

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

**Docket No. EP 762**

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**COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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Norfolk Southern Railway Company (“NS”) respectfully submits these comments in response to the Board’s notice of proposed rulemaking in this proceeding.<sup>1</sup>

NS generally supports the Board’s efforts to make service relief appropriately accessible in times of emergency. At the same time, the Board’s existing emergency service rules at 49 C.F.R. part 1146 remain useful and have been invoked a number of times since those rules were adopted.<sup>2</sup> While NS supports review and appropriate updates based on sound policy and evidence, the Board should keep in mind that it does have existing tools at its disposal, including the informal Rail Customer and Public Assistance process, that remain useful and effective to address service issues in an expedited manner.

In these comments, NS offers three suggestions and minor modifications that would improve the Board’s proposed rule in this proceeding. First, NS asks the Board to define what constitutes an “emergency” and, in the context of the Board acting on its own initiative, ensure that the impacted rail carrier(s) have had an opportunity to comment, either in writing or by telephonic conference, prior to issuing any order under § 11123. Second, if the Board moves forward with the proposed § 1146.2 accelerated process, NS asks the Board to limit the situations to which that process would apply in two important respects. Third, the Board should clarify that its emergency service authority does not apply to traffic that moves

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

<sup>2</sup> See, e.g., *Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Caddo Valley Railroad Company*, Docket No. FD 35416; *PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, Docket No. FD 34802; *Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc.*, Docket No. FD 34479; *Denver Rock Island Railroad—Alternative Rail Service—Lines of Kansas Southwestern Railway, L.L.C.*, Docket No. FD 33762. See also footnote 3.

exclusively under private contract, as such traffic is outside the Board's jurisdiction. Finally, NS concludes by highlighting several additional minor modifications that would improve the proposed rule.

**I. THE BOARD SHOULD CLARIFY WHAT CONSTITUTES AN EMERGENCY AND, IF ACTING ON ITS OWN INITIATIVE UNDER § 11123, ENSURE THAT IT HAS OBTAINED SUFFICIENT INFORMATION FROM THE IMPACTED PARTIES.**

The NPRM proposes to add language to part 1146 clarifying that the Board can act on its own initiative as well as pursuant to petition. While the statute plainly provides the Board authority to act on its own initiative, 49 U.S.C. § 11123(b)(1), it is nonetheless important that the Board use this extraordinary power in appropriate circumstances. In particular, before exercising this extraordinary power, there must be a true emergency that can be addressed through Board action, and the Board should ensure it has obtained sufficient information from the impacted carrier(s) to avoid substantially impairing the carrier(s) ability to serve its customers.

The language of the statute itself, the legislative history, and the Board's prior decisions all emphasize the extraordinary nature of the Board's authority under § 11123 and the importance of only exercising it in true emergencies. *See* 49 U.S.C. § 11123 ("an emergency situation of such magnitude"); Staggers Rail Act of 1980, Conf. Report No. 96-1430, at 119 (Sept. 29, 1980) ("the [agency's] powers under this section are extraordinary and should be exercised only in genuine emergencies."); Notice of Proposed Rulemaking, *Expedited Relief for Service Inadequacies*, Docket No. EP 628, slip op. at 6 (STB served May 12, 1998) ("EP 628 NPRM") ("We caution that the proposed rules are not meant to redress minor service disruptions").

Yet the NPRM does not define what constitutes an emergency. The Board should articulate a standard for when the use of its emergency authority is appropriate.<sup>3</sup> In particular, NS is concerned by the Board’s statement—in the context of its authority to act on its own initiative—that “[r]ail service problems come to the Board’s attention in several ways,” including through “review of performance service data submitted by carriers.” NPRM at 5. While NS agrees that the service performance metrics collected pursuant to 49 C.F.R. part 1250 can help the Board identify trends in rail service, “rail service problems” are not necessarily emergencies under the statute. Moreover, that data alone should not form the basis of an emergency service order without additional information from all parties involved.

