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**Ricardo Martinez,**

*Administrator.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

#### 49 CFR Parts 1146 and 1147

[STB Ex Parte No. 628]

#### Expedited Relief for Service Inadequacies

**AGENCY:** Surface Transportation Board.

**ACTION:** Final rules.

**SUMMARY:** The Surface Transportation Board (Board) is issuing final rules establishing procedures for obtaining temporary alternative rail service when there has been a substantial measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

**DATES:** These rules are effective January 27, 1999.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** In April 1998, the Board conducted hearings, at the request of Congress, to examine issues of rail access and competition in today's railroad industry. A recurring complaint voiced by rail shippers at those hearings was the delay and ineffectiveness of existing procedures for obtaining relief from localized service failures, and the railroads agreed that we should reexamine how such service failures can best be addressed.<sup>1</sup> Accordingly, in a notice of proposed rulemaking in this proceeding served May 12, 1998, and published in the *Federal Register* on May 18, 1998 (63 FR 27253) (*May Notice*), we sought comments on a proposal to establish expedited procedures for shippers to obtain localized temporary alternative rail service from another carrier when the incumbent carrier cannot properly serve them.

Under the proposed procedures, parties could seek alternative rail service, under 49 U.S.C. 10705, 11102, or 11123, when, over an identified time period, there has been a substantial measurable deterioration in the rail service provided by an incumbent carrier. We did not list particular factors

to be used in making that assessment, or propose a specific test period, but rather sought to retain the flexibility needed to address widely varying circumstances. We explained, however, that these procedures were not meant to redress minor service disruptions, but rather would be directed only at substantial service problems that cannot readily be resolved by the incumbent railroad. Petitioners would be required to first discuss and assess with the incumbent carrier whether adequate service would be restored within a reasonable time (and, if not, to explain why not); to obtain from another railroad the necessary commitment should it be afforded access—to meet the service needs; and to describe how the new service could be provided safely, without degrading service to its existing customers and without unreasonably interfering with the incumbent's overall ability to provide service. Where relief is granted and the incumbent carrier can later demonstrate that it has restored, or is prepared to restore, adequate service, it could petition to terminate that relief.

In a supplemental notice of proposed rulemaking served October 15, 1998, and published in the *Federal Register* on October 20, 1998 (63 FR 55996) (*October Notice*), we sought comments on a request by the American Short Line and Regional Railroad Association (ASLRRRA) for similar expedited procedures for Class II and Class III railroads to obtain temporary access to an additional carrier under similar circumstances.

We have received comments in response to both the *May Notice*<sup>2</sup> and

<sup>2</sup> Comments were submitted by ACE Cogeneration Company (ACE); Alliance for Rail Competition; AmerenUE; ASLRRRA; Arkansas, Louisiana & Mississippi Railroad Company (AL&M); Association of American Railroads (AAR); BHP Copper Inc. (BHP); California Public Utilities Commission (CPUC); Cemex USA Management, Inc. (Cemex); Chemical Lime Company (CLC); Chemical Manufacturers Association (CMA); Edison Electric Institute, Farmland Industries, Inc. and The Fertilizer Institute (Edison-Farmland-Fertilizer); Empire Electric District Company (Empire); Entergy Services, Inc. and Entergy Arkansas, Inc. (Entergy); International Paper Company (IPC); Lower Colorado River Authority and the City of Austin, TX (LCRA); National Grain and Feed Association (NGFA); National Industrial Traffic League (NITL); National Lime and Stone Company; National Mining Association (NMA); North Dakota Grain Dealers Association, North Dakota Public Service Commission, and North Dakota Wheat Commission (North Dakota); Ohio Rail Development Commission, Public Utilities Commission of Ohio, and Ohio Attorney General Antitrust Section; PP&L, Inc. (PP&L); Shell Oil Company and Shell Chemical Company (Shell); Society of Plastics Industry, Inc. (SPI); Swanson-Superior Forest Products, Inc.; United States Department of Agriculture; United States Department of Transportation (DOT); United Transportation Union (UTU); U.S. Clay Producers Traffic Associations, Inc. (US Clay); Joseph C. Szabo, for and on behalf of United Transportation

the *October Notice*.<sup>3</sup> The comments express near-universal support for both proposals,<sup>4</sup> although the commenting parties differ somewhat on what the rules should provide and how they should be applied. After considering the comments,<sup>5</sup> we are clarifying and modifying the earlier proposals and are adopting the rules set forth below, to be codified at 49 CFR Parts 1146 and 1147.

