

BEFORE THE
SURFACE TRANSPORTATION BOARD

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REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF FOR SERVICE EMERGENCIES

COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking (“Notice”), served on April 22, 2022, the Association of American Railroads (“AAR”), on behalf of its freight railroad members, responds to the Surface Transportation Board’s (“Board”) proposal to amend its rules with relation to emergency service regulations.¹ AAR supports the Board’s effort to properly structure expedited relief where appropriate and necessary to resolve emergency situations. This is an important authority under the statute and clarity on the nature of the relief available, as well as the process for obtaining it, is critical.

The first section of AAR’s comments explains the importance of further defining the nature of the emergencies to be addressed with this particular authority, which is one among several at the Board’s and shippers’ disposal for addressing various types of service matters. The second section explains why, as a practical matter, it is essential to have an alternative carrier committed on the frontend. Relatedly, the third section proposes limiting the relief

¹ See *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 (STB served Apr. 22, 2022).

available under the super-accelerated, 24-hour process to incumbent-based relief only. The fourth section expresses concern with the feasibility of the procedural timelines proposed in the rule. The fifth section recommends protecting against any chilling effects of the Board initiation on Rail Customer and Public Assistance program's ("RCPA") informal processes. Finally, the last section identifies additional clarifications that should be made in the Board's final rule.

I. THE BOARD SHOULD CLEARLY DEFINE WHAT CONSTITUTES AN EMERGENCY JUSTIFYING THE PROCESSES UNDER SECTIONS 1146.1 AND 1146.2.

A. Congress intended emergency relief to be utilized only for substantial, "real" emergencies.

The statute provides emergency service order authority for "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." 49 U.S.C. § 11123(a). This relief should be reserved for serious service crises that are truly emergencies, not general service complaints. As explained by Congress in adopting the authority in the Staggers Rail Act, "[t]his is intended to ensure that the Commission restricts the use of its emergency powers to *real emergencies* and reflects a widespread consensus that the ICC issues far too many car service orders in situations where real emergencies do not exist."² The Board previously recognized this and warned that the rules were not to be utilized for minor disruptions, noting "[w]e caution that the proposed

² S. Rep. No. 96-470, at 42 (1989) (emphasis added); see H. Rep. No. 96-1430, at 118 (1980) (explaining, similarly, "*only real emergencies* should trigger such orders and that in the past, the Commission has been far too willing to issue car service orders in other than emergency situations. ... The conferees emphasize that the Commission's *powers under this section are extraordinary* and should be exercised *only in genuine emergencies.*") (emphasis added).

rules are not meant to redress minor service disruptions. 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, and we intend that the rules be used to remedy only substantial service problems that cannot readily be resolved.”³ The Board also explained that the final rules were “designed to enable the Board to provide temporary relief from *serious, localized railroad service problems* more quickly and effectively.... Moreover, they are not intended to address demands for more competitive service.”⁴ Given the recognized limitations on the authority and Congress’ warning about its use, the powers authorized here should only be invoked in “real emergencies.”

The important question, of course, is what type of emergency situation constitutes one “of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States.”⁵ Given the plain language of the statute, clearly not every “emergency situation” experienced by an individual shipper qualifies. But in light of the expedited and extraordinary relief the Board may order under this authority, and on a very limited record, it is essential that the rule articulate clear and objective standards for when it is the correct vehicle, as opposed to when other Board authorities for addressing service issues would be more appropriate. This is not an area in which the Board should postpone grappling with that question, and assume it can effectively make law one case at a time.

³ *Expedited Relief for Service Inadequacies*, EP 628, at 6 (STB served May 12, 1998) (“NPRM 1998”).

⁴ *Expedited Relief for Service Inadequacies*, EP 628, at 4 (STB served Dec. 21, 1998) (“Final Rule 1998”).

⁵ 49 U.S.C. § 11123(a).