If the Board determines that a genuine emergency exists, its actions are constrained both by the list of available remedies at § 11123(a) and the provisions of § 11123(c)(2), which prohibit the Board from taking actions 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

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<sup>3</sup> See, e.g., Decision, *San Francisco Bay Railroad—Mare Island Petition for Emergency Service Order and Petition for Declaratory Order—Lennar Mare Island, LLC*, Docket No. FD 35360 (STB served Dec. 6, 2010); Decision, *Roseburg Forest Products Co., Timber Products Company, L.P., Suburban Propane, L.P., Cowley D&L, Inc., Sousa AG Service, & Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc.*, Docket No. FD 35175 (STB served Mar. 4, 2009); Decision, *Pioneer Industrial Railway Co.—Alternative Rail Service—Central Illinois Railroad Company*, Docket No. FD 34917 (STB served Jan. 12, 2007); Decision, *Albemarle Corporation—Alternative Rail Service—Line of the Louisiana & North West Railroad Company*, Docket No. FD 34931 (STB served Oct. 6, 2006); Decision, *Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo Peoria & Western Railway Corporation*, Docket No. FD 34397 (STB served Oct. 31, 2003); Decision, *American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad*, Docket No. FD 33795 (STB served Dec. 7, 1999).

obligations.” This language recognizes the fact that directing operations through the authority at § 11123 could have serious negative implications for both rail carriers and their shippers.

In order to ensure the Board exercises this extraordinary authority in genuine emergencies and in ways that would not impair substantially a carrier’s ability to service customers, NS requests that the Board define what constitutes an emergency for purposes of this authority and clarify that, if exercising authority on its own initiative, it will ensure that the impacted rail carrier(s) have had an opportunity to comment, either in writing or by telephonic conference, prior to issuing an order under § 11123.

**II. IF THE BOARD MOVES FORWARD WITH THE PROPOSED ACCELERATED PROCESS, IT SHOULD LIMIT THAT PROCESS IN TWO IMPORTANT RESPECTS.**

In addition to shortening the filing deadlines in the existing process at 49 C.F.R. § 1146.1 so that the record would close within 5 business days of the filing of a petition, NPRM at 7, the NPRM proposes to establish a separate “accelerated process” at § 1146.2, in which a telephonic hearing would occur within 24–48 hours of the filing of a petition (or as soon after 48 hours as logistically possible), with no written replies, after which a single Board Member would decide within two business days whether to exercise the Board’s extraordinary § 11123 authority, NPRM at 7–8. The NPRM rightly questions whether such an accelerated process sacrifices too much with regard to maintaining due process and appropriately seeks comment on whether the accelerated process affords an adequate opportunity to present sufficient information to the Board. *Id.* at 9.

NS is concerned that the proposed accelerated process will not allow for the development of a factual record upon which the Board can act. Indeed, when the

Board was asked previously to shorten the time frames in part 1146, the Board declined, stating “[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.” Final Rules, *Expedited Relief for Service Inadequacies*, Docket No. EP 628, slip op. at 16 (STB served Dec. 21, 1998) (“EP 628 Final Rule”). Despite this prior sound reasoning, the Board is now proposing to shorten not only the time frame for the existing § 1146.1 process, but to shorten the process even further in a new § 1146.2 process—and all without any evidence that a faster process is needed or superior to the current expedited timeline in § 1146.1.<sup>4</sup>

If the Board is intent on establishing the accelerated process, it should limit the situations to which that process may apply in two ways. First, the accelerated process should be limited to directing actions of only the incumbent, not alternate carriers. As proposed, NS is seriously concerned about the ability to adequately develop a record under the accelerated process, particularly where when the remedy desired is access by an alternate carrier. The Board has previously recognized the complexity of emergency access: “[a]ccess—particularly that which would compel physical access by another railroad over an incumbent’s lines—is a serious remedy