## Discussion and Conclusions

### Overview

The procedures we are adopting here are designed to enable the Board to provide temporary relief from serious, localized railroad service problems more quickly and effectively. They do not provide permanent remedies; to the contrary, they include specific procedures for terminating the relief as soon as the incumbent carrier is ready and able to serve the traffic again. Moreover, they are not intended to address demands for more competitive service. The "competitive access" regulations, at 49 CFR 1144, remain available for obtaining more permanent relief where the incumbent railroad has acted in a way "that is contrary to the competition policies of 49 U.S.C. 10101[] or is otherwise anticompetitive," 49 CFR 1144.5(a)(1)(i).

### Choice of Remedies

In the *May Notice* we proposed a single set of procedures under which parties could seek temporary alternative rail service under either the "access" provisions of sections 10705 or 11102 or the "emergency service" provisions of

Union-Illinois Legislative Board (UTU-IL); and Western Coal Traffic League (WCTL).

Replies were filed by AL&M; AAR; BHP; CPUC; Empire; Entergy; IPC; LCRA; NITL, CMA, Edison-Farmland-Fertilizer, NMA, SPI, US Clay, AmerenUE, and PP&L (NITL et al.); Shell; and WCTL.

<sup>3</sup> Supplemental comments were filed by AL&M; CPUC; Cemex; Edison-Fertilizer; Empire; Farmrail System, Inc. (Farmrail); NGFA; NITL; Reagent Chemical & Research, Inc.; UTU; UTU-IL; WCTL; and Western Railroad Company, Inc.

Supplemental replies were filed by AAR; ASLRRRA; Edison-Fertilizer; Farmrail; and DOT.

<sup>4</sup> UTU-IL is the only commenter opposing the proposals. It argues that new procedures are unnecessary. Its assertion, however, is belied by the overwhelming consensus, expressed in the comments of the shipper and railroad communities alike, that such procedures would be useful and would assist parties in overcoming temporary service problems.

We also note that the national UTU, while voicing "serious concerns" about issues that could arise in individual cases regarding safety and adverse effects on rail employees, does not oppose the proposals.

<sup>5</sup> Individual suggestions or arguments not specifically referenced here are embraced by our general discussion in this decision setting forth the positions of various groups and our response thereto.

<sup>1</sup> See *Review of Rail Access and Competition Issues*, STB Ex Parte No. 575 (STB served Apr. 17, 1998) (*Review*), slip op. at 6-7.

section 11123. Under section 10705(a), the Board has broad authority to prescribe alternative through routes when we "consider[] it desirable in the public interest." Similarly, under section 11102, we have broad authority to order the use of another carrier's terminal facilities (in subsection (a)) or to order switching arrangements (in subsection (c)) when we find such arrangements "to be practicable and in the public interest."<sup>6</sup> Finally, we have very broad authority under section 11123 to direct the handling of traffic and the use of rail facilities for a limited time (not more than 270 days) when there is an "emergency situation" causing "substantial adverse effects on shippers," or "on rail service in a region" of the country, or when a rail carrier "cannot transport the traffic offered to it in a manner that properly serves the public."<sup>7</sup> We explained that providing a choice of relief would afford flexibility in addressing individual circumstances.<sup>8</sup>

AAR argues that temporary relief for service problems may only be afforded under section 11123, and not under sections 10705 or 11102. AAR reasons that, because section 11123 addresses emergency situations requiring expedited action and embraces the types of service relief that would be available under sections 10705 or 11102, we cannot circumvent the limitations imposed under section 11123—the 30-day reappraisal requirement and the 270-day total time limit<sup>9</sup>—by providing the same relief under sections 10705 or 11102.

We agree with AAR, but only in part. We conclude that it would not be appropriate to provide emergency service relief under sections 10705 or

11102 based on an accelerated or summary process, as section 11123 is specifically tailored for that purpose. Indeed, section 11123 permits us to act immediately, without observing normal due process procedures, 49 U.S.C. 11123(b)(1), but our actions under those circumstances must therefore be short-term (not to exceed 270 days). Under the rules that we had proposed, and those that we have decided to adopt in Part 1146 for requests brought under section 11123, significant process will in fact be provided,<sup>10</sup> but under very short time frames given the urgency of the situations for which they are designed. It is therefore appropriate that the relief granted be limited to a specific duration, as it will be based upon the limited record that can be developed under such a tight schedule.