Two examples may elucidate this point. In both cases, the current formulation of the rule would permit relief. But in only one is such relief appropriate under this authority. In Scenario One, two chlorine cars are needed within a week at a water treatment plant in Smallville. Without the chlorine, the plant will shut down and Smallville will not have clean drinking water. Smallville's Water District cannot get through to Gotham Railroad's service department to provide an update or any expectation to when cars may be moved. Additionally, Gotham's online tools note the cars are in a yard, but they have not moved in several days. Without any feasible or available transportation alternatives, the Smallville Water District petitions the Board for relief under section 1146.2. The Board Member on call orders Gotham to prioritize the movement of the cars to the Smallville Water District plant from the yard within the week. The lack of clean drinking water for a town, which threatens the health of many, clearly rises to the level of a "real emergency." Indeed, the need for immediate delivery rises to the level of section 1146.2, super-accelerated relief.

On the other hand, in Scenario Two the Bugle Paper Company has experienced an increase of missed switches by Osborn Rail Lines of its paper feedstock over the last few weeks. The situation has worsened so that the Bugle will have to pause its weekend paper production at its plant if it does not receive its cars this week. This will result in \$1 million in lost sales by the Bugle. On Monday night, the Bugle petitions the Board under section 1146.2 to allow Parker Railroad to access Osborn's lines and provide a switch for Parker Railroad to deliver the cars to the Bugle Paper plant by Friday. This delivery will ensure that the Bugle's plant does not shut down for the weekend. (However, Parker Railroad knows nothing about any of this – an issue addressed in Parts II and IV.B below.)

As the proposed rule is currently written, Scenario Two would qualify for relief under the super-accelerated relief under section 1146.2, because it entails the potential of a plant shutdown. In addition, the most extraordinary relief -- access of a foreign carrier (Parker Railroad) to an incumbent's track (Osborn Rail Lines) -- would be justified on an expedited basis with little opportunity for response. The inability to produce the Bugle's paper over the weekend is concerning, especially to the Bugle, but it is not an emergency "of such magnitude" to shippers generally or to a region of the country to warrant relief under the statute. It is a serious service problem for the Bugle, but one that can be remedied through other types of proceedings, including possible monetary damages. An injunction would not be available to Bugle in a private contract dispute. While this is an example of ineffective service, it does not rise to the level of a "real emergency" Congress contemplated in 49 U.S.C. § 11123(a).

The railroads are not disputing that Scenario Two is a service inadequacy for the Bugle Paper, but only whether it rises to the type of emergency envisioned by the statute, which by its terms is targeted at a subset of service emergencies. If the Board does not provide further guidance on what types of service emergencies are eligible for relief under the revised rule, and which are not, there is every reason to expect many shippers will race to use the procedure as a means to secure leverage and immediate attention to their particular service complaints with their carriers. In addition to overwhelming the Board, such a result will undeniably disrupt the service carriers are able to provide other customers.

B. The applicability of the super-accelerated process in section 1146.2 in particular should be more narrowly tailored.

Given the highly expedited process envisioned under section 1146.2, and the very limited record on which the Board proposes to order extraordinary and potentially disruptive

relief, the definitional concerns expressed above are even more acute. The proposed standard of 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,” raises several concerns.⁶

First, this super-accelerated relief should be granted only if the petitioner will experience immediate and irreparable harm. Much like a preliminary injunction or temporary restraining order (“TRO”), the relief granted here is extraordinary and the quick procedural schedule—with minimal opportunity for response from the involved railroad[s]—requires that it be for only the most egregious circumstances. AAR believes this is the Board’s intent. However, the Board, like with a preliminary injunction or TRO, should clarify that it will only invoke this extraordinary relief when there is a threat of immediate and irreparable harm.