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<sup>4</sup> To be clear, NS does not believe it is necessary to adopt two separate processes for emergency relief. If the Board is concerned about the timeline of the § 1146.1 process, it could propose to eliminate the optional rebuttal period. Moreover, the Board does not need the proposed accelerated process because the Board already has the authority under 49 U.S.C. § 1321(b)(4) to issue expedited preliminary injunctions, and it has in fact issued one where emergency service was sought. *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) (explaining that the complainant’s “application for an emergency service order will be dismissed as moot, as the injunctive relief granted here effectively grants the same relief CVAG has sought through an emergency service order”).

with potentially significant operational, safety, and financial consequences for the involved carriers . . .” EP 628 NPRM at 6.<sup>5</sup> It is for that very reason the Board adopted the requirement that a shipper’s petition describe the alternate’s plan to safely provide operations—a requirement the Board is now proposing to eliminate while simultaneously shortening the evidentiary timeline.

Not only would it be unwise to consider relief by an alternate carrier in these circumstances, it would also be impractical. The proposed relief under the accelerated process is appropriately limited to 20 days, without the possibility of extension. *See* NPRM at 9. For such a short period of potential relief, crews from the alternate carrier would either have to be qualified from a safety perspective to operate on the tracks of the incumbent, which is not guaranteed; or if they are not qualified, they would need to become qualified, which cannot happen quickly and likely could not be accomplished within a 20-day period. It also may be operationally impractical for the incumbent to even arrange for service by an alternate carrier for a mere 20-day period.

Second, given the legitimate question about whether the accelerated process allows for the development of a sufficient basis for action, the Board should clarify that any request for relief under the accelerated process must meet the Board’s injunctive relief standard. The Board already has the authority to issue injunctive relief under § 1321(b)(4), and the standard for such relief is well established. *See, e.g., Decision, City of Fishers, City of Noblesville & Hamilton County, Ind.—Petition for Partial Revocation of Exemption*, Docket No. FD 36137, slip op. at 7–8 (STB served July 31, 2019) (articulating the Board’s preliminary injunction standard); *Decision, Union Pacific Railroad—Petition for Declaratory Order and Preliminary*

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<sup>5</sup> Indeed, labor voiced serious concerns about issues that could arise in individual cases regarding safety and the impacts to employees. EP 628 NPRM at 3, n.4.

*Injunction*, Docket No. FD 36197, slip op. at 3 (STB served June 29, 2018); *Richard Best Transfer, Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42149, slip op. at 4 (STB served Dec. 22, 2016). Just as the Board has stated that a preliminary injunction is an extraordinary remedy, so too is the use of the Board’s emergency authority. *See* Staggers Rail Act of 1980, Conf. Report No. 96-1430, at 119 (Sept. 29, 1980).

As such, if the Board chooses to move forward with its proposed accelerated process, it should clarify that any relief must meet its injunctive relief standard and will be limited to directing the actions of only the incumbent carrier.

**III. THE BOARD SHOULD CLARIFY THAT ITS § 11123 AUTHORITY DOES NOT EXTEND TO SITUATIONS WHERE THE ENTIRETY OF THE TRAFFIC AT ISSUE IS UNDER A § 10709 CONTRACT.**

The NPRM does not address the limits of the Board’s jurisdiction under 49 U.S.C. § 11123 with regard to contract traffic, and NS asks the Board to clarify that, where the entirety of the traffic at issue is under private contract, the Board has no authority to order emergency service related to that traffic. Shippers may be entitled to relief—including preliminary injunctions or temporary restraining orders—but it must be sought through the courts.

The plain language of 49 U.S.C. § 10709(c)(1) makes clear that contract traffic is not subject to Title 49, Subtitle IV, Part A – Rail, which encompasses 49 U.S.C. §§ 10101 through 11908. *See* 49 U.S.C. § 10709(c)(1) (“A contract that is authorized by this section, and transportation under such contract, *shall not be subject to this part* ...” (emphasis added)); *Entergy Servs., Inc. v. Union Pac. R.R. Co.*, 99 F. Supp. 2d 1080 (D. Neb. 2000) (indicating that “this part” in 49 U.S.C. § 10709(c)(1) is referring to “Part A-RAIL”). The Board has previously acknowledged that “Congress expressly removed all matters and disputes arising from rail

transportation contracts from the Board's jurisdiction,"<sup>6</sup> and the Board has held on multiple occasions that it has no jurisdiction to regulate the service of contract traffic.<sup>7</sup>