However, contrary to AAR's position, the statute does not preclude us from prescribing alternative service under sections 10705 and 11102 to alleviate service problems on a fuller, less hastily developed record. Inherent in the power to provide permanent relief under those sections is the authority to provide the lesser included remedy of temporary alternative service. Accordingly, we have decided to adopt separate rules, in Part 1147, under which requests for temporary alternative service under sections 10705 and 11102 based on service problems will be entertained under less pressing time frames, and under which the authority granted will be temporary but not limited to a specific duration.

Upon the adoption of these new rules, we will have three different sets of rules under which parties may seek alternative rail service. Each set of rules will serve a different purpose. The Part 1146 rules will apply to requests for expedited, short-term emergency relief under section 11123.<sup>11</sup> The Part 1147 rules will apply to requests for temporary alternative service under sections 10705 or 11102, on a more fully developed record, to address serious

(but not necessarily emergency) service problems. The Part 1144 rules will remain available for requests for more permanent alternative service under sections 10705 or 11102 to address competitive abuses.

These various procedures are not mutually exclusive; parties may seek relief under more than one set of rules. For example, parties may need temporary access under Part 1147 to address serious ongoing service problems while they prepare a case for more permanent alternative arrangements under Part 1144 to address a more basic underlying competitive problem. Or, in emergency situations, parties may need immediate, short-term relief under Part 1146, while they pursue longer-term relief through the necessarily slower proceedings under Part 1147 and/or Part 1144. In short, to obtain both immediate and complete relief, multiple proceedings may be needed, requiring a separate record to be developed in each proceeding. This is necessary, however, so that the speed of the process, and extent of the showing required, can be appropriately tailored to the nature and extent of the relief sought. Moreover, we believe that the resulting selection of procedures—Part 1146 for expedited, short-term emergency relief; Part 1147 for temporary, service-based access; and Part 1144 for permanent, competition-based access—will be both fair to the interests of the affected railroads and responsive to the transportation needs of the shippers involved.

#### *Nature and Extent of Service Problems*

The comments reflect differing views on the nature and extent of service problems to be addressed by these rules. AAR, supported by UTU, argues for a somewhat more restrictive approach than we had envisioned, while various shippers advocate a broader approach than we believe is appropriate. We emphasize that the temporary service relief to be offered under these rules is meant only to address serious service problems and only to the extent necessary to meet a demonstrated need for rail service; it is to be used for restorative or alleviative purposes only, and not as a punitive or preventive measure.

Thus, we reject AAR's attempt to exclude from the reach of these rules those service problems for which the incumbent railroad is not at fault.<sup>12</sup>

<sup>12</sup> AAR seeks to carve out service reductions caused by a change in demand for rail service or by other shifts in market conditions. AAR offers the following examples of what it considers to be major market shifts: the Russian grain purchases of the

<sup>6</sup> We may also order switching arrangements upon a finding that they are "necessary to provide competitive service." 49 U.S.C. 11102(c). However, as noted above, the rules adopted here are not designed to address such needs. A party seeking relief based on a desire for more competitive service must proceed under the "competitive access" rules at 49 CFR 1144.5(a). See *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), *aff'd sub nom. Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987) (adopting the competitive access rules); *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

<sup>7</sup> As we explained in the *May Notice*, although section 11123 typically has been used to respond to regional service emergencies, it is not limited to regional emergencies, but by its terms is also available to address more localized situations.

<sup>8</sup> We noted that the relief available under sections 10705 and 11102 is limited in nature (for example, trackage rights can only be granted to terminal facilities), whereas the emergency relief available under section 11123 is limited in duration (restricted to a maximum 270-day period) but not in nature.

<sup>9</sup> 49 U.S.C. 11123(c)(1).

<sup>10</sup> The incumbent railroad will be served with a copy of the petition for relief and afforded an opportunity to reply. Moreover, while the time for filing a reply is short, the incumbent will receive additional actual notice, because the petitioner is required to discuss the service problems with the incumbent carrier prior to filing the petition for relief. In addition, we will issue a written decision addressing the record and containing our findings.

<sup>11</sup> Our adoption of the Part 1146 rules for handling requests for localized immediate service relief is not intended to preclude us from handling broader, regional service emergencies, as we have in the past, under ad hoc, case-by-case procedures, as in *Joint Pet. for Service Order*, STB Service Order No. 1518 (Oct. 31, 1997), modified and extended (Dec. 4, 1997), further modified and extended (Feb. 17 and 25, 1998), terminated with wind-down period (July 31, 1998) (*UP/SP Service Order*).

