

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 762

**REVISIONS TO REGULATIONS FOR EXPEDITED
RELIEF FOR SERVICE EMERGENCIES**

COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) respectfully submits these comments pursuant to the Board’s notice of proposed rulemaking (NPRM) served on April 22, 2022 in this proceeding.¹

In 1998, the Board adopted regulations at 49 C.F.R. parts 1146 and 1147, under the emergency and access provisions of the statute, respectively, “to enable the Board to provide temporary relief from serious, localized railroad service problems more quickly and effectively,” and emphasized that “they are not intended to address demands for more competitive service.” Final Rules, *Expedited Relief for Service Inadequacies*, Docket No. EP 628, at 4 (STB served Dec. 21, 1998) (“EP 628 Final Rule”). The agency determined that such short-term provisions would complement the existing access regulations at 49 C.F.R. part 1144 and the accompanying *Midtec* standard,² which appropriately only provides permanent

¹ Notice of Proposed Rulemaking, *Revisions to Regulations for Expedited Relief for Service Emergencies*, Docket No. EP 762 (STB served April 22, 2022) (“NPRM”)

² *Midtec Paper Corp. v. Chicago & Nw. Transp. Co.*, 3 I.C.C. 2d 171, 174 (1986).

relief to address competitive abuses. The Board has now issued the NPRM in order to modify and update its emergency service rules at part 1146.³

CSXT believes the Board's review of its emergency service regulations—which are temporary in nature yet powerful enough to address service emergencies and incentivize a carrier to restore prior service levels—is a more constructive way to address service issues than broad-brush proposals like the proposed rule in *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1). The temporary relief available under part 1146 is designed to remedy emergency service situations without the long-term disincentives and operational and revenue implications of the Board's pending proposal in *Reciprocal Switching*. CSXT supports the Board's review of its regulations and its stated goal of ensuring access to the Board in times of service emergencies. In that spirit, CSXT now turns to the specifics of the Board's proposal in the NPRM.

The existing regulations at 49 C.F.R. part 1146, which were adopted in 1998 under the statutory authority of 49 U.S.C. § 11123(a), provide a sound framework for seeking an emergency service order. CSXT supports the following proposals from the Board that appropriately update and improve the regulations:

- CSXT supports the clarifications that emergency service orders can be directed at the incumbent as well as the alternate carrier.
- CSXT agrees with the Board that a detailed explanation of the specific remedy being sought must be included in the petition.

³ NPRM at 1–2.

- CSXT agrees with the Board that it is appropriate to ask the rail carrier (either the alternate or the incumbent), rather than the shipper, to address the safety and feasibility of the requested service.
- CSXT also agrees with the NPRM’s proposal to include decision deadlines (with slight modifications as described below).

While CSXT supports the Board’s efforts, CSXT does have serious concerns about two aspects of the NPRM, which are described in more detail below. First, given the extraordinary nature of the relief, the seriousness of providing access to an alternate carrier, and the constraints on the Board’s emergency service authority, the Board should retain the requirement that there be a commitment from an alternate carrier in advance of filing a petition seeking alternative rail service. Second, the Board should eliminate the accelerated process proposed at § 1146.2. CSXT also asks the Board to make certain other clarifications and minor modifications which will further improve the proposed rule.

I. The Board Should Retain the Requirement That Any Petition for Alternative Emergency Rail Service Identify an Alternate Carrier That Has Already Agreed to Provide the Alternative Service.

Any Board action under its § 11123 authority carries with it potential risks to cause further harm due to the highly complex nature of remedying an emergency service situation. Such a remedy necessarily requires both thoughtfulness and expertise regarding safety, operational logistics, staffing, resources, network fluidity, and more. In light of these potential risks, Congress has emphasized that the Board’s authority under § 11123 is “extraordinary” and appropriate only in certain rare situations—namely, “genuine emergencies” of a serious and substantial

nature that cannot be remedied via any alternative, less invasive remedy (such as damages). Staggers Rail Act of 1980, Conf. Report No. 96-1430, at 119 (Sept. 29, 1980); *see* 49 U.S.C. § 11123(a) (“emergency situation of such magnitude”); *see also* *Granite State Concrete Co. v. Bos. & Me. Corp.*, Docket No. 42083, slip op. at 6 (STB served Sept. 15, 2003) (shipper complaint regarding a decrease in service frequency and other service-related problems did “not me[e]t the requirements for emergency action” and “the extraordinary relief available under [49 U.S.C. § 11123 and 49 C.F.R. pt. 1146]”).

Section 11123 accordingly limits the Board’s emergency service authority to situations that 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.” 49 U.S.C. § 11123(a). To further protect against the risks of harm that could result from the Board’s exercise of its § 11123 authority, Congress specifically limited its emergency service power in time, 49 U.S.C. § 11123(a), (c)(1), and in action, § 11123(a), (c)(2), (c)(4).