In its decision adopting the regulations in 49 C.F.R. part 1146, the Board correctly recognized that it "cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract."<sup>8</sup> Unfortunately, certain other language in that decision injected unnecessary ambiguity into this area:

However, where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts. Moreover, there may be other instances where it is possible and appropriate to exercise our broad regulatory authority to ensure that traffic can move, as in the recent UP/SP Service Order. Thus, we are not inclined to disavow in advance any possible exercise of jurisdiction. Such jurisdictional issues are best left to a case-by-case examination and, again, our assertion of jurisdiction in any specific case will be subject to judicial review.

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<sup>6</sup> Notice of Proposed Rulemaking, *Rail Transportation Contracts Under 49 U.S.C. 10709*, Docket No. EP 676, at 2 (STB served Jan. 6, 2009).

<sup>7</sup> *Cross Oil Refining & Mktg., Inc. v. Union Pac. R.R. Co.*, Docket No. FD 33582 (STB served Oct. 27, 1998) (granting motion to dismiss complaint, including invocation of § 11123 authority, for lack of jurisdiction because shipments moved under contract); Decision, *Union Pacific Railroad Company—Petition for Declaratory Order*, Docket No. 35021, at 2 (STB served May 16, 2007) ("However, that holding does not apply to any traffic handled under rail transportation contracts, because under 49 U.S.C. 10709 we have no authority to regulate rail rates and services that are governed by a contract."); Decision, *Rail Fuel Surcharges*, Docket No. EP No. 661, at 13 (STB served Jan. 26, 2007) ("Under 49 U.S.C. 10709, we have no authority to regulate rates and services that are governed by a contract.").

<sup>8</sup> EP 628 Final Rule, at 10 (citing 49 U.S.C. § 10709(b), (c)).

EP 628 Final Rule at 10 (emphasis omitted). While the Board was apparently seeking to leave open the possibility of exercising jurisdiction in particular cases, the Board has no ability to claim jurisdiction that Congress has not granted it.

Even where the contracted-for transportation “is [not] being provided,” EP 628 Final Rule at 10, any relief in such a circumstance is wholly outside the Board’s jurisdiction and governed by state contract law. If a railroad stops service governed by a contract, the 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, not Part A of Title 49, Subtitle IV or any of the Board’s related regulations. § 10709(c)(2). The Board has no role in regulating contract traffic and cannot supplement the remedies available under state law by the plain language of section 10709.

The Board should take this opportunity to clear up this unnecessary ambiguity<sup>9</sup> and affirmatively state that, where the entirety of the traffic at issue is under private contract, the transportation subject to that contract is not subject to any authority granted to the Board by Congress in the entirety of “Part A – Rail” of Title 49, Subtitle IV, which includes the Board’s emergency service authority under 49 U.S.C. § 11123. *See Ameropan Oil Corp. v. Canadian Nat’l Ry. Co.*, Docket No. NOR 42161, slip op. at 3 (STB served Apr. 17, 2019) (“Under § 10709(c)(1), a rail services contract ‘and transportation under such contract, shall not be subject to [49 U.S.C. Subtitle IV, Part A]’ and ... ‘[i]t is well settled that the Board’s authority does not extend to those movements conducted pursuant to transportation

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<sup>9</sup> The need for such clarity is evident from a recent proceeding. *See Decision, Hasa, Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42165 (STB served Aug. 21, 2019) (where the applicant (Appl. at 15) and railroad (Reply at 15-18) presented argument regarding the Board’s § 11123 authority over exclusively contract transportation and the language from EP 628, but the Board failed to address the jurisdictional issue).

contracts.” (internal footnotes omitted)); *id.* at 3–4 (“Nothing in § 10709 indicates that only those aspects of rail service explicitly addressed by the contract are removed from the Board’s regulatory authority. To the contrary, § 10709(b) states that ‘[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.’ ... In addition, § 10709(c)(1) exempts from the Board’s regulation ‘transportation’ subject to a contract without specifying that it pertains only to the individual service terms addressed by a contract ... H.R. Rep. No. 96-1430, at 100 (1980) (‘[rail] service provided under [a] contract is exempt . . . from all regulation and all of the requirements of the Interstate Commerce Act.’).”).

