR 1146.1(b) are unnecessary when a second carrier is not involved. (Shipper Grps. Comment 9.)

The Board finds it unnecessary to remove the phrase "over an identified period of time" from 49 CFR 1146.1(a). This language does not restrict petitioners from seeking emergency

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[10] NACD, NMA, and Shipper Groups express support for both clarifications. (See NACD Comment 3; NMA Comment 2; Shipper Grps. Comment 4.) CSXT,NITL, and ISRI state that they support clarifying that the Board may direct an emergency service order at the incumbent as well as the alternative carrier, (see CSXT Comment 2; NITL & ISRI Reply 1), while AFPM, IMA, and PRFBA state they support clarifying that the Board can act on its own initiative as well as on petition, (see AFPM Comment 6; IMA Comment 7; PRFBA Comment 7; NS Comment 2 (acknowledging that the statute provides the Board authority to act on its own initiative)).

service orders in quickly emerging situations because the section prescribes no minimum period that must pass prior to filing. See Expedited Relief, EP 628, slip op. at 8 n.14. In addition, as the Board has previously noted, the language of 49 CFR 1146.1(a) in its current format affords the Board the needed flexibility to address varying circumstances on a case-by-case basis. See Expedited Relief, EP 628, slip op. at 8-9.

Regarding the request from NGFA and Shipper Groups that the Board address its authority to issue emergency service orders on an ex parte basis, the Board agrees that 49 U.S.C. 11123 permits the Board to order emergency service without regard to Administrative Procedure Act requirements. See 49 U.S.C. 11123(b)(1).[11] Even though the Board is modifying its regulations to improve the processing time when emergencies occur, there may still be circumstances when the Board needs to act on an ex parte basis. Under the current proposal, the Board retains the statutory authority to order emergency service on an ex parte basis in appropriate circumstances and may waive its regulations when appropriate.[12]

AAR and NS ask the Board to articulate a standard for the types of emergency situations that would be eligible for relief under 49 CFR part 1146. (AAR Comment 3; NS Comment 3.) They argue that emergency service relief should be available only in "real" or "true" emergencies. (AAR Comment 2; NS Comment 2.) According to AAR, without further guidance, the regulations could be used to "secure leverage and immediate attention to their particular service complaints." (AAR Comment 5.) On reply, various commenters argue AAR's request is unnecessary and overly restrictive. (See Coalition Ass'ns Reply 9; NITL & ISRI Reply 3.) The Coalition Associations note that the existing process has been in place for "nearly

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[11] The Board is subject to the Administrative Procedure Act when it establishes the terms of compensation if the railroads do not agree. 49 U.S.C. 11123(b)(1) and (2).

[12] The procedures in the proposed regulations do not address situations when the Board is acting on its own initiative. NS argues that the Board should ensure impacted rail carriers have an opportunity to comment—either in writing or by telephonic conference—before the Board orders emergency service in these situations. (NS Comment 4.) Absent extraordinary circumstances, the Board intends to afford carriers an opportunity to be heard even when the Board acts on its own initiative.

25 years without the objective standards AAR deems 'essential'" and that the Board has denied emergency relief when a petitioner has improperly invoked 49 CFR 1146.1. (Coalition Ass'ns Reply 9.)[13] They argue that a case-by-case approach is superior because the Board cannot anticipate every scenario that may arise. (Coalition Ass'ns Reply 9-10; see also NITL & ISRI Reply 3; Shipper Grps. Reply 2 ("[w]hether relief is appropriate should be determined based on a full set of facts").)

AAR also asks that the Board require petitioners seeking relief under 49 CFR part 1146 to "affirm that there are no alternative modes available or feasible." (AAR Comment 17.) According to AAR, the Board could not find there was a "real" emergency if the petitioner could shift its traffic to truck, barge, or another mode. (Id.) In response, the Coalition Associations note that it is unclear whether AAR is asking the Board to require the petitioner to include a sworn statement or market dominance analysis and that the latter would be impractical in an emergency. (Coalition Ass'ns Reply 14.) The Coalition Associations also assert that the "time, cost, and uncertainty of pursuing emergency service relief will always outweigh the additional cost of a non-rail transportation alternative to avoid the emergency," so AAR's inference that shippers would petition for an emergency service order when they have alternatives available is "unrealistic and cynical." (Coalition Ass'ns Reply 14; see also Shipper Grps. Reply 8 ("[O]ne would expect that a shipper that had a viable, economic option to pursue would choose that option before seeking emergency relief.").) Shipper Groups claim that carriers are attempting to increase the burden on petitioners by inserting a "mini-market dominance case" into emergency service proceedings. (Id.)

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[13] In support of its argument, Coalition Association cite to Granite State Concrete Company v. B&M Corporation, NOR 42083 (STB served Sept. 15, 2003) (denying an emergency service order but commencing a proceeding); Keokuk Junction Railway—Alternative Rail Service—Line of Toledo, Peoria & Western Railway, FD 34397 (STB served Oct. 31, 2003) (denying an emergency service order because alleged service inadequacy was based primarily upon rate levels); and Ohio Valley Railroad—Petition to Restore Switch Connection & Other Relief, FD 34608 (STB served Feb. 23, 2005) (denying an emergency service order but granting relief under 49 U.S.C. 10742).

AAR's and NS's proposal to limit the type of situations eligible for emergency relief under 49 CFR part 1146 is not necessary and would complicate the process, increase the burden on shippers, and undermine the flexibility provided by the current regulations.[14] In addition, as various commenters have observed, the substantive standard in the part 1146 regulations has been in place for nearly 25 years without this limitation, during which time the Board has denied petitions where it found the situation did not constitute an emergency. See, e.g., S.F. Bay R.R.—Mare Island Pet. for Emergency Serv. Ord. & Pet. for Declaratory Ord.—Lennar Mare Island, LLC, FD 35360, slip op. at 3 (STB served Dec. 6, 2010) (denying an emergency service petition "because the record does not show that an emergency exists"). The Board has previously emphasized that the emergency service procedures are "not meant to redress minor service disruptions," Expedited Relief, EP 628, slip op. at 2, but rather provide temporary relief for serious ones, id. at 8.

The Board also declines to adopt AAR's suggestion to require petitioners to affirm that no alternative modes of transportation are feasible or available. Generally, it seems unlikely that a shipper would seek emergency service relief from the Board if it has easy access to other transportation options, as the Coalition Associations have observed. However, in evaluating emergency service petitions, the Board has considered and will continue to consider the transportation environment in which the emergency occurs and the impact of the inadequate rail

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[14] In contrast, the Board has proposed using objective standards, rather than a flexible case-by-case approach, to determine when a reciprocal switching arrangement should be prescribed, since objective standards in that context "would create an incentive for rail carriers to provide adequate service in the first instance and because, if a rail carrier did not do so, the affected shippers and receivers would then have more certainty in their opportunities to obtain line-haul service from an alternate carrier." See Notice of Proposed Rulemaking, Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 2), slip op. at 9-10 (STB served Sept. 7, 2023). Those proposed objective standards seek to "provide the certainty that is needed to protect the public interest, as well as the interests of rail customers, in adequate service on a general and sustained basis." Id. at 5. The Board made clear, however, that these standards should not be used "for the prescription of emergency service under part 1146." Id. at 10-11. The Board finds that a more flexible approach is appropriate here, given the nature of an emergency finding, its related effects, and generally shorter remedy period.

service on the affected shippers. Roseburg Forest Prod. Co.—Alt. Rail Serv.—Cent. Or. & Pac. R.R., FD 35175, slip op. at 7-8 (STB served Mar. 4, 2009); Pioneer Indus. Ry.—Alt. Rail Serv.—Cent. Ill. R.R., FD 34917, slip op. at 9-11 (STB served Jan. 12, 2007).

NS expresses its concern that the Board might base an emergency service order on the railroad performance data collected under 49 CFR part 1250 without obtaining additional information from all parties involved. (NS Comment 3.) NS argues that, although railroad performance data might identify service trends, those trends do not necessarily amount to service emergencies under 49 U.S.C. 11123. (Id.) The Board appreciates the significance of ordering emergency service and the operational, safety, and financial implications it may have on carriers, and it anticipates getting more information beyond service trends in individual emergency service cases to aid the Board in appropriately resolving these matters. The procedures in the proposed regulations thus allow an opportunity for carriers to provide specific information to the Board about the situation at hand.

Lastly, AAR requests the Board either "clarify that it will not invoke [49 CFR] 1146.1 authority on its own motion if the issue has been the subject of [an] RCPA informal dispute resolution process about which the Board was aware," or add a requirement that the Board "certify when it invokes its [49 CFR] 1146.1 authority on its own motion, that none of the information leading to such invocation came from an RCPA informal dispute resolution process." (AAR Comment 15.) As the Board explained in the NPRM, RCPA serves as a resource for the Board's stakeholders, and a key part of RCPA's mission involves providing informal facilitation services to shippers and other parties without charge to resolve disputes with railroads. Requests for RCPA assistance, including informal facilitation services, are kept confidential and not shared with other STB offices. Accordingly, the Board does not find it necessary to add the language requested by AAR.

Modifying Petition Requirements. Currently, under 49 CFR 1146.1(b)(1)(iii), a petitioner must have a commitment from another available railroad to provide alternative service

and explain how the alternative service would be provided safely without degrading service to the alternative carrier's existing customers and without unreasonably interfering with the incumbent's overall ability to provide service. As the Board discussed in the NPRM, many proponents of a rule modification have expressed frustration with the requirement to secure an alternative carrier in advance (i.e., a commitment to be included in a petition) during a service emergency because potential alternative carriers may be reluctant to participate in emergency alternative service. NPRM, EP 762, slip op. at 5. The Board stated in the NPRM that requiring an advance commitment from an alternative carrier as a condition to filing an emergency service petition is an unnecessary burden on petitioners experiencing a service crisis that undermines the usefulness of this important statutory remedy. Id. at 5-6. Accordingly, the Board proposed removing that requirement and instead requiring petitioners to submit only a list of possible alternative carriers, based on the petitioner's understanding of other rail carriers' nearby operations. Id. at 6.