It is in light of the invasive nature of the Board’s authority under § 11123 and the complexities that accompany emergency service relief that CSXT urges the Board to retain its existing requirement that, in any petition for alternative emergency rail service (under either § 1146.1 or the proposed § 1146.2), the

petitioner must identify an alternate carrier that has already agreed to provide the requested relief.⁴

This requirement is critical for several reasons. First, it ensures both the speed and the success of the emergency service process. If the Board allows petitions for alternative emergency rail service to be filed without a prior commitment from an alternate carrier, the Board will be spending precious time trying to identify, contact,⁵ and obtain critical information regarding the alternate service (which takes time to understand and analyze)—all of which are highly unlikely to happen in the tight timeframes the Board is proposing for part 1146. Even after such efforts, the Board may be faced with an alternate carrier that is either unwilling or unable to provide the alternate service, which risks further delay and a host of other harms. As the Board observed in EP 628: “Forcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances.” EP 628 Final Rule at 11.

In contrast, requiring the petitioner to have secured a commitment from an alternate carrier that is willing and able to perform sets the stage for smooth, safe, and sound alternative service. In particular, this requirement enables the Board to

⁴ CSXT notes that, in some prior cases under the existing regulations at part 1146, the petitioner has been the alternate carrier itself. *See, e.g., Arkansas Midland Railroad Company—Alternative Rail Service—Line of Caddo Valley Railroad Company*, Docket No. FD 35416 (STB served Sept. 17, 2010); *Denver Rock Island Railroad—Alternative Rail Service—Lines of Kansas Southwestern Railway, L.L.C.*, Docket No. FD 33762 (STB served June 16, 1999).

⁵ Under the Board’s proposal, the alternate carrier is not even required to participate in the proceeding. NPRM at 12–13 (Proposed § 1146.1(b)(2)).

iron out the practicalities of the requested relief as soon as possible with the alternate carrier. This is critical to ensure the alternative rail service can begin as soon and as safely as possible, with as little negative impact as possible on other customers on the network. Complicated issues can arise with any emergency service relief, but this is true particularly where access over the lines of another railroad is sought. As the Board recognized in EP 628: “Access—particularly that which would compel physical access by another railroad over an incumbent’s lines—is a serious remedy with potentially significant operational, safety, and financial consequences for the involved carriers.” Notice of Proposed Rulemaking, *Expedited Relief for Service Inadequacies*, Docket No. EP 628, slip op. at 6 (STB served May 12, 1998).

Second, requiring a commitment from an alternate carrier at the beginning of the process will ensure that any Board action is consistent with § 11123(c)(2), which prohibits the Board from taking any action under § 11123 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.” 49 U.S.C. § 11123(c)(2)(A)–(B). The prohibitions in § 11123(c)(2) are issues that must ultimately be resolved with respect to any alternate carrier (or incumbent carrier, as the case may be), so it is important that the Board have these relevant discussions as soon as possible in the process, especially when the Board is proposing to further compress the timeline for accessing emergency service relief.

Requiring the petitioner to obtain a willing alternate carrier prior to filing its petition for emergency alternative rail service is not an obstruction to a petitioner's ability to seek quick relief under part 1146. To the contrary, this requirement is *essential* to the petitioner getting the very relief it seeks. In fact, this requirement can only expedite the process by ensuring the alternate carrier is ready, willing, and able to act at the earliest possible point in the remedial process.

As the Board rightly recognized in EP 628, where it considered and rejected the Board's very position in the NPRM, "the cooperation of the alternative carrier is *essential* ... given the potentially significant operational, safety, and financial implications for the carriers involved." EP 628 Final Rule at 11 (emphasis added). Nothing has happened to undermine the Board's reasoning in EP 628. The mere desire to lessen the temporal or informational burden on the petitioner under part 1146 does not justify the serious risks to safety and service that would accompany forcing an alternate carrier to provide service when it is unwilling or unable to do so.

As such, the NPRM would represent a significant and unexplained departure from this agency's prior reasoning. Federal courts of appeal have consistently held that "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). Here, when the agency has previously concluded that having a willing alternate carrier in hand

from the start is “essential,” the Board must offer a reasoned decision supported by substantial evidence for making any change to that conclusion. *See, e.g., Jicarilla Apache Nation v. Dep’t of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) (“Silence in the face of inconvenient precedent is not acceptable.”). Indeed, it is “elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent.” *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995). “[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (internal citations omitted).

The NPRM offered no reasoned analysis for abandoning a feature of the rule that it previously concluded was *essential*. Nor is CSXT aware of any change in the industry or technology that could justify transforming a feature from essential to irrelevant. The proposal to eliminate this feature should therefore be abandoned.

II. The Board Should Discard the Proposed Accelerated Process.

The NPRM also proposes to add a separate process under a new § 1146.2 for obtaining emergency service relief. The new § 1146.2 contemplates a timeline that is even more compressed than the highly accelerated process under § 1146.1, which the NPRM is proposing to further shorten. *See* NRPM at 7–9. The process under proposed § 1146.2 would aim to hold a telephonic hearing within 24–48 hours of the filing of a petition, after which a single Board member would exercise the Board’s

extraordinary authority under § 11123 within two business days of the hearing, with no written replies permitted. *Id.* at 7–8. Such a compressed schedule unnecessarily creates significant due process concerns, and CSXT appreciates the Board’s willingness to hear feedback on this proposal.

First, there is no need for a second process for obtaining emergency service relief, especially where the Board is already proposing to further accelerate the existing process. In the NPRM, the Board points to shipper feedback that “the overall length of the process set forth in part 1146, as well as the lack of a date certain by which a Board decision can be expected” were problematic. NPRM at 7. The NPRM proposes to address both of these issues by shortening the time frame of the § 1146.1 process and by proposing that the Board will endeavor to issue a decision within five business days after the optional rebuttal period. *Id.*

While the Board notes the possibility of “acute service emergencies, such as those involving public health or safety issues and imminent and extended potential plant shutdowns,” it does not explain why such “acute” service emergencies cannot be addressed under § 1146.1 or through the Board’s injunctive authority at 49 U.S.C. § 1321(b)(4) to prevent irreparable harm. *Id.* In addition, the Board’s emergency service authority under § 11123 is to be exercised *only* in acute service emergencies, as it is an extraordinary remedy that should be reserved for only the most severe service situations with no other remedial options. *See supra* § I. There is no authority for an even more extraordinary remedy for a different category of emergency—emergent is emergent.

As such, there should be a single process to address all genuine emergencies, and the further expedited process proposed under § 1146.1 is as far as the Board should compress the process. The proposed acceleration to the § 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.

Second, as proposed, the timeline for the accelerated process under § 1146.2 is so compressed that it undermines basic principles of fairness and the Board's ability to gather thorough information necessary to exercise its § 11123 power responsibly. Practically, the proposed process leaves no meaningful time to review, analyze, and respond to the allegations in the petition. Service issues can be complex, requiring multiple departments and individuals within a railroad to work together to determine the cause of the problem and the potential options that can be implemented to remedy it. It is practically impossible to ask a carrier to review a petition, collect information about the allegations (and potential solutions) from its employees, conduct legal research if necessary, and prepare "oral replies" within 24–48 hours. It is more likely that such a rushed process will result in inaccurate information which, when relied upon, will lead to poor regulatory action. That action, and its unintended consequences, will result in negative impacts on other shippers and the broader public. While expedited remedies are important, the Board must balance that goal with the reality that there must be sufficient time for

both the impacted parties and the Board to assess the situation, including operational and safety considerations.

In light of these issues, CSXT urges the Board to set aside its § 1146.2 proposal. There is no problem highlighted by the NPRM that requires the Board to adopt two separate processes for emergency relief and no reason that the type of “acute” service emergencies described by the Board could not be addressed either by the more expedited process proposed under § 1146.1 or the Board’s existing authority to issue preliminary injunctions under 49 U.S.C. § 1321(b)(4), which it may exercise in the context of a request for emergency service relief. *See, e.g., Central Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, Docket No. NOR 42159, slip op. at 7 (STB served June 12, 2018).

III. The Board Should Make Other Clarifications and Minor Modifications to the Proposed Rule.

In addition to the suggestions above, and with the goal of improving the existing emergency service regulations, CSXT respectfully suggests that the Board make the following clarifications and minor modifications to the proposed rule:

- The Board should require the petition under § 1146.1(b) to describe any efforts taken to resolve the issue through other means. The Board is already proposing a similar requirement for the accelerated process proposed at § 1146.2, and 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.

- Given the truncated timelines under part 1146, the Board should require any petition filed under that part to include a verification that the transportation at issue for which relief is sought is not governed by a § 10709 contract.⁶
- The NPRM proposes a change to the service requirements at § 1146.1(e) and § 1146.2(e). It is unclear whether the Board is suggesting that all pleadings need to 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 suggests that the Board clarify this language.
- If the Board adopts an accelerated process at § 1146.2, it should modify the proposed treatment of confidential information under that process at § 1146.2(a)(2). It would be unfair and inconsistent with how the Board treats confidential information in other proceedings (via protective order) to entirely close portions of the hearing to certain parties.
- If the Board adopts an accelerated process at § 1146.2, it should clarify in the regulations that those orders may not be extended and that additional relief beyond the 20-day period would require a request under § 1146.1, consistent with the Board's intent. *See* NPRM at 9.
- The proposed regulations state that the Board will endeavor to issue decisions by a certain date. *See* proposed § 1146.1(b)(4), § 1146.2(a)(3). CSXT believes that providing a firm deadline for a decision would be beneficial to all parties.

⁶ The Board has previously stated that it cannot “directly regulate transportation that is provided under such a contract.” EP 628 Final Rule at 10 (citing 49 U.S.C. § 10709(b), (c)).

IV. Conclusion

CSXT appreciates the opportunity to provide these comments, and respectfully requests that the Board make the above modifications to the proposed rule.

Respectfully submitted,

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