#### **IV. OTHER MINOR MODIFICATIONS WOULD IMPROVE THE PROPOSED RULE.**

In this section, NS offers several additional minor modifications for the Board’s consideration that would improve the proposed rule.

##### **A. The Board Should Revise Its Language Regarding Service of Pleadings.**

The current rule regarding service of pleadings under 49 C.F.R. part 1146, which was adopted in 1998, specifies that all pleadings under part 1146 are to be served by hand or overnight delivery. 49 C.F.R. § 1146.1(e). The NPRM proposes to update this service requirement, apparently to allow for electronic service of pleadings. NPRM at 13, 15 (Proposed §§ 1146.1(e), 1146.2(e)). However, the actual language of the proposed rule states that pleadings “shall be served by e-filing on the Board’s website ...” *Id.* While e-filing a document through the Board’s website notifies the Board of the filing, it does not effectuate service of the document on other parties or a government entity, including the Federal Railroad Administration. It is important that all parties be notified of any pleading filed

under part 1146, and simply e-filing a document should not be considered sufficient service. NS supports the Board adding a method of electronic service and suggests that the Board consider using language similar to that contained in 49 C.F.R. § 1104.12, which governs service of documents.

**B. If the Board Adopts the Accelerated Process, It Should Modify the Regulatory Language Regarding Confidential Information.**

For the proposed regulations governing the accelerated process, the NPRM proposes language stating that “[t]he designated Board Member<sup>10</sup> may deem that portions of the hearing will be closed to certain parties if confidential business information needs to be discussed.” NPRM at 14 (Proposed § 1146.2(a)(2)(ii)). If the Board moves forward with the accelerated process, it should clarify this language. In other proceedings, confidential information may be accessed by a party subject to a protective order, and highly confidential material can be disclosed to outside counsel or outside consultants, again subject to a protective order. It would be unnecessary and prejudicial for the Board to entirely close an aspect of a proceeding to a party and/or its outside counsel merely due to the discussion of confidential business information.

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<sup>10</sup> In the accelerated process, the NPRM proposes that an individual Board Member would be empowered to issue a decision. NS notes that the NPRM does not actually delegate authority to an individual Board Member. The Board has previously delegated its authority under § 11123, and those delegations appear at 49 C.F.R. part 1011.4 (delegations to individual Board Members). *See* Final Rules, *Revision of Delegation of Authority Regulations*, Docket No. EP 642 (STB served Feb. 14, 2003); 49 C.F.R. § 1011.4(a)(9); 49 C.F.R. § 1011.7(b)(5).

**C. The Board Should Consider Requiring the Summary At 1146.1(b)(1)(ii) To Describe Attempts to Resolve Issues Prior to Filing.**

In the NPRM, the Board states that it is “concerned with the effects of an accelerated process on the Board’s informal dispute resolution processes, and it proposes a requirement that a petitioner make a good faith effort [at] informal dispute resolution prior to filing.” NPRM at 8. The Board’s stated concern appears to be tied to the timeline of an accelerated process, but that concern seems equally applicable to the process at § 1146.1, which the Board is also significantly shortening. The process at § 1146.1(b)(1)(ii) currently requires petitioners to submit a summary of discussions with the incumbent carrier of the service problems. The Board should consider requiring that summary to also cover any efforts taken to resolve the issue through other means.

**V. Conclusion**

For the foregoing reasons, NS respectfully requests that the Board make the above-described modifications and clarifications to the proposed rule in this proceeding.

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