After all, the potentially ruinous impacts on affected shippers and connecting carriers of not having adequate rail transportation generally do not depend upon the root cause of the carrier's service problems. Moreover, because this temporary relief is not a punishment against the incumbent railroad—the relief is terminable as soon as that carrier is ready and able to provide adequate service itself—we need not assign fault for service problems in order to provide relief from them.

Similarly, these rules are designed only to address serious ongoing service disruptions. They are not intended to anticipate problems that have not yet occurred (and might not occur), as mentioned by AL&M. Nor are they meant for situations where service is adequate, but simply not up to the level that a particular shipper or connecting carrier might desire. In other words, while transportation needs are crucial, individual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service, as some shippers have suggested.

Many comments addressed the level of service problems that would warrant relief under these rules. AAR argues that relief should be restricted to instances of "severe" service deterioration<sup>13</sup> occurring over a meaningful time period<sup>14</sup> as measured against an

1970s; shifts in traffic due to coal type changes resulting from the Clean Air Act; and the primary market for Pacific Northwest lumber changing from Asia to the Eastern United States.

AAR also argues that car supply issues—such as car acquisition, allocation, and maintenance—should not be addressed in these rules, as they can be addressed under 49 U.S.C. 11121 (under which we may, after a hearing, require a railroad to furnish safe and adequate car service if we make certain findings). We do not believe that section 11121 precludes us from taking other, temporary measures to enable traffic to move by other means while a carrier confronts its own car supply problems. Indeed, section 11123 expressly includes a "shortage of equipment" among the urgent situations to be addressed under that section.

<sup>13</sup> AAR advocates using the adjective "severe" so as to limit relief to instances of a major service decline and to prevent the rules from being used as a subterfuge for universal "open access." It further suggests that this is necessary to avoid chilling railroads from taking initiatives to improve service, out of fear that any improvement in service that cannot be sustained will serve as a new benchmark for a later determination that service has since deteriorated. We plan to administer these rules in such a manner that these fears should not be realized, and our application of these rules in individual cases is, of course, subject to judicial review.

<sup>14</sup> AAR argues that this time period should be 90 days, to distinguish a sustained decline in service quality from the ordinary variability of rail service. AAR concedes, however, that a shorter test period could be appropriate where there have been "extreme and undisputed service breakdowns," as in bankruptcies.

appropriate comparison period.<sup>15</sup> Various other parties advocate a looser standard based upon the particular needs and viewpoint of the shippers involved. Still others would have us set out in advance more definitive service standards, presumptions or benchmarks that would entitle petitioners to relief.

We do not believe that it is possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times. Rather, we remain convinced that such issues are best addressed on a case-by-case basis, under flexible general rules, because transportation needs and service difficulties can vary substantially. Moreover, we believe that the "substantial measurable deterioration" language we had proposed appropriately describes serious, objectively determinable service declines for which relief should be available under these rules.

However, we are persuaded by the comments that there may be an equally compelling need for relief in instances where there has been no deterioration from prior service levels because service has been continuously inadequate or because there are new rail transportation needs (by newly located shippers or existing shippers with changed transportation needs) for which adequate service is not being provided. To address such situations, we are also providing for relief from "other demonstrated inadequacy in rail service provided by the incumbent carrier."<sup>16</sup>

ASLRRA suggests a 30-day time period, arguing that for a small railroad such a period is "extremely damaging and intolerable . . . [and] long enough to rule out temporary, minor or fleeting service problems." Various shippers urge even shorter time periods.

BHP and IPC argue against a specific test period, and for maintaining the flexibility to address varying situations. We agree that it is not necessary or appropriate at this time to prescribe a minimum period. We note, however, that petitioners have the burden of demonstrating the inadequacy of the existing service, and, presumably, the longer problems continue, the easier it should be for petitioners to document those problems and to demonstrate the gravity of the situation.

<sup>15</sup> AAR suggests that the base period for comparison should consist of several equivalent time intervals over a span of prior years, in order to guard against a ratcheted approach where every temporary improvement in service that results from seasonality and traffic ups and downs could establish a new baseline standard. Such concerns, however, can and should be addressed on a case-by-case basis. Both petitioners and the incumbent carriers should submit any relevant evidence of instructive base periods in making their respective presentations.

<sup>16</sup> This change is consistent not only with sections 10705 and 11102, but also section 11123(a), which refers to transportation "that properly serves the public," and with the railroads' overarching common carrier obligation, embodied in 49 U.S.C. 11101(a), to provide service upon reasonable request.