Relatedly, and as noted in Section I above, the Board must clarify that not *any* business closure or plant shutdown is an emergency entitling the petitioner to relief under section 1146.2, or section 1146.1 for that matter. While AAR recognizes that a closure or shutdown is disruptive to the customer, shutdowns or closures can often be remedied with monetary damages, which does not rise to the level of irreparable harm. The Supreme Court has explained as much, “[i]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury...The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”⁷ The language of the proposal should be revised to state section 1146.2 will be invoked only to prevent immediate and

⁶ Notice at appx. A, 49 CFR § 1146.2(a).

⁷ *Sampson v. Murray*, 415 U.S. 61, 90 (1964) (citation omitted).

irreparable harm. Such a clarification would eliminate some of the ambiguity around what kind of emergency is envisioned.

The Board should also clarify what is meant by “food security.” Does this refer to a shortage of pet food; what about livestock feed; does it entail a shortage of bread to feed people; or would a shortage of potato chips or soda qualify? It is simply not clear. Nor is it clear what a threat to “food security” would entail in the railroad context. Without further clarification, the rule is impermissibly vague and may be extended in application beyond the authority granted by Congress.

II. AN ALTERNATIVE CARRIER MUST BE IDENTIFIED AND HAVE AGREED TO PROVIDE SERVICE ON THE FRONTEND.

The Board proposes to dispense with the requirement that the complaining shipper identify an alternative service provider that has agreed to provide relief.⁸ While the arguments in favor of eliminating this requirement are understandable, doing so is simply impractical. In the time frames and with the abbreviated processes contemplated by the rule, the question of whether there is an alternative carrier ready and able to provide emergency service cannot be deferred until the point at which the Board determines that is the appropriate remedy. Such a system would unfairly penalize the alternative carrier by suddenly dragging them into an emergency proceeding as to which they had no prior knowledge. And it would threaten the Board’s ability to act quickly and decisively, with knowledge of all relevant facts, as the situation—and the Board’s duty to other potentially impacted railroads and their customers—requires.

⁸ Super-accelerated relief under the newly proposed section 1146.2 must be limited to incumbent-based relief only. *See infra* Part III.

The Board notes that proponents of changing section 1146.1 to remove the alternative carrier commitment claim that “potential alternative carriers are reluctant to participate in emergency alternative service (1) because taking on new business for a short and unknown period of time can be unattractive financially, (2) for fear of retaliation by the incumbent carrier (particularly where the alternative carrier is a railroad that depends on an ongoing working relationship with the incumbent), and (3) due to uncertainty in ensuring that alternative service can be provided safely and in accordance with applicable regulations and operating practices.”⁹ The Board, however, rejected similar claims in adopting section 1146.1. There, the Board emphasized that “cooperation of the alternative carrier is *essential*, we must reject this suggestion.”¹⁰ Nothing has changed since then to undermine the essential nature of having an alternative carrier committed to the service. Indeed, as the Board explained in 1999 without an alternative carrier involved, there were “*significant operational, safety, and financial implications ... [and that f]orcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances.*”¹¹ In adopting the provision in the current rule that the Board now proposes to change, it explained that “we believe that it is appropriate to have the petition describe the alternative carrier’s operational plans and discuss how the proposed operations can be conducted safely.”¹² These safety, operational, and financial concerns should not be taken lightly, and are best identified and resolved by the alternative carrier and the petitioner together.

⁹ Notice at 5

¹⁰ Final Rule 1998 at 11 (emphasis added).

¹¹ *Id.* (emphasis added).

¹² *Id.* at 13.

The Board's somewhat breezy dismissal of its prior wisdom—"the requirement that an alternative carrier be identified in advance] is not a needed burden on petitioners experiencing a service crisis and undermines the usefulness of this important statutory remedy"—makes no sense.¹³ The effectiveness of the remedy is entirely dependent upon the ability of the alternative carrier to safely provide the service, and to do so without frustrating its own operations and customers. For all the Board knows, a carrier's labor contracts may not allow them to provide the service. The alternative carrier may be having operational difficulties of its own, or simply not have the capacity to handle the petitioner's emergency traffic. There is no way for the Board and the shipper to know this information without the alternative carrier being involved on the frontend. The Notice even admits an alternative carrier may not even file a reply, and the Board might need to take action to force it to file information.¹⁴

In a scenario where time is of the essence, cooperation is paramount. Instead, the Board has created a potentially adversarial process, where an unsuspecting alternative carrier may be thrust into a proceeding to resolve an emergency situation involving another railroad. This is fundamentally unfair and impractical. While emergencies are serious and difficult for the shipper, service will not improve with an alternative carrier that is unable to provide the service in a safe and efficient manner.