The Board also proposed requiring the incumbent carrier and alternative carriers, if any, to address in the first instance whether the specific remedy proposed by the petitioner would be unsafe or infeasible, or whether it would substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations. Id. Regarding the requirement that petitions include an explanation of reasons why the incumbent carrier is unlikely to restore rail service, the Board proposed to clarify that the explanation need only take the form of a "summary" to the extent that such information is available to the petitioner. Id. The Board reasoned that these changes would place the informational requirements on the parties most likely to have the information. Id.

According to NGFA, these changes are "an extremely equitable and more efficient way to ensure the Board is presented with the evidence it needs to make a decision in an efficient manner." (NGFA Comment 4-5.) Shipper Groups, AFPM, IMA, and PRFBA each express support for how these changes place the burden to provide certain relevant information on the

entity likely to have direct knowledge of it. (AFPM Comment 8; IMA Comment 10; PRFBA Comment 10; Shipper Grps. Comment 5-6.) Shipper Groups argue that the changes would "lead to the development of a better evidentiary record and more efficient and expeditious decision-making," further the rail transportation policy goals of requiring fair and expeditious regulatory decisions when regulation is required, and provide for the expeditious handling and resolution of proceedings. (Shipper Grps. Comment 5-6 (citing 49 U.S.C. 10101(2), (15)).) AFPM, IMA, and PRFBA note that these changes would incentivize rail shippers to bring cases that may have gone unfiled in the past for lack of evidence not within the petitioner's control. (AFPM Comment 8; IMA Comment 10; PRFBA Comment 10.)

RFA projects that the Board's proposal to eliminate the requirement for an advance commitment from an alternative carrier and instead require only a list of potential alternative carriers would ease the burden on petitioners, streamline the petition process, and minimize disruptions in important customer service dynamics with carriers. (RFA Comment 1.) According to NACD, NGFA, and Shipper Groups, the advance commitment requirement has made it excessively difficult for shippers seeking relief as the regulations intended. (NACD Comment 3; NGFA Comment 4; Shipper Grps. Reply 6; see also Shipper Grps. Comment 6.) According to Shipper Groups, an alternative carrier "may be reluctant to commit publicly in advance to providing alternative service, especially if it is otherwise dependent on the incumbent carrier in some way, such as a short line that is beholden to the affected carrier for all or much of its business or otherwise subject to 'paper barriers' established by the incumbent." (Shipper Grps. Reply 6.) NITL and ISRI contend that this change will enhance the utility of the emergency service remedy. (NITL & ISRI Reply 2.)

On the other hand, AAR and CSXT oppose this change. AAR argues that deferring the question of whether an alternative carrier is available and able to provide emergency service would be impractical given the short time frames, "unfairly penalize the alternative carrier by suddenly dragging them into an emergency proceeding as to which they had no prior

knowledge," and hinder the Board's ability to "act quickly and decisively, with knowledge of all relevant facts." (AAR Comment 7.) According to AAR, for the Board to be aware of factors affecting an alternative carrier's ability to provide service, such as restrictions on service in labor contracts or operational difficulties being experienced by the alternative carrier, the alternative carrier must be "involved on the frontend." (Id. at 9.) AAR claims its concerns are exacerbated by the tight timelines proposed. (Id.)

CSXT argues that retaining the requirement for an advance commitment would promote the speed and success of the emergency service process and would ensure that any Board action is consistent with the prohibition in 49 U.S.C. 11123 of any Board action that would "cause a rail carrier to operate in violation of this part" or "impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations." (CSXT Comment 6 (quoting 49 U.S.C. 11123(c)(2)(A)-(B)).) CSXT further argues that requiring petitioners to obtain advance commitment from an alternative carrier is not "an obstruction" to their ability to obtain relief but rather "essential" because it "can only expedite the process by ensuring the [alternative] carrier is ready, willing, and able to act at the earliest possible point in the remedial process." (Id. at 7.)

AAR and CSXT both note that the Board—when it adopted 49 CFR 1146.1—considered and rejected the position the Board took in the NPRM. (AAR Comment 8 (quoting Expedited Relief, EP 628, slip op. at 11); CSXT Comment 7.) AAR argues that nothing has changed since then that would make an alternative carrier's advance commitment less essential, (AAR Comment 8), and CSXT asserts that "the Board must offer a reasoned decision supported by substantial evidence for making any change to [its] conclusion." (CSXT Comment 7-8 (citing Jicarilla Apache Nation v. Dep't of Interior, 613 F.3d 1112, 1120 (D.C. Cir. 2010)).)

In response to these concerns, the Coalition Associations suggest the Board require petitioners to serve their petitions on the identified alternative carriers and to mandate that those carriers participate in the process. (Coalition Ass'ns Reply 6, see also NGFA Comment 5-6

(suggesting the Board mandate that identified alternative carriers reply to a petition).) NGFA urges the Board to "err on the side [of] collecting as much relevant information as possible, as quickly as possible, from the incumbent and an identified alternative carrier." (NGFA Comment 6.) NITL and ISRI also oppose the carriers' proposal to retain the advance commitment requirement, arguing that elimination of this requirement would increase the usefulness of the emergency service regulations. (NITL & ISRI Reply 3.)

The Board does not find AAR's and CSXT's concerns persuasive and finds it in the public interest to eliminate the advance commitment requirement, as was proposed in the NPRM. Requiring shippers to obtain an advance commitment from an alternative carrier has unduly hindered the objectives of the emergency service process for the reasons stated in the NPRM, slip op. at 5-6, and by various commenters, see supra at 9-10, and removing this obstacle will help the process work more effectively. As the Board acknowledged in the NPRM, and as AAR and CSXT point out, the Board took a different position in the 1998 decision, stating that the absence of an advance commitment could create safety concerns, impair service to the alternative carrier's customers, or hurt the alternative carrier's finances. NPRM, slip op. at 5 (citing Expedited Relief for Serv. Inadequacies, EP 628, slip op. at 11). However, as the Board explained in the NPRM, feedback from rail users and the agency's own observations have led the Board to conclude that the disadvantages of the advance commitment requirement outweigh any potential advantages, and that the concerns expressed in the 1998 decision can be adequately addressed when considering individual requests. See id. Moreover, the inability of shippers to obtain such advance commitments from alternative carriers appears to have been a key driver in shippers' failure to use the regulatory process at all. Id. In promulgating the original regulations in 1998, the Board did not anticipate that the alternative carrier commitment requirement would lead to that result, and AAR and CSXT cite no precedent requiring the Board to ignore its experience under the regulations. With regard to the NGFA's suggestion, the Board will require an identified alternative carrier to reply to a petition. Though the Board noted in the NPRM that

it could take appropriate action to request more information from an alternative carrier, it has determined that—for the Board to best meet its information needs and carry out its statutory obligations in a more efficient manner—the Board will require that an alternative carrier address whether the specific remedy would be unsafe or infeasible, or would substantially impair the carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

Numerous commenters support the Board's proposal to require incumbent carriers to first address whether the proposed remedy would be unsafe or infeasible or whether it would substantially impair the replying carrier's ability to adequately serve its other customers or fulfill its common carrier obligations.[15] AFPM, IMA, and PRFBA assert that such a procedural shift makes sense in proceedings where the "use of the discovery process [would be] too slow to allow the Board to act expediently." (AFPM Comment 9; IMA Comment 10; PRFBA Comment 10.) NACD also supports this proposed change, calling it a "common sense reform," (NACD Comment 3), and CSXT agrees that it is appropriate to ask the rail carrier rather than the shipper to address the safety and feasibility of the requested service, (CSXT Comment 3). BLET supports the Board's proposal to allow an alternative carrier to reply to the petition, arguing that its employees and members could provide valuable insight into how operations are happening in the field. (BLET Comment 4.)

The Coalition Associations suggest the Board consider requiring railroads to provide certain minimum information to validate their claims that a remedy is unsafe or infeasible, or that it will interfere with their ability to serve their other customers. (Coalition Ass'ns Comment 7.) Similarly, Shipper Groups ask the Board to require carriers to make a "specific and documented showing," rather than "conclusory assertions," of substantial impairment in order to defeat a request for emergency service relief. (Shipper Grps. Comment 7.) According to Shipper Groups, carriers will seek to preserve service that is more profitable or that limits liquidated

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[15] (See, e.g., AFPM Comment 8; BLET Comment 4; IMA Comment 10; NACD Comment 3; PRFBA Comment 10; USDA Comment 1.)

damages or other contractual exposure. (Id.) The Coalition Associations also ask the Board to clarify that a petition would not be defeated automatically if the proposed emergency service would affect another shipper. (Coalition Ass'ns Comment 8.)

AFPM, IMA, and PRFBA argue the Board should shift the burden of proof to the railroads if a petitioner can demonstrate a prima facie case of "a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier." (AFPM Comment 9; IMA Comment 10; PRFBA Comment 10.) They further ask the Board to establish a defined standard for that prima facie showing of service deterioration, which could be based on, for example, the percentage of missed switches for first mile/last mile, trip plan compliance data, or plant/facility shutdown/ slowdown in the past, present, or future. (AFPM Comment 9-10; IMA Comment 10-11; PRFBA Comment 11.) AFPM, IMA, and PRFBA also suggest that in cases where the incumbent railroad's reply fails to adequately rebut the petitioner's prima facie case, the Board should issue its order five days after the reply, effectively eliminating the rebuttal period and expediting the case by two days. (AFPM Comment 11; IMA Comment 13; PRFBA Comment 13.) AAR opposes this request, arguing that the Board's authority under 49 U.S.C. 11123 is "limited to emergency situations, not generalized service complaints," and that service metrics, "whether based on first-mile/last-mile data or trip plan compliance, are ill-suited to the identification of emergencies." (AAR Reply 4-5.) AAR further argues that proponents of a Board order are required to make their case in support of the order, and that it would be unfair to further shorten a carrier's response time while also shifting the burden to the carrier. (Id. at 5.)

Since emergencies can take various forms, flexibility is critical in determining whether a particular situation constitutes an emergency requiring expeditious Board action. The Board will not attempt to define the required minimum information appropriate for every case, nor will it establish a requirement for a carrier to make "a specific and documented showing" of substantial impairment in its ability to serve its other customers to defeat a request for an emergency service

order. The Board seeks to gain a quick and accurate understanding of the circumstances underlying requests for relief so it can act to serve the public when necessary, not bog proceedings down with technical requirements that might undermine the purpose of these emergency proceedings. To be sure, especially given the expedited timelines, the Board expects that parties will support their claims with available evidence. The Board will not accept bald assertions regarding feasibility or safety as evidence of such, but circumstances will unfold differently from case to case, and the Board must maintain flexibility so it can evaluate all aspects of a case and act appropriately.[16] Additionally, emergencies often arise from unexpected or unanticipated circumstances, and the Board must have the flexibility to respond to those circumstances promptly.

The Board also clarifies that petitions, regardless of whether they seek emergency service from incumbent carrier or an alternative, will not automatically be defeated simply because the proposed emergency service order would affect another party. Rather, the concern lies with whether a proposal would "substantially impair" a carrier's ability to serve its other customers or fulfill its common carrier obligations, which is why the Board is asking for replies from carriers to address this matter. Pursuant to 49 U.S.C. 1146.1(a), the Board will then consider this information and the effects on other shippers of ordering emergency service as part of its analysis when determining whether emergency service is suitable under the circumstances and whether to order relief.

In addition, the Board declines to shift the burden of proof onto carriers by requiring a petitioner only to make a defined prima facie showing of a substantial and measurable service deterioration or another demonstrated service inadequacy, as requested by certain shipper

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[16] The Board is mindful that whether railroad operations are safe is generally within the purview of the Federal Railroad Administration (FRA). The Board's regulations accordingly require that petitions for emergency service relief under part 1146 be served on FRA. See 49 CFR 1146.1(e), 1146.2(e). Carriers should demonstrate that they have undertaken the requisite advance planning necessary to assure safe operations, including consideration of FRA safety regulations. See Expedited Relief, EP 628, slip op. at 13 n.19.

interests. As AAR notes, this would shift the burden from petitioners to carriers while also giving carriers less time to respond. While the regulations adopted here seek to remove unnecessary burdens on petitioners, such as obtaining the advance commitment from alternative carriers, petitioners must still bear the burden of establishing the need for such relief.

CSXT and NS ask the Board to require petitioners seeking relief under 49 CFR 1146.1 to describe the efforts taken to resolve the issue through other means, as the Board is proposing for the new, accelerated process under 49 CFR 1146.2. (CSXT Comment 11; NS Comment 12.) According to CSXT, "it would be appropriate to likewise encourage good faith efforts at informal dispute resolution prior to seeking the extraordinary relief of an emergency service order." (CSXT Comment 11.) NS notes that the Board's reasoning for including this requirement in 49 CFR 1146.2, which it states appears related to the timeline of the accelerated process, seems to apply equally to the 49 CFR 1146.1 process, which the Board also proposes to shorten. (NS Comment 12.)

The Board agrees that it is appropriate to require petitioners seeking relief under 49 CFR 1146.1 to describe efforts taken to resolve issues prior to the filing of the petition. The Board prefers informal resolution of disputes whenever possible, and requiring petitioners to describe efforts taken to arrive at solutions prior to emergency service will encourage parties to make such efforts in good faith rather than seeking an order from the Board as a matter of first resort. Moreover, many petitions already include this information to some degree, given that the current regulations require petitions to include a "summary of the petitioner's discussions with the incumbent carrier of the service problems," so mandating that petitioners describe their efforts at resolution in 49 CFR 1146.1 would not significantly increase their burden. Finally, requiring this information in 49 CFR 1146.1 petitions would better align that process with the 49 CFR 1146.2 process and help ensure that the Board receives all information necessary to understand the underlying emergency and overall circumstances. 49 CFR 1146.1(b)(ii) will be amended to adopt this requirement.

Shipper Groups argue that a carrier should face additional consequences, such as penalties or damages, when it has "deprived itself of the ability to meet its commitments and obligations" due to underinvestment in employees and other resources, particularly when it cannot provide emergency service due to this underinvestment. (Shipper Grps. Comment 8.) According to Shipper Groups, penalties would incentivize carriers to act more proactively to maintain their service commitments and reduce the need for emergency service orders altogether. (Id.) NGFA agrees, adding that the Board should more aggressively penalize carriers that do not comply with emergency service orders or are unable to provide emergency service relief due to business or operational decisions. (NFGA Reply 3-4.) NGFA further contends that the Board should interpret the phrase "each violation" more broadly, for example, on a per-car basis instead of a per-train basis. (Id. at 4.) AAR, in contrast, maintains that a punitive approach is not authorized by 49 U.S.C. 11123, which contemplates alternative carriers compensating incumbent carriers for the use of incumbents' equipment and facilities. (AAR Reply 2-3 (quoting Pyco Indus., Inc.—Alt. Rail Serv.—S. Plains Switching, Ltd. Co., FD 34889 et al, slip op. at 4-5 (STB served Jan. 11, 2008)).)

The Board will not adopt these changes suggested by Shipper Groups and NGFA. Section 11123, from which the Board derives its emergency authority, contains no language or provision authorizing penalties or damages. Furthermore, the Board rejected similar arguments when adopting the existing regulations, noting that emergency service relief "is to be used for restorative or alleviative purposes only, and not as a punitive or preventive measure." Expedited Relief, EP 628, slip op. at 7.[17]

Finally, APFM, IMA, and PRFBA want the Board to create a "reasonable railroad standard" requiring "the incumbent railroad to cooperate in a reasonable manner with the

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[17] See also Notice of Proposed Rulemaking, Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 2), slip op. at 10 (STB served Sept. 6, 2023) (distinguishing the standard for obtaining a reciprocal switching order from complaint-based common carrier obligation cases under 49 U.S.C. 11101(a)).

petitioner and the alternative carrier, while the [emergency service] order is in effect." (AFPM Comment 10; IMA Comment 11-12; PRFBA Comment 11-12.) The Board finds that implementing such a "reasonable railroad" standard is not necessary because acting reasonably, in good faith and in compliance with Board orders, is already required. See 49 U.S.C. 10702. Any allegation of unreasonableness, bad faith or non-compliance can and will be dealt with on a case-by-case basis.

Modifying the Regulatory Timeframe. In response to stakeholders' previously-expressed concerns about the overall length of the current 49 CFR 1146.1 process, as well as the lack of a date certain by which a Board decision can be expected, the Board proposed in the NPRM to shorten the filing deadlines for replies and rebuttals set forth in 49 CFR 1146.1 and to establish a target timeframe for a Board decision. NPRM, EP 762, slip op. at 7. The Board explained that by shortening the timeframe and indicating when the parties can expect a decision by the Board, the proposed amendments would further streamline the process for all parties involved in an emergency service proceeding. Id.

Many commenters support this aspect of the Board's proposal.[18] AFPM, IMA, and PRFBA assert that shortening the procedural timeline would expedite the proceeding where time is clearly of the essence. (AFPM Comment 10-11; IMA Comment 13; PRFBA Comment 13.) NGFA asserts that a short timeline is imperative to avoid severe damage to a petitioner's business and customers since shippers will have exhausted all commercial remedies before seeking Board intervention. (NGFA Comment 5.) According to Shipper Groups, the Board's proposal to shorten the filing deadlines and establish a target timeframe for a Board decision is reasonable and appropriate. (Shipper Grps. Comment 8.)

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[18] (See AFPM Comment 10-11; BLET Comment 4; IMA Comment 13; NACD Comment 3; NGFA Comment 5; PRFBA Comment 13; RFA Comment 2; Shipper Grps. Comment 8; USDA Comment 1.)

Several commenters ask the Board to shorten the 49 CFR 1146.1 timeline further still. According to RFA, "the modified timeline is too lengthy to efficiently address emergencies in a timely manner." (RFA Comment 2.) RFA explains that because ethanol facilities can typically store less than one week's production on-site, shortening the process by a few days would not fully address emergency situations at these facilities. (Id.) ARA presents a similar argument, noting that timely delivery of products, such as fertilizer, is critical for agricultural retailers as crop production is weather-dependent and seasonal. (ARA Comment 1.)[19]

AAR opposes shortening the timeline under 49 CFR 1146.1, arguing that "[r]educing the time available for the parties to make an adequate record is not the solution to uncertainty over how quickly relief will be ordered," and suggests that modifying the proposed rule to provide firm decision deadlines may help alleviate this concern. (AAR Comment 13; see also CSXT Comment 12 (asking the Board to provide firm decision deadlines for 49 CFR 1146.1 and 1146.2).) AAR notes that the Board previously rejected shorter timelines and argues that the concerns expressed in that decision remain valid today. (AAR Comment 12 (quoting Expedited Relief, EP 628, slip op. at 16 ("[w]e do not believe that a shorter time frame is feasible, given the nature of the relief sought, the need for an adequately developed record regarding the factual predicate for such action, and the ability of the parties to implement the proposed arrangement safely and without harm to either railroad or their other shippers.").) According to AAR, shortening the timeline is even less feasible under the current proposal because the Board is also eliminating the requirement that petitioners obtain an advance commitment from an alternative carrier. (Id.) AAR asserts petitioners can consider the total timeline when deciding when to file

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[19] BLET asks the Board to permit extension of the deadlines if all parties agree, (BLET Comment 4), and AFPM, IMA, and PRFBA urge the Board to grant extension requests in extraordinary circumstances only, (AFPM Comment 11, IMA Comment 13; PRFBA Comment 13). In most cases, extension requests agreed upon by all parties to an emergency service proceeding are likely to be appropriate. However, given the urgent nature of the situations underlying emergency service proceedings, the Board will grant unilateral extension requests only for good cause. The Board will amend 49 CFR 1104.7 to clarify that requests for an extension under 49 CFR part 1146 must be filed as early as possible under the circumstances.

a petition. (Id. at 13.) In addition, AAR urges the Board to reject the requests to further shorten the proposal's timelines. (AAR Reply 6.) AAR claims the proposal's timelines are "already so short as to strain feasibility" and asserts shippers can time the filing of their petitions "to ensure relief can be provided in the correct amount of time." (Id.)

On reply, Shipper Groups assert that AAR's proposals are unnecessary or at least speculative at this time, and they state that a firm decision deadline might prevent the Board from taking the time that is needed in complex situations. (Shipper Grps. Reply 7.) The Coalition Associations state they are amenable to forgoing the shortening of the timelines in 49 CFR 1146.1 since the Board has proposed an accelerated process in 49 CFR 1146.2. (Coalition Ass'ns Reply 6-7.)

The Board is not persuaded by AAR's arguments for retaining the existing timeline in 49 CFR 1146.1. As explained in the NPRM, the Board agrees with stakeholders that have expressed concern that the process in 1146.1 is too lengthy in the context of a service emergency. NPRM, EP 762, slip op. at 7. Although the Board rejected a shorter timeframe in 1998, its subsequent experience with 49 CFR 1146.1 has convinced the Board that a shorter time frame would in fact be feasible, contrary to what the Board anticipated when it adopted these regulations. See Foster Farms—Ex Parte Pet. for Emergency Serv. Ord., FD 36609 (STB served June 17, 2022).

Because the final rule includes an accelerated process for acute service emergencies, the Board does not find it necessary to further shorten the timelines in 49 CFR 1146.1 beyond the periods initially proposed in the NPRM. The Board will also refrain from setting a firm decision deadline in the regulations. The Board intends to issue decisions within five days of the rebuttal deadline, as proposed in the NPRM, but setting a firm deadline for this part of the regulations would serve only to complicate the decision-making process by constraining the Board (or requiring additional procedural decisions) in situations where a specific deadline might prove to

be impracticable. The Board again emphasizes that flexibility is vital in conducting these proceedings.

Establishing an Accelerated Process to Handle Acute Service Emergencies. In an effort to more efficiently address the most urgent service emergencies in a more expeditious manner, the Board proposed in the NPRM to establish a new, accelerated process at new 49 CFR 1146.2 for certain acute service emergencies presenting potential imminent harm and threatening potentially severe adverse consequences to the petitioner, its customers, or the public. NPRM, EP 762, slip op. at 7. Under the new process proposed by the Board, a petitioner seeking accelerated relief must indicate that it is seeking such relief pursuant to that process, include a description of specific and particularized actions that can be performed by the incumbent or an alternative carrier and ordered by the Board,[20] and demonstrate that the described emergency presents an imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. Id. To satisfy this standard, the Board proposed that the petitioner must demonstrate the alleged harm will occur before any relief could be ordered under 49 CFR 1146.1 and that any relief ordered by the Board pursuant to 49 CFR 1146.1 would be rendered ineffective. NPRM, EP 762, slip op. at 7. The Board noted that such severe adverse circumstances would exist when there is a clear and present threat to public health, safety, or food security, or a high probability of business closures or immediate and extended plant shutdowns. Id. Additionally, the Board proposed that the petition must include a verified description of any efforts taken to resolve the issue through other means, such as consultation with RCPA or direct discussions with the incumbent railroad. Id. at 8. The Board proposed to limit the length of petitions to three substantive pages (not including cover page, verifications, or

[20] Because the statute limits the Board's emergency service authority to the actions enumerated in 49 U.S.C. 11123(a), the proposal limited any relief ordered pursuant to the accelerated process to the actions listed in the statute. NPRM, EP 762, slip op. at 7 n.9.

certificate of service), noting that a petitioner could present further evidence in support of its petition during a telephonic or virtual hearing. Id.

Under the Board's proposal, a petition filed under the proposed 49 CFR 1146.2 would be assigned to a designated Board Member for initial resolution. NPRM, EP 762, slip op. at 8. The Board proposed that the Board Member designation would rotate on a quarterly basis, and if the designated Board Member is unavailable, the next Board Member in the rotation would be assigned to evaluate the petition. Id. The designated Board Member would notify the parties regarding a telephonic or virtual hearing to be held between 24 and 48 hours after receipt of the petition or as soon thereafter as logistically possible. Id. Given the accelerated process, the Board's proposed schedule did not include a period for written replies—oral replies to the petition would occur during the hearing—however, the designated Board Member could order the carriers to submit, or the carriers could voluntarily submit, an alternative plan to address the emergency within 24 hours of the hearing. Id. The Board's proposal contemplated an initial decision on the merits of the petition by the designated Board Member within two business days after completion of the hearing. Id. That initial decision could be appealed to the entire Board pursuant to 49 CFR 1115.2. Id.

The Board proposed that any relief granted under 49 CFR 1146.2 clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately or to fulfill its common carrier obligations. NPRM, EP 762, slip op. at 8-9. Given the accelerated nature of this process, the Board also proposed a 20-day limit on relief, which it stated should provide petitioners with sufficient time to pursue relief up to 240 days, if necessary, under 49 CFR 1146.1. Id. at 9. Under the Board's proposal, if a petition for relief under 49 CFR 1146.2 is denied for failure to satisfy the standard for relief, the petitioner may appeal that ruling to the entire Board, or the petitioner may file a new petition pursuant to 49 CFR 1146.1 regarding the same service emergency. NPRM, EP 762, slip op. at 8.

According to the Coalition Associations, the creation of this new accelerated process is the "single most impactful proposal" in the NPRM. (Coalition Ass'ns Comment 2.) NACD also supports the creation of this new accelerated process, noting that emergencies require immediate action and accelerating the timeliness would facilitate relief in emergency situations. (NACD Comment 3.) SDDC states that it "sees the potential for a significant improvement from adding [49 CFR] 1146.2," (SDDC Comment 1), and NITL and ISRI state that the creation of this new process is a critical change that will enhance the usefulness of the Board's emergency service regulations, (NITL & ISRI Reply 1-2). AFPM, IMA, NGFA, RFA, and USDA also indicated their support of the new proposed process at 49 CFR 1146.2. (AFPM Comment 12; IMA Comment 14; NGFA Comment 6; RFA Comment 2; USDA Comment 1.)

AAR, CSXT, and NS urge the Board to discard its proposal for a new accelerated process. According to AAR, the new accelerated process is "fundamentally unfair and impracticable," and the "extreme limitations on development of a record and meaningful opportunity to be heard present substantial questions of procedural fairness and due process." (AAR Comment 13.) AAR notes that neither the incumbent nor any alternative carrier would have the opportunity to reply in writing to a petition and claims "the incumbent (and any alternative carrier) will have virtually no time to investigate the few facts provided" in the three-page petition. (Id.) AAR doubts the timeline would allow the Board to "make a responsible decision" and asserts its concerns are exacerbated by the fact that petitioners would not be required to obtain an advance commitment from an alternative carrier. (AAR Comment 13-14; see also CSXT Comment 10 ("The proposed acceleration to the [49 CFR] 1146.1 process is as fast as the Board could reasonably act in a manner that ensures that the parties and the Board have sufficient time to both gather and analyze the available information to make a wise decision with such an extraordinary power.") (emphasis omitted); NS Comment 4 ("[T]he proposed accelerated process will not allow for the development of a factual record upon which the Board can act.").)

CSXT argues it is unnecessary to create a second process when the Board is shortening the existing process. (CSXT Comment 9.) According to CSXT, because the Board's authority under 49 U.S.C. 11123 is limited to acute service emergencies, there is "no authority for an even more extraordinary remedy for a different category of emergency—emergent is emergent." (CSXT Comment 9.) CSXT also asserts the Board has not explained why "acute service emergencies" cannot be handled under 49 CFR 1146.1 or through the Board's injunctive authority at 49 U.S.C. 1321(b)(4). (CSXT Comment 9.)

NS likewise cites to the Board's injunctive authority as a reason for discarding the proposed new process, noting that the Board has in the past granted an injunction where emergency service was sought. (NS Comment 5 n.4 (citing Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 7 (STB served June 12, 2018).) NS further argues that the Board previously declined to shorten the timeline of 49 CFR 1146.1 and that there is no evidence a faster process is "needed or superior to the current expedited timeline in [49 CFR] 1146.1." (NS Comment 5.) NS asserts that if the Board is concerned about the timeline of the 49 CFR 1146.1 process, the Board can eliminate the rebuttal period. (NS Comment 5 n.4.)

On reply, the Coalition Associations urge the Board to reject the carriers' requests to abandon the accelerated process and suggest several modifications to address the concerns raised. (Coalition Ass'ns Reply 8.) First, the Coalition Associations suggest that rather than discarding the new accelerated process, the Board could discard its proposal to shorten the existing 49 CFR 1146.1 process. (Coalition Ass'ns Reply 8.) According to the Coalition Associations, the accelerated process would sufficiently address shippers' concerns that the 49 CFR 1146.1 process is "too slow and cumbersome for the most time-sensitive emergencies." (Coalition Ass'ns Reply 8.) The Coalition Associations also state they are open to limiting the relief available under 49 CFR 1146.2 to incumbent-based relief only. (Coalition Ass'ns Reply 8-9.)

NITL and ISRI also oppose the carriers' proposal to jettison the accelerated process, noting that it offers one of the "greatest opportunit[ies] to improve the usefulness of the [Board's regulations]." (NITL & ISRI Reply 3.) Shipper Groups argue that "[t]here is no basis to conclude at this stage that any railroad will be deprived of a fair hearing without the opportunity to make a written presentation." (Shipper Grps. Reply 8.)

The Board finds that an accelerated process is warranted to address acute service emergencies more efficiently. As noted in the NPRM, the most serious issue identified by stakeholders was the timeliness of regulatory action in situations involving acute service emergencies. In certain instances, the process in 49 CFR 1146.1 would simply take too long (even under the shortened 1146.1 timeline adopted in this final rule) for a shipper facing an acute emergency to utilize it effectively, even though the shipper might otherwise qualify for emergency service relief. The accelerated process addresses this timeliness issue by streamlining the petition process in certain emergency situations to allow the Board to act quickly while providing it with enough time to make a responsible decision while maintaining adequate due process for carriers.[21]

Although the process will be short, carriers will have a meaningful opportunity to reply to the petition, and the provision of an oral response at a hearing is consistent with 49 U.S.C. 11123, which intended summary procedures in these emergency situations.[22] Additionally, the regulations do not preclude the provision of written comments by the rail carriers; it simply does not provide specific extra time for them in the necessarily short schedule. Nor will the filing of a petition be the first opportunity for carriers to investigate the circumstances surrounding the

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[21] The Board appreciates the Coalition Associations' suggestion that 1146.2 might make it possible to discard its proposal to shorten the deadlines for 1146.1, but concludes that the best solution is to adopt 1146.2 and to shorten the deadlines under 1146.1. The situations that justify the use of 1146.1 are emergencies, even if they are not "acute" emergencies, so a faster timeline will be beneficial.

[22] As noted above, the Board's decision would not be subject to the APA. See 49 U.S.C. 11123(b)(1).

particular service issue. Prior to filing at the Board, a petitioner would have to engage in the process mandated by 49 CFR 1146.2(a), which requires that parties seek, in good faith, to resolve any service issues through an informal dispute resolution process first. Finally, the accelerated process limits relief to no more than 20 days, and parties may petition the Board to reconsider its decision.[23] The Board understands the gravity of issuing emergency service orders and finds that this new process will accommodate the procedural rights of all parties while affording the Board the ability to swiftly act on behalf of the public interest in necessary situations, as Congress intended.[24]

Concerning the standard for relief proposed by the Board, the Coalition Associations state that the proposal "reasonably restricts this process to circumstances that threaten severe consequences to the shipper, its customers, or the public that cannot be avoided using the [49 CFR] 1146.1 procedures." (Coalition Ass'ns Comment 3.) However, several commenters ask the Board to define "acute service emergency" more clearly. AFPM, IMA, and PRFBA urge that the Board permit any plant shutdown to qualify for relief under this new process, arguing that any shutdown is acute. (AFPM Comment 12; IMA Comment 14; PRFBA Comment 14.) AFPM suggests removing the requirement that plant shutdowns be "extended," (AFPM Comment 12), and IMA and PRFBA suggest removing the requirement that plant shutdowns be "immediate and extended," (IMA Comment 14; PRFBA Comment 14). NMA expresses concern

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[23] NS contends that the Board should not adopt a shorter 1146.2 process because it rejected a shorter 1146.1 process when it adopted the rule in 1998. (NS Comment 5.) But the fact that relief under 1146.2 is significantly more limited than relief under 1146.1 (a distinction that did not exist in 1998) weighs in favor of a shorter time frame. See Expedited Relief, EP 628, slip op. at 16. Also, the absence of rebuttal and reply periods in 1146.2 will facilitate a faster process. Moreover, as explained above in connection with 1146.1, the Board has reevaluated its views of the feasibility of faster timelines than the one established in 1998.

[24] NS argues that the 1146.2 process is unnecessary because the Board could issue preliminary injunctions instead, but the emergency service standard is different from the preliminary injunction standard, as discussed in more detail below. The fact that the Board has found it appropriate under certain circumstances to issue preliminary injunctions in lieu of emergency service orders does not mean that preliminary injunctions are an adequate substitute for 1146.2.

that entities may interpret "acute service emergency" differently and notes that if there are multiple emergencies at the same time, the Board may need to weigh one emergency over the other. (NMA Comment 3.)

AAR opposes allowing any plant slowdown or shutdown to qualify under 49 CFR 1146.2, arguing that not all plant slowdowns, shutdowns, or even closures are genuine emergencies that would qualify for emergency service relief.[25] (AAR Reply 5-6.) According to AAR, "shutdowns and closures can often be remedied with monetary damages." (AAR Comment 6.) AAR and NS both argue the accelerated process, if adopted, should be more narrowly tailored, available only if the petitioner will experience immediate and irreparable harm, as is required for a preliminary injunction or temporary restraining order. (AAR Comment 6; NS Comment 6-7.) NS notes emergency service orders are similar to preliminary injunctions in that both are extraordinary remedies, (NS Comment 7), and AAR argues that much like temporary restraining orders, petitions brought under 49 CFR 1146.2 would be decided pursuant to a short procedural schedule with "minimal opportunity for response from the involved railroad[s]," (AAR Comment 6 (brackets in original)).

Shipper Groups and the Coalition Associations both take issue with AAR's suggestion that not all plant shutdowns meet the statutory requirements for an emergency under 49 U.S.C. 11123. (Shipper Grps. Reply 2; Coalition Ass'ns Reply 10.) According to Shipper Groups, the basis for relief should be decided in individual adjudications, not based on hypothetical facts at the rulemaking stage. (Shipper Grps. Reply 2.)

Shipper Groups and the Coalition Associations also both oppose applying the standard for injunctions at 49 U.S.C. 1321(b)(4) to emergency service petitions. (Shipper Grps. Reply 4; Coalition Ass'ns Reply 12.) The Coalition Associations argue that the irreparable harm standard

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[25] The Board agrees that not all "immediate plant shutdowns" are genuine emergencies that would qualify for relief under 1146.2 and, as reflected in the language of 1146.2, that it is highly unlikely that a plant "slowdown" would ever constitute a genuine emergency under 1146.2.

considers whether the petitioner could be made whole, whereas the Board's emergency service authority is also exercised for the public interest. (Coalition Ass'ns Reply 12-13). According to Coalition Associations, "[i]t is entirely conceivable that the petitioner could be made whole with monetary damages, but the broader public interest could not." (Id. at 13.) The Coalition Associations further argue that monetary damages are not a realistic remedy for plant shutdowns as most contracts and tariffs allow only for direct damages (i.e., primarily the additional cost of alternative transportation) but not consequential damages.[26] (Id. at 10.) According to Shipper Groups, the fact that shippers need to seek emergency relief in the first place is evidence that the "other types of proceedings" AAR references are insufficient and fail to deter carriers from curtailing service. (Shipper Grps. Reply 2 (quoting AAR Comment 5).) According to Shipper Groups, the economic losses shippers face from rail service failures can be massive, and the carriers' proposal would "categorically preclude[]" shippers and their customers from receiving emergency service. (Shipper Grps. Reply 3-4.)

The Board will revise the portion of 49 CFR 1146.2(a) that states "immediate and extended plant shutdowns" to simply state "immediate plant shutdowns." Striking "extended" as a qualifier allows the Board to consider how the impact of a shutdown will vary by industry. In some industries, for example, imminent significant harm and severe adverse consequences could occur immediately upon plant shutdown. This change will allow the Board to better assess petitions for emergency relief based on the circumstances of the underlying emergency.[27]

The irreparable harm standard applicable to injunctions under section 49 U.S.C. 1321(b)(4) will not be imported by the Board to its consideration of emergency petitions under 49 U.S.C. 11123. Congress has kept separate the emergency service and preliminary injunction

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[26] The Coalition Associations further note that captive shippers, which they claim have the greatest need for emergency service, have the least ability to use alternative transportation. (Coalition Ass'ns Reply 10-11.)

[27] 49 CFR 1146.2 will also be revised to include reference to 49 U.S.C. 11123 in a manner similar to 49 CFR 1146.1.

powers of the Board. The Board sees no reason to conflate the general preliminary injunction standard in 49 U.S.C. 1321(b)(4) with the more specific emergency issues arising under 49 U.S.C. 11123, which provides an independent standard for when it applies, see 49 U.S.C. 11123(a).

NGFA and AAR ask the Board to clarify the phrase "food security." More specifically, NGFA asks the Board to clarify that the new accelerated process could be used in situations presenting a "clear and present threat to the health of livestock." (NGFA Comment 6.) NGFA states that railroads' failures to deliver corn, which its members process into feed for livestock, can be damaging and potentially catastrophic to the health of livestock populations. (Id.) AAR questions what the phrase would include (e.g., does it cover a shortage of pet food, livestock feed, potato chips, or soda) and asserts it is not clear "what a threat to 'food security' would entail in the railroad context." (AAR Comment 7.) The Coalition Associations argue that "food security" need not be defined more clearly as it is "common sense" and note that food security is "traced back to the ultimate food sources, not the manufactured products in the AAR's hypotheticals." (Coalition Ass'ns Reply 11.)

Further clarification of "food security" is unnecessary at this time. While the Board agrees with the Coalition Associations that shortages of the ultimate food sources are more likely to constitute an emergency than shortages of manufactured products, the Board cannot anticipate all circumstances of potential food security-related emergencies. Instead, a case-by-case application that affords the Board flexibility in addressing situations based on the specific conditions of each case will best allow the Board to apply these regulations appropriately.

SDDC requests the Board add "a threat to national defense" to the standard for relief under 49 CFR 1146.2. (SDDC Comment 1.) SDDC states that "national defense is one very important aspect of the public interest, and the timely deployment of military units to a port or timely movement of critical defense materiel are important to that end." (Id.) AAR states it does not object to this change if the accelerated process is adopted. (AAR Reply 7.) The Board of

course agrees that national defense is critical to the public interest and will therefore include language in 49 CFR 1146.2 to reflect that the accelerated process is an appropriate mechanism for addressing threats to national defense related to rail service.

Regarding the proposed petition requirements under 49 CFR 1146.2, AAR requests that the Board require a petitioner to include in its petition that it has "previously notified the incumbent railroad of the emergency and its intent to file." (AAR Comment 17.) According to AAR, while the proposal requires a good faith effort to resolve the dispute before filing, it does not require the petitioner to notify the incumbent carrier of the emergency. (Id.) AAR asserts that this modification would ensure the incumbent carrier has sufficient notice to prepare a response to a petition and that the Board has the most complete information. (Id.) Shipper Groups argue this concern is unfounded. (Shipper Grps. Reply 8.) Additionally, Shipper Groups express concern with the Board's proposal to limit petitions under 49 CFR 1146.2 to three substantive pages. According to Shipper Groups, this page limit may lead to skeletal filings that could cause uncertainty, confusion, and longer hearings. (Shipper Grps. Comment 10.) Shipper Groups suggest that a word count limitation would be less subject to manipulation. (Id.)

The Board agrees with Shipper Groups regarding AAR's concerns here. It is redundant to require petitions to state that petitioners have notified incumbent carriers of emergencies and their intent to file for emergency service given that shippers are required in good faith to seek informal resolution of the matter before filing under 49 CFR 1146.2 and to describe those efforts in their petitions. The Board expects that shippers facing such an emergency would make the impact of the service issue on their business clear to the railroad during informal discussions.

The Board declines to adopt Shipper Groups' suggestion that it address concerns about the page limitation by using a word limit instead. It is not clear from Shipper Groups' argument why such a change would be meaningful, and doing so would depart from standard Board practice. See, e.g., 49 CFR 1115.2(d), 1115.3(d), 1115.5(c). Moreover, 49 CFR 1104.2 sets forth requirements such as page size, font size, and line spacing, which will help prevent parties

from manipulating the limitations. The Board will, however, expand the petition page limit from three substantive pages to five substantive pages to accommodate the requirements that petitions include a particularized description of the commodities and volumes subject to the requested relief and the timing necessary for such relief, including why relief under 1146.1 would be ineffective; as well as a particularized description of how the measurable deterioration or other demonstrated inadequacy, absent the requested relief, presents imminent significant harm and threatens potentially severe consequences as specified in 1146.2(a).

AAR expresses concern about the Board's proposal to rotate, on a quarterly basis, the Board Member assigned to evaluate petitions for emergency relief and issue the initial decision. AAR projects that a single quarter may see a large number of complaints, which could tax a single Board Member; AAR goes so far as to speculate that single-Member decision making could even lead to "judge shopping" by shippers. (AAR Comment 15-16.) AAR suggests that the Board "shorten the rotation, not make it public, and allow for at least two Members" to resolve cases or allow Board staff to hold a conference before making a recommendation to the full Board, as is done for motions to compel. (Id. at 16.) The Coalition Associations do not object to AAR's proposals intended to mitigate the burdens that could fall unduly upon a single Board Member; however, they object to AAR's statement that petitioners would "judge shop." (Coalition Ass'ns Reply 14.) According to the Coalition Associations, "any circumstance in which a shipper can afford to wait until the following calendar quarter to have its petition decided by a different Board Member would not qualify for the [49 CFR] 1146.2 process." (Coalition Ass'ns Reply 14-15.) Shipper Groups argue that AAR's concerns may never materialize, and if they do, the Board can address them at that time. (Shipper Grps. Reply 7.)[28]

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[28] NS notes the NPRM did not propose to amend the Board regulations at 49 CFR 1011.4 to delegate this authority to an individual Board Member. (NS Comment 11 n.10.) Because the regulations adopted in this final rule provide for a full Board decision, this modification is unnecessary.

After considering the concerns raised in the comments, the Board finds that the objectives of the new 49 CFR 1146.2 process would be best achieved through a full Board decision rather than through delegation to a single Board Member. The Board's emergency service powers, when exercised, undoubtedly have a significant impact on various parties and the interstate rail network as a whole. Consideration by the full Board better lends itself to the exercise of that power, even in the accelerated process. Moreover, consideration by the full Board in the first instance (rather than upon appeal of a single-Member decision) will allow the process to be more efficient while still protecting the right to appeal by petitioning the Board for reconsideration. Accordingly, the regulations adopted in this final rule provide for a full Board decision on the merits of petitions seeking relief under 49 CFR 1146.2. To accommodate this procedural change but still allow proceedings to move quickly, instead of a hearing before the designated single Board Member as was proposed in the NPRM, Board staff will hold a staff-led conference with parties, as suggested by AAR.[29] (AAR Comment 16.) Board Members may attend the staff-led conference.[30] A transcript or recording of the staff-led conference will be made available to all Board Members before they make their decision and will be posted in the docket following any necessary redactions for confidentiality. In addition, given the change from a single Member to full Board decision, the Board will endeavor to issue a decision on the merits within three business days, rather than two as was proposed in the NPRM. This process is intended to be quick and flexible while also respecting the regulatory powers involved in the emergency service process.[31] Moreover, including a staff-led conference might encourage discussion and resolution among parties to a proceeding.

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[29] Designated Board staff will not be recused from handling substantive elements of the case.

[30] The Board Members may do so "without regard to subchapter II of chapter 5 of title 5." 49 U.S.C. 11123(b)(1).

[31] Shipper Groups assert that the possibility for consecutive appeals—first, to the entire Board, followed by a petition for reconsideration of the full Board decision—could dissuade petitioners from utilizing the accelerated process because the 49 CFR 1146.1 process, which

NGFA asks the Board to require potential alternative carriers to address at the hearing proposed by the Board in the NPRM "whether the remedy proposed by the petitioner is unsafe, infeasible, or will substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations," as the proposed regulations required of incumbent carriers. (NGFA Comment 6-7.) Additionally, CSXT and NS argue that if the Board adopts the accelerated process, it should modify the proposed treatment of confidential information because closing portions of the proposed hearing to certain parties is unnecessary and would be unfair, prejudicial, and inconsistent with how the Board treats confidential information in other proceedings (accessible subject to a protective order). (CSXT Comment 13; NS Comment 11.)

Potential alternative carriers will be required to attend the staff conference where that information can be discussed and will be required to identify, at the conference, facts showing whether the proposed alternative service would be infeasible, or substantially impair the replying carrier's service to other customers. As for CSXT's and NS's positions on modifying the treatment of confidential information, the Board finds it is best to adopt this aspect of the regulation as proposed in order to maintain flexibility. This flexibility is imperative, for example, if a case involves multiple carriers and requires discussion of highly confidential information. While the Board will leave this aspect of the proposal unchanged, the Board emphasizes that transparency will be pursued to the greatest extent possible.

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takes 10 business days, would appear to be less burdensome. (Shipper Grps. Comment 10-11.) On reply, AAR argues that the right to appeal is "fundamental and already required by the Board's own regulations" and that "prohibiting appeal from the decision of a single Board [M]ember would be patently unfair and a denial of due process." (AAR Reply 4.) Now that the entire Board will decide on petitions under 49 CFR 1146.2, parties will no longer need to appeal these decisions to the full Board before then petitioning for reconsideration. However, petitions for reconsideration will be permitted under a shortened timeline, similar to the timeline provided for appeals in the NPRM, given the nature of proceedings under the accelerated process. The Board will amend 49 CFR 1115.3 accordingly.

Regarding the proposed limitations on relief available under the new process, BLET argues the 20-day relief limit would provide a "back-stop to causing most major harms." (BLET Comment 4-5.) CSXT asks the Board to clarify in the regulations that orders under 49 CFR 1146.2 may not be extended beyond the 20-day period and that additional relief would require a petition under 49 CFR 1146.1. (CSXT Comment 12.) AAR and NS argue that relief under the proposed new accelerated process should be limited to incumbent-based relief. (AAR Comment 10-11; see also NS Comment 5.) Both carrier interests argue it would be impractical for an alternative carrier to provide service for 20 days and that, for safety reasons, crews from the alternative carrier must be qualified to operate on the incumbent's tracks. (AAR Comment 10-11; NS Comment 5-6.) AAR adds that if an incumbent crew is available to train the crew of the alternative carrier, the incumbent crew could simply be directed to provide the service itself. (AAR Comment 10-11.) AAR asserts that limiting 49 CFR 1146.2 to incumbent-based relief would provide more time to identify an alternative carrier for continued relief under 49 CFR 1146.1. (AAR Comment 11.)[32] The Coalition Associations state they are amenable to limiting the relief under 49 CFR 1146.2 to "incumbent-based relief" only, which they understand to include relief that does not involve the grant of trackage rights to an alternative carrier but could include granting an alternative through route using an alternative carrier. (Coalition Ass'ns Reply 7.)

The Board will adopt language clarifying that relief under 49 CFR 1146.2 may not be extended beyond the 20-day period and any additional relief will require a separate petition under 49 CFR 1146.1. This will provide a clearer pathway for any party wishing to seek additional emergency relief. However, the Board will not limit 49 CFR 1146.2 to provide for

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[32] AAR notes the proposed language for 49 CFR 1146.2 in the NPRM did not include a requirement to provide even an identification of an alternative carrier, although potential alternative carriers would be required to attend the hearing. (AAR Comment 11 n.16.) However, 49 CFR 1146.2(e) requires service on other parties, which, as discussed below, includes any proposed alternative carriers. Accordingly, the contact information for any potential alternative carriers should be provided on the certificate of service.

incumbent-based relief only. Section 1146.1 allows the Board to provide for trackage rights to an alternative carrier with the same safety and feasibility concerns present as those raised regarding 49 CFR 1146.2. Additionally, while the Board expects incumbent-based relief to be utilized in the vast majority of instances, the Board finds it important to maintain flexibility in its process since, for example, there may be situations where arrangements between parties could make trackage-rights relief more feasible. Nevertheless, the Board emphasizes that feasibility will be considered in determining what relief is appropriate in a given case and that it will not order a remedy that it deems infeasible.

Several commenters asked the Board to clarify the proposed service requirements. CSXT questions whether the Board is suggesting that all pleadings must be e-filed with the Board, or whether it is proposing to introduce electronic service of pleadings, which cannot be accomplished through e-filing. (CSXT Comment 12.) AAR and NS each ask the Board to clarify that e-filing alone is not considered sufficient service since e-filing on the Board's website does not effectuate service on other parties or the FRA. (AAR Comment 16; NS Comment 10.) NS states it "supports the Board adding a method of electronic service and suggests that the Board consider using language similar to that contained in 49 CFR 1104.12, which governs service of documents." (NS Comment 11.) The Coalition Associations agree that the requested clarifications are needed. (Coalition Ass'ns Reply 15.) They also ask the Board to consider requiring all Class I carriers to file with the Board the name and electronic address for service of petitions, which it states would ensure faster delivery to those carriers and maximize their response time. (Id.)

The Board agrees that the proposed service provisions were unclear and will clarify them by revising the text to read more like that in 49 CFR 1104.12. The Board should be served by e-filing on the Board's website, given the short timeline of these proceedings. Service on other parties, including any proposed alternative carriers, and the FRA may be done by email, hand, or overnight delivery. In addition, all pleadings should also be emailed to

ServiceEmergency@stb.gov. However, the Board will not at this time require the Class I carriers to file the name and electronic address for service of petitions. The contact information for the serving carrier is the type of information that should already be in the possession of the petitioner. Moreover, parties are required to make a good faith effort to resolve any service issues through an informal dispute resolution process, during which time they can obtain this information from the carrier, if needed.

BLET expresses concern that emergency service for acute service emergencies might undermine collective bargaining agreements (CBAs). (BLET Comment 5.) The Board does not anticipate that CBAs will be an issue in most emergency service proceedings, but notes that any such issues are best resolved on a case-by-case basis in any event.

Lastly, NMA cautions that the new process, if codified, should be used sparingly because, although "it is not the intent of the [Board] to create a new program to regulate rail, this proposed rulemaking is a slippery slope that has the potential to be abused by bad actors." (NMA Comment 3; see also AAR Reply 8-9 (noting that it shares the concerns expressed by NMA).) While the accelerated process may impact informal dispute resolution between the parties, the Board finds no reason to assume potential abuse of the accelerated process itself. By its own definition, 49 CFR 1146.2 will be used only sparingly because it is much narrower than 49 CFR 1146.1, and the circumstances under which it can be used are limited. Moreover, it is in the interest of all parties to act in good faith, and the Board will deny petitions filed in bad faith or that otherwise abuse the Board's processes.

Contract and Exempt Traffic. Various carrier interests also ask the Board to clarify that traffic moving pursuant to a contract is not eligible for relief under the Board's proposal. (AAR Comment 18-19, CSXT Comment 12; NS Comment 7-10.) According to NS, the plain language of 49 U.S.C. 10709(c)(1) makes clear that traffic moving pursuant to a contract is outside the Board's jurisdiction, but the Board's final rule adopting 49 CFR 1146.1 "injected unnecessary ambiguity" into the issue. (NS Comment 7-10 (citing Expedited Relief, EP 628, slip op. at 10).)

NS argues that even if a railroad stops service, if that service is governed by a contract, "any relief . . . is wholly outside the Board's jurisdiction," and any remedies "must be provided for in the contract itself (e.g., a force majeure provision) and are enforceable only in the courts and subject to applicable state law." (Id. at 9 (citing 49 U.S.C. 10709(c)(2)).) CSXT asks that the Board require all petitions filed under part 1146 to include a verification that the transportation for which relief is sought is not governed by a contract. (CSXT Comment 12.) AAR also argues exempt traffic should be ineligible for relief under part 1146 because the expedited timelines would not provide sufficient time for the Board to complete the analysis required by statute to revoke an exemption. (AAR Comment 19.) AAR further argues that revocation of an exemption requires a decision of the full Board, not an individual Board Member as contemplated by 49 CFR 1146.2. (AAR Comment 20.)

The Coalition Associations disagree, arguing the Board may exercise its authority to order emergency service over traffic covered by a contract. (Coalition Ass'ns Reply 3.) According to the Coalition Associations, Congress would not have granted the Board the broad emergency authority it did in 49 U.S.C. 11123 only to carve out in 49 U.S.C. 10709 the substantial volume of traffic covered by a contract, nor would Congress have subordinated the public interest to a private contract. (Coalition Ass'ns Reply 4.) The Coalition Associations contend that "[t]he transportation that occurs pursuant to an emergency service order is not occurring under a contract," but rather is "alternate service pursuant to [49 U.S.C.] 11123," (Coalition Ass'ns Reply 5), and they identify a prior instance where the Board exercised its 49 U.S.C. 11123 authority over contract traffic, (Coalition Ass'ns Reply 4 (citing Joint Pet. for Serv. Ord., SO 1518 (STB served Oct. 31, 1997), modified and extended (STB served Dec. 4, 1997), further modified and extended (STB served Feb. 17 and 25, 1998), terminated with wind-down period (STB served July 31, 1998).)

NGFA also disagrees with the proposition that contract traffic is not eligible for emergency service relief, pointing to the Board's rejection of this very argument made by AAR

in the 1998 final rule in Docket No. EP 628, and asserting that the Board "clearly established that it has jurisdiction to issue an order under [49 U.S.C.] 11123 for movements subject to a transportation contract if the facts and circumstances require it." (NGFA Reply 1-2 (citing Expedited Relief, EP 628, slip op. at 10.)) NGFA likewise urges the Board to decline NS's request for the Board to clarify that its emergency service authority does not apply to contract traffic, observing that the adoption of such a "blanket, overreaching prohibition" would be bad public policy because it would render the Board powerless to act when rail service failures significantly harm businesses and the public merely because the service is governed by a contract. (Id. at 3.) Rather, NGFA asks the Board to reaffirm its decision that 49 U.S.C. 11123 grants the Board authority "to act in the public interest to avert rail service emergencies, regardless of whether the service the railroad has failed to provide is governed by a tariff or a contract, subject to the restrictions set forth in [Expedited Relief, EP 628]." (NGFA Reply 3.) In a similar vein, NGFA disputes the claim that exempt traffic is ineligible for emergency service, citing Expedited Relief, EP 628, where the Board noted that this argument "is clearly wrong" because the Board "retain[s] full jurisdiction to deal with exempted transportation, as [the Board] can revoke the exemption at any time, in whole or in part, under [49 U.S.C.] 10502(d)." (NGFA Reply 2 (quoting Expedited Relief, EP 628, slip op. at 10).)

NITL and ISRI similarly dispute carrier arguments that the Board lacks the power to exercise its emergency service authority over contract and exempt traffic. With respect to contract traffic, NITL and ISRI assert the carriers' arguments "are factually and legally incorrect and contrary to the intent of Congress." (NITL & ISRI Reply 3.) As for exempt traffic, NITL and ISRI request that the Board partially revoke existing class exemptions so they will not apply to requests for emergency service. (Id. at 8.) NITL and ISRI argue there are "substantial similarities" between the Board's "partial revocation of the exemption for agricultural commodities and the circumstances involving exempt traffic and emergency service orders,"

which would justify the Board partially revoking existing exemptions to permit shippers of exempt commodities to access the Board's emergency service regulations. (Id. at 3-8.)

Shipper Groups contend that the carriers have not presented any basis for the Board to depart from its decision in Expedited Relief, EP 628, (Shipper Grps. Reply 4), and argue that this issue is outside the scope of the proceeding because it was not included in the NPRM, (id. at 5).

The NPRM did not make any new proposal regarding the application of section 11123 to contract traffic. In Expedited Relief, EP 628, the Board concluded that any advance rejection of all authority to address situations where a contract exists in an emergency would be inappropriate and declined to include any bright-line prohibition. Expedited Relief, EP 628, slip op. at 10. In the NPRM, the Board made no proposals changing the status of existing law on this issue and sees no reason to revisit that position here.

As for exempt traffic, the Board reiterates that it has the authority to revoke exemptions when appropriate. Petitioners may request partial revocations in their filings at 49 CFR 1146.1 or the new accelerated process at 49 CFR 1146.2 (which will not be decided by a single Member, as the NPRM originally proposed, but by the full Board). See supra at 23-24.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Regulatory Flexibility Act), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant economic impact of a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. 5 U.S.C. 601-604. In its final rule, the agency must either include a final regulatory flexibility analysis, 5 U.S.C. 604(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," 5 U.S.C. 605(b).

Because the goal of the Regulatory Flexibility Act is to reduce the cost to small entities of complying with federal regulations, the Regulatory Flexibility Act requires an agency to perform

a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.[33] The Board explained that the proposed changes were intended to improve the Board's directed service procedures and would not mandate or circumscribe the conduct of small entities. Rather, the Board said, the changes would be largely procedural and would not have a significant economic impact on the Class III rail carriers to which the Regulatory Flexibility Act applies. Because affected shippers or railroads could seek the relief under 49 CFR part 1146 to obtain temporary relief from serious, localized service problems more quickly and effectively, the Board certified under 5 U.S.C. 605(b) that the proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of Regulatory Flexibility Act.

The final rule adopted here revises the rules proposed in the NPRM; however, the same basis for the Board's certification of the proposed rule applies to the final rule. Thus, the Board again certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act. A

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[33] For the purpose of Regulatory Flexibility Act analysis for rail carriers subject to Board jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 CFR part 1201, General Instructions 1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, EP 719 (STB served June 30, 2016). Class III carriers have annual operating revenues of $40.4 million or less in 2019 dollars. Class II rail carriers have annual operating revenues of less than $900 million but more than $40.4 million in 2019 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1-1; Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served June 29, 2023).

copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and Appendix B, about the impact of the collection for the Directed Service Regulations (OMB Control No. 2140-XXXX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described in Appendix A, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimated in the NPRM that the proposed requirements will have a total hourly burden of 2,710 hours. There were no proposed non-hourly burdens associated with these collections. No comments were received pertaining to the collections of this information under the PRA. The new collections will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Congressional Review Act. Pursuant to the Congressional Review Act, 5 U.S.C. 801-808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. 804(2).

**List of Subjects**
**49 CFR Part 1011**

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

**49 CFR Part 1104**

Administrative practice and procedure.

**49 CFR Part 1115**

Administrative practice and procedure.

**49 CFR Part 1146**

Railroads.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the Federal Register.

2. This decision is effective February 23, 2024.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

Decided: January 18, 2024.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, parts 1011, 1104, 1115, and 1146 of the Code of Federal Regulations as follows:

**PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY**

1. The authority citation for part 1011 continues to read as follows:

**Authority:** 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

2. Add § 1011.7(a)(2)(xx) to read as follows:

**§ 1011.7 Delegations of authority by the Board to specific offices of the Board.**

(a) * * *

(2) * * *

(xx) To delegate to Board staff any necessary parties for purposes of accelerated emergency service proceedings at § 1146.2 of this chapter.

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**PART 1104—FILING WITH THE BOARD-COPIES-VERIFICATION-SERVICE-PLEADINGS, GENERALLY**

1. The authority citation for part 1104 continues to read as follows:

**Authority:** 5.U.S.C. 553 and 559; 18 U.S.C. 1621; and 49 U.S.C. 1321.

2. Revise § 1104.7(b) to read as follows:

**§ 1104.7 Computation and extension of time.**

* * * * *

(b) *Extensions.* Any time period, except those provided by law or specified in these rules respecting informal complaints seeking damage, may be extended by the Board in its discretion, upon request and for good cause. Requests for extensions must be served on all parties of record at the same time and by the same means as service is made on the Board. However, if service is made on the Board in person and personal service on other parties is not feasible, service on other parties should be made by first class or express mail. A request for an extension must be filed not less than 10 days before the due date, except that in cases seeking expedited relief for service emergencies under part 1146 of this chapter, a request for an extension must be made within 24 hours of service of the petition, reply, or other filing or procedural order of the Board as applicable. Only the original of the request and certificate of service need be filed with the Board. If granted, the party making the request should promptly notify all parties to the proceeding of the extension and so certify to the Board, except that this notification is not required in rulemaking proceedings.

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**PART 1115—APPELLATE PROCEDURES**

1. The authority citation for part 1115 continues to read as follows:

**Authority:** 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

2. Revise § 1115.3(e) to read as follows:

**§ 1115.3 Board actions other than initial decisions.**

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review and in cases seeking expedited relief for service emergencies under the accelerated process at 49 CFR 1146.2, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

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**PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES**

1. The authority citation for part 1146 continues to read as follows:

**Authority:** 49 U.S.C. 1321, 11101, and 11123.

2. Revise § 1146.1 to read as follows:

**§ 1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.**

(a) *General.* Alternative rail service, or directed action by an incumbent carrier, will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. In prescribing the relief described herein, the Board may act on its own initiative or pursuant to a petition.

(b) *Procedure for petition for relief* - (1) *Petition for relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of both the petitioner's discussions with the incumbent carrier of the service problems (including a description of the efforts taken to resolve the matter prior to filing of the petition, verified by a person or persons with knowledge of the efforts taken to resolve the

matter), and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable period of time;

(iii) In a petition that seeks alternative rail service, identification of at least one possible rail carrier to provide alternative service, based on the petitioner's understanding of other rail carriers' nearby operations, that would meet the current transportation needs of the petitioner; and

(iv) A detailed explanation of the specific remedy that is being sought.

(2) *Reply.* The incumbent carrier and any proposed alternative carriers must file a reply to a petition under this paragraph within three (3) business days of service of the petition. If applicable, any reply must address whether the specific remedy proposed by the petitioner would be unsafe or infeasible, or would substantially impair the carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

(3) *Rebuttal.* The party requesting relief may file rebuttal no more than two (2) business days after the reply is filed.

(4) *Board Decision.* The Board will endeavor to issue a decision five (5) business days after receiving the rebuttal or time has expired for the party requesting relief to file a rebuttal, whichever is earlier.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d) *Procedure for petition to terminate relief* - (1) *Petition to terminate relief.* Should the Board prescribe alternative rail service under paragraph (a) of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carriers are admonished not to file such a petition prematurely.

(2) *Reply.* Parties must file replies to petitions to terminate filed under this paragraph (d) within five (5) business days.

(3) *Rebuttal.* The incumbent carrier may file any rebuttal no more than three (3) business days later.

(e) *Service.* Every document filed with the Board under this section must include a certificate showing simultaneous service upon all parties to the proceeding, including any proposed alternative carriers and the Federal Railroad Administration. Service on the parties must be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy must be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service must be made by overnight delivery. If a document is filed with the Board through the e-filing process, a copy of the e-filed document must be emailed to other parties if that means of service is acceptable to those other parties. If email is not acceptable to the receiving party, a paper copy of the document must be personally served on the other parties. If neither email nor personal service is feasible, service of a paper copy must be by overnight delivery. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party. All pleadings under this section must also be emailed to ServiceEmergency@stb.gov.

3. Add § 1146.2 to read as follows:

**§ 1146.2 Accelerated process.**

(a) *Request for accelerated process.* After making a good faith effort to resolve its service issue through an informal dispute resolution process or service of the Board, affected shippers or railroads may seek accelerated temporary interim relief under 49 U.S.C. 11123(a) for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier that presents potential imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. Such emergencies exist when there is a clear and present threat to public health, safety, national defense, or food

security, or a high probability of business closures or immediate plant shutdowns. The timing of potential harm and consequences must render potential relief under § 1146.1 ineffective. The relief requested must be feasible and clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.

(b) *Procedure for accelerated process* - (1) *Petition for relief.* A petitioner seeking accelerated relief must indicate in its petition that it is seeking such relief pursuant to paragraph (a) of this section and must demonstrate circumstances that meet the standard set forth in that paragraph. The petition must include:

(i) A particularized description of the commodities and volumes which would be subject to the requested relief and the timing necessary for such relief, including why potential relief under § 1146.1 would be ineffective;

(ii) A particularized explanation of how the measurable deterioration or other demonstrated inadequacy, absent the requested relief, presents imminent significant harm and threatens potentially severe adverse consequences as specified in paragraph (a) of this section;

(iii) A description of specific and particularized action that could be performed by the incumbent carrier or an alternative carrier and ordered by the Board to relieve the potential harm and adverse consequences;

(iv) A summary description of the efforts taken to resolve the matter prior to filing the petition, which must be verified by a person or persons with knowledge of the efforts taken to resolve the matter; and

(v) Contact information for the incumbent carrier.

(vi) The petition will be limited to five (5) substantive pages, not including the cover page, verifications, or certificate of service.

(2) *Staff conference.* When the Board receives a petition seeking accelerated relief under paragraph (a) of this section, the petition will be evaluated on its merits by the Board.

(i) After the Board receives the petition for accelerated relief, a telephonic or virtual conference, led by designated Board staff, will be held no sooner than 24 hours after receipt of the filing, but no later than 48 hours after receipt of the filing, if practicable. Designated Board staff may continue to work on the case after the conference.

(ii) Required parties for the conference include the petitioner(s), the incumbent carrier, and any proposed potential alternative carriers and other parties deemed necessary by the Board. Portions of the conference may be closed to certain parties if confidential business information needs to be discussed. The conference will be recorded and later transcribed (with redactions, if necessary), and placed in the public docket of the proceeding.

(iii) If applicable, the incumbent carrier or any alternative carrier shall address at the conference whether the remedy proposed by the petitioner is unsafe, infeasible, or will unreasonably impair the carrier's ability to serve other customers. The Board may order the incumbent carrier to submit, or if no such order is issued, the incumbent carrier may choose to submit, within 24 hours of the completion of the conference, an alternative service plan for the Board to consider. Any alternative carrier may also submit, within 24 hours of the completion of the conference, an alternative service plan for the Board to consider. The Board may choose to receive such information either via written submission or a second virtual or telephonic conference, if practicable.

(3) *Board decision.* The Board will endeavor to issue an initial decision on the merits of the petition requesting accelerated relief within three (3) business days of the completion of the conference. The Board shall not award relief under this section for more than 20 days, and any relief ordered under this section shall not be extended beyond the 20-day period. A party may petition the Board for subsequent relief under § 1146.1.

(c) *Petition for reconsideration.* After the Board issues an initial decision on the merits of the petition requesting accelerated relief, parties may petition the Board for reconsideration. The

petition for reconsideration will be subject to § 1115.3 of this chapter. The record is to include any filings by the parties in the proceeding and the unredacted recording of the conference.

(d) *Stay of relief.* Notwithstanding § 1115.3 of this chapter, parties seeking a stay of the relief issued by the Board must concurrently file a petition for reconsideration of the decision and a petition to stay.

(e) *Service.* Every document filed with the Board under this section must include a certificate showing simultaneous service upon all parties to the proceeding, including any proposed alternative carriers and the Federal Railroad Administration. One copy must be served on each party. Service on the Board must be made through the e-filing process, and a copy of the e-filed document must be emailed to other parties if that means of service is acceptable to those other parties. If email is not acceptable to the receiving party, a paper copy of the document must be personally served on the other parties. If neither email nor personal service is feasible, service of a paper copy must be by overnight delivery. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party. All pleadings under this section must also be emailed to ServiceEmergency@stb.gov.

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