### Available Traffic

AAR argues that we lack authority to provide any relief for transportation that has been exempted from our regulation pursuant to 49 U.S.C. 10502 or that is the subject of a rail transportation contract under 49 U.S.C. 10709.

AAR is clearly wrong with respect to exempt traffic. We retain full jurisdiction to deal with exempted transportation, as we can revoke the exemption at any time, in whole or in part, under section 10502(d). *G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3rd Cir. 1987), cert. denied, 485 U.S. 988 (1988). We will do so to the extent required to provide relief shown to be justified under these rules.

As for transportation that is provided under a rail transportation contract, AAR is correct that we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract. 49 U.S.C. 10709(b), (c). 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.

### Discussions With the Incumbent Carrier

AAR supports the requirement that prospective petitioners discuss service problems in advance with the incumbent railroad, and that their petitions address the reasons why the incumbent carrier is unlikely to restore adequate rail service in a reasonable period of time. AAR suggests adding a further requirement that the petitioner act responsibly, cooperate reasonably with the incumbent railroad to allow provision of adequate service, and not be allowed to reject reasonable alternatives proposed by the incumbent carrier to solve the service problems.

Some commentators take a different view. WCTL objects to imposing an additional burdens on petitioners. AL&M submits that the advance discussions with the incumbent should

be simply for the purpose of establishing facts about the service problem, such as its causes, magnitude, and the forecast for service restoration; in an expedited process, they argue, parties should not have to engage in deeper discussions. Shell expresses concern that requiring projections of when service will be restored may lead the incumbent railroad to project dates that it knows it cannot meet in order to forestall the introduction of an alternative service provider.

We see no need to reduce, expand, or otherwise place conditions on the requirement that was proposed. Advance discussions between the parties are indispensable. They may help solve or ameliorate the service problems; narrow the issues in dispute; or, at a minimum, enable a more complete and informative record to be developed upon which we can assess the situation and the proposal for relief. Thus, it is in all parties' interests to engage in full, good faith discussions.<sup>17</sup> Any allegations that either party is acting unreasonably or in bad faith can and will be considered on a case-by-case basis.

#### *Arrangements With an Alternative Carrier*

Several commentors express concern about the requirement that a petition include a commitment from another carrier to provide the alternative service. CMA suggests that a potential alternative carrier may be unwilling to participate because taking on new business for a short period of time may be unattractive financially. Or a carrier may be hesitant to serve for fear of retaliation by the incumbent carrier, particularly if the alternative carrier is a small railroad. CMA and CPUC suggest that an unwilling carrier be required to explain its objections and, unless they are reasonable, we should order it to provide service. Because the cooperation of the alternative carrier is essential, we must reject this suggestion. As we explained in the *May Notice*, at 6, even temporary access is a serious remedy, given the potentially significant operational, safety, and financial implications for the carriers involved. Forcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances.

BHP and IPC seek clarification that a shipper can seek alternative service from any entity that is ready, willing,

and able to provide service, including third-party rail switchers or other entities that may not be certificated carriers.<sup>18</sup> AAR objects, arguing that a carrier is not in a position to help if it does not own its own infrastructure. We do not foreclose the possibility that third-party rail switchers and others can provide genuine service relief in certain circumstances, and we will allow any competent carrier to serve, provided it can do so safely. However, inasmuch as an entity authorized under these provisions will be required to interface directly and fully with other rail carriers as common carriers by rail, the entity authorized to provide alternative service should be a carrier certificated by the Board. That is not to say, as noted, that noncarrier entities would be foreclosed from participation, only that such entities would be required to use our 7-day notice procedures (at 49 CFR 1150.31) to obtain the requisite operating authority. In these circumstances, and in order to expedite the process and minimize burdens on temporary operators, filing fees for such authority will be waived.

AAR seeks clarification that the alternative carrier must be able to provide better service than the incumbent carrier is currently providing. We consider that to be implicit in the reason for providing relief under these rules, and we will deal with this matter on a case-by-case basis. We will authorize relief where the combination of the alternative carrier and the incumbent carrier will provide better service than the incumbent carrier is providing by itself. In this regard, we note that providing authority to an alternative carrier does not supplant the service furnished by the existing carrier, but rather supplements it.

AAR further suggests that these rules should apply only to exclusively-served petitioners, and not to those that already have access to an alternative carrier. We agree that as a general rule no relief is necessary for petitioners that can already access another carrier capable of handling the service needs. If neither of the incumbent carriers is providing adequate service, however, relief