These concerns are exacerbated by the tighter proposed timelines for the procedures under both sections 1146.1 and 1146.2. As the Board previously explained, "the carriers

¹³ Notice at 5-6.

¹⁴ See *Id.* at 6, fn 8 ("Should it need information from any possible alternative carrier that does not file a reply, the Board will take appropriate action, including directly contacting possible alternative carriers to request such information.").

involved need to discuss with each other how they can work together to make the alternative service work smoothly, and any problems or disputes should be raised and dealt with as early in the process as possible.”¹⁵ The Board provided little justification to change this reasoning. Yet, the timelines for the procedures under both sections 1146.1 and 1146.2 are shorter than those provided in the current section 1146.1. AAR believes the Board’s prior reasoning that identification as early on as possible will ensure timely service is established, which will benefit the shippers and the public alike. If the intent of emergency service is to be efficient alternative service that is also safely operated, an alternative carrier must be ready, willing, and able to provide the service, on the frontend.

III. SUPER-ACCELERATED RELIEF UNDER SECTION 1146.2 SHOULD BE LIMITED TO INCUMBENT-BASED RELIEF.

In addition to setting clear guidelines regarding an emergency for which section 1146.2 may be invoked, the Board should clarify that the super-accelerated process will only offer incumbent-based relief, not relief through an alternative carrier. Limiting relief to direction to the incumbent resolves a number of concerns created under the current proposal.

First, the shortened period of relief under section 1146.2 is impractical for an alternative carrier. It may be difficult to develop a service offering for a mere 20 days of service, especially when the alternative carrier is given days, not even weeks, to do so. But because the proposal does not require an alternative carrier even be identified, it is not clear how a Board Member operating within the 24-to-48-hour timeframe the rule envisions would even identify an

¹⁵ Final Rule 1998 at 13.

alternative carrier, much less provide it notice and give it a meaningful opportunity to be heard.¹⁶

Other practical realities apply. An alternative carrier must have their crews qualified on the route for safety purposes. To do so, however, the incumbent carriers' crews need to be available to qualify a crew for the alternative carrier on the territory. Obviously, this takes days away from the 20-day period of relief. But more importantly, if an incumbent crew is available to train an alternative crew, the incumbent crew could simply be directed to provide the service itself, especially for such a short timeframe.

Given that the Board has the authority under the statute to order incumbent-based relief—and the proposal itself contemplates an incumbent carrier service plan—it would be able to direct the incumbent's operations in whatever manner needed. This would make relief under the procedural timeframe more workable. Though the incumbent presumably is experiencing service issues, it would only need to provide relief, at most, for 20 days. This solution would not only eliminate the concern of identifying an alternative carrier for only 20-days of relief, it would allow more time to identify an alternative carrier for continued relief under section 1146.1, if needed. For these reasons, the Board should limit section 1146.2 to incumbent-based relief only.

¹⁶ While the petition under section 1146.2(a)(1) must include contact information for the incumbent carrier, it does not require any information regarding an alternative carrier—not even an identification of an alternative carrier—yet “potential alternative carriers” would be required parties for the hearing, per section 1146.2(a)(2)(ii). See Notice at appx. A, 49 C.F.R. § 1146.2.

IV. THE PROCEDURAL TIMELINES PROPOSED FOR BOTH SECTIONS 1146.1 AND 1146.2 RAISE QUESTIONS AS TO THEIR FEASIBILITY.

A. Section 1146.1 unreasonably limits the time needed to develop a fair record.

The record-development timeline under section 1146.1 is shortened by three days (the reply period is shortened from five days to three days, and the rebuttal period is shortened from three days to two days). The Board should not shorten these timeframes, for several important reasons.

As the Board previously explained in rejecting shorter timelines when it adopted section 1146.1, “[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.”¹⁷ Safety and operational ability to serve should come before a shipper’s desire for quick relief. Yet, shortening the procedural timelines will create a less robust record on these matters. Given the Board proposes to remove the alternative carrier commitment, the shorter pleading times will allow even less opportunity for the incumbent and alternative carriers to evaluate and develop a record on safety, operations, and financial impacts of the petition. Indeed, without a commitment upfront there is more, not less, information that will need to be briefed, yet the Board is providing less time to do more work. The Board’s prior concerns that safety and ensuring no harm are important reasons not to shorten the pleading period remain equally valid today.

¹⁷ Final Rule 1998 at 16.

Furthermore, the petitioner knows its needs best and controls the timing of its filing. Petitioner can take into account the total timeline for procedures by filing earlier if necessary. Reducing the time available for the parties to make an adequate record is not the solution to uncertainty over how quickly relief will be ordered, which is something only the Board can control. Modifying the proposed rule to provide firm decision deadlines may help alleviate this concern.

B. The procedure under section 1146.2 is impracticable and fundamentally unfair.

Proposed section 1146.2 would give the incumbent and any alternative carrier no opportunity to reply to a petition in writing. Indeed, the process contemplates only an oral response, in a telephonic or virtual hearing held within 24-48 hours of the petition. Even the petition—which sets forth the emergency—is limited to three pages. These extreme limitations on development of a record and meaningful opportunity to be heard present substantial questions of procedural fairness and due process. While AAR recognizes that emergencies are just that, the incumbent (and any alternative carrier) will have virtually no time to investigate the few facts provided in three pages and respond. The Board is required by statute and by good stewardship of the overall rail network to consider whether any emergency order it issues will “impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.”¹⁸ It is inconceivable how the Board will make a responsible decision on this question under the proposed procedure.

This timing concern will only be exacerbated by the proposal’s failure to require agreement of an alternative carrier on the frontend. Without an alternative carrier committed

¹⁸ 49 U.S.C. §11123(c)(2)(B).

upfront, an entity that may have no knowledge of the service emergency (presumably the incumbent would have some knowledge of the service concerns) would be given an extremely short timeframe to explain any safety, operational, or financial concerns it has with providing the alternative service. The Board has previously recognized the validity and importance of such concerns. In sum, the super-accelerated process proposed in section 1146.2 will not allow the Board sufficient information to ascertain whether its order would “impair substantially” the ability of involved rail carriers to serve other customers adequately, “or to fulfill their common carrier obligations.”¹⁹ As structured, this newly proposed section is fundamentally unfair, impracticable, and should be removed.

V. THE BOARD’S RULES SHOULD NOT CREATE A CHILLING EFFECT ON RCPA’S INFORMAL WORK ON THE RESOLUTION OF DISPUTES.

RCPA is a valuable asset to the Board, the shipper community, and railroads alike. AAR’s freight railroad members believe strongly in the value of informal resolution processes made available by the Board.²⁰ As the Board found in the Notice, “RCPA has been quite effective in working directly with railroads to resolve critical-need situations.”²¹ Under no circumstances should action by the Board ever undermine these important tools. While AAR does not disagree with the proposed amendment to make clear the Board can initiate an investigation

¹⁹ *Id.*

²⁰ See Notice at 2 (“While carrier interests acknowledged that very few emergency-service petitions had been filed, they generally indicated a belief that the existing procedures were sufficient and that the Board’s informal Rail Customer and Public Assistance program (RCPA) was helpful in resolving acute service issues.”).

²¹ *Id.* at 8.

on its own motion, we do caution that it should take strenuous efforts to insulate itself from RCPA, if the matter was the subject of an RCPA informal dispute resolution process.

Were information to be utilized from RCPA's efforts to informally resolve complaints to then initiate a Board investigation, there would be substantial chilling effects on cooperating with RCPA in the future. Given the requirement that the petitioner summarize discussions with the incumbent carrier on the service problems and reasons why the incumbent is unlikely to restore service, it seems likely a section 1146.1 petitioner would have availed itself of the RCPA's informal processes. Indeed, because section 1146.2 requires a petitioner to attempt to "resolve its service issue through an informal dispute resolution process or service of the Board" and section 1146.2 procedures are contemplated as leading to section 1146.1 petitions, there are some cases where the RCPA *would have been* involved. Therefore, the Board should clarify that it will not invoke section 1146.1 authority on its own motion if the issue has been the subject of RCPA informal dispute resolution process about which the Board was aware, or the Board could certify when it invokes its section 1146.1 authority on its own motion, that none of the information leading to such invocation came from an RCPA informal dispute resolution process. No stakeholders would benefit if entities are reluctant to engage with RCPA, because the Board could use what RCPA learns to invoke the Board's investigative authority under section 1146.1.

VI. THE BOARD SHOULD REVISE THE QUARTERLY ROTATION OF ONE BOARD MEMBER.

Under section 1146.2, the Board should revise the quarterly rotation requirement to ensure a single Board member is not tasked with making these important decisions for an entire quarter. It is not difficult to imagine a situation in which one quarter might see a flood of

complaints for resolution. This could be taxing for a single Board Member, as he/she would be on-call for three months at a time. Additionally, this approach could lead to “judge shopping” by shippers.

The Board could revise this process in one of two ways. First, it could shorten the rotation, not make it public, and allow for at least two Members to share the burden and resolve these important issues together. Two Members would avoid a quorum of the Board and would ensure a variety of viewpoints and expertise to resolve any concerns. Not making the rotation public and shortening the rotation period would alleviate judge-shopping and workload concerns.

A second option would be to allow for Board staff to hold the hearing and make a recommendation to the full Board for resolution. This is similar to the Board’s process for motions to compel where staff holds a conference and recommends an outcome for resolution.²² In addition, there are more staff at the Board than Members, so less burden on single individuals in emergency situations.

VII. OTHER IMPROVEMENTS TO THE PROPOSAL WILL ENSURE IT IS APPROPRIATELY CONSTRUCTED IN A MEANINGFUL MANNER.

A. Notice to the incumbent carrier under section 1146.2 should be made as soon as possible.

Section 1146.2 requires service of the petition by e-filing on the Board’s website, hand or overnight delivery. First, e-filing on the Board’s website does not effectuate service on other parties, or the Federal Railroad Administration, for that matter. The rule should clarify that e-

²² See 49 C.F.R. § 1114.31(a) (establishing a process for Board staff to hold a conference on the motion and the Director of the Office of Proceedings to issue a ruling on it).

filing, alone, is not considered sufficient service. Second, under the proposal e-filing, hand delivery, or overnight delivery would be the first formal notification of the emergency required under the rules, and it would be just 24 hours before the incumbent railroad may be required to respond. Due process and the seriousness of the relief contemplated demand more. While the proposal envisions a good faith effort to resolve the dispute prior to filing, it does not indicate there needs to be any notice of the emergency to the incumbent carrier. Given the 24-to-48-hour timeframe for response to the petition, a requirement to include in the petition that the petitioner has previously notified the incumbent railroad of the emergency and its intent to file would be appropriate. This would help provide the incumbent carrier with enough notice to prepare a response and ensure the Board has the best available and most complete information on which to make a decision.

B. The Board should require an affirmation of no other modal options before granting emergency relief.

The Board should require petitioners under both sections 1146.1 or 1146.2 to affirm that there are no alternative modes available or feasible for the petitioner. Without such a representation, the Board cannot conclude there is a “real” emergency, as a shipper could potentially shift its traffic to truck, barge, or other mode. The mere preference for rail traffic movement over another mode does not, in and of itself, constitute an emergency. Given that the access of one railroad to another’s assets is a “serious remedy with potentially significant operational, safety, and financial consequences”, it should only be mandated in circumstances where there is no choice otherwise.²³

²³ NPRM 1998 at 6.

C. Compensation must be established by the alternative carrier and the petitioner.

As to the alternative carrier, compensation is an important factor. Of note, the Board should clarify that compensation for an alternative carrier's service is a matter between the shipper and that carrier. The Board does not have the authority to fix that rate. Instead, it must "first find that the carrier has market dominance over the traffic involved and that the rate selected by the carrier is unlawful. Thus, the rates to be charged for the alternative service are a matter for discussion between the shipper and alternative carrier."²⁴ As noted previously, if there is commitment upfront by an alternative carrier these discussions could begin before the filing so the rate is established expeditiously.

D. The Board should clarify the parameters of exempt and contract traffic under this rule.

Certain traffic is not eligible for relief under the proposal, specifically exempt or contract traffic. In general, the Board lacks authority to provide any relief for transportation that has been exempted from regulation pursuant to 49 U.S.C. § 10502 without appropriate revocation, or that is the subject of a rail transportation contract under 49 U.S.C. § 10709. As the Board recognized previously, it "cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract."²⁵ It should again make this distinction clear.

With regard to exempt traffic, AAR recognizes the Board's statement previously that it "retain[s] full jurisdiction to deal with exempted transportation, as [it] can revoke the

²⁴ Final Rule 1998 at 15 (citing 49 U.S.C. §§ 10701(c), (d), 10704(a)(1), 10709).

²⁵ *Id.* at 10 (citing 49 U.S.C. 10709(b), (c)).

exemption at any time, in whole or in part, under section 10502(d).”²⁶ The proposal here would not provide the opportunity to do so.

The expedited timelines under both sections 1146.1 and 1146.2 do not provide enough time for a full analysis under the statute to revoke an exemption. Under section 1146.1, the incumbent carrier would only have three days to develop a reply to the emergency petition and a petition to revoke. There’s even less opportunity under section 1146.2, as the incumbent carrier could be required to reply to the petition in as little as 24 hours and without the opportunity for an argument on the papers. Neither procedure provides enough time to develop a complete market analysis of the commodity. Revoking an exemption is a serious re-regulatory measure, requiring an analysis not conducive to a 3-day reply, much less a possible 24-hour procedural timeframe. The statute recognizes the complex nature of exemption revocation, providing a full year for the process (i.e., 90 days for the Board to initiate a proceeding to revoke, followed by 9 months to complete the revocation proceeding).²⁷ It is simply not appropriate to assume a full record can be developed and certain statutory findings be made in such truncated timeframes. For these reasons, the Board should therefore limit the utilization of the proposal to non-exempt traffic.

²⁶ *Id.* at 9 (citing *G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3rd Cir. 1987), cert. denied, 485 U.S. 988 (1988)).

²⁷ See 49 U.S.C. § 10502(d) (“The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.”).

Furthermore, as currently structured in the proposal, exempt traffic cannot be addressed by section 1146.2.²⁸ As proposed, section 1146.2 envisions a single Board member acting to resolve the emergency. To put a finer point on it, only the full Board can revoke an exemption, not a single Board Member.

Conclusion

AAR supports the Board's efforts to provide clarity for emergency relief proceedings. As explained above, AAR supports certain refinements to the rules that will make the proposal more workable and comply with the congressional intent of the provision.

Respectfully submitted,



Kathryn D. Kirmayer
J. Frederick Miller Jr. (*admitted in Maryland*)
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2100

*Counsel for the Association of
American Railroads*

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²⁸ *See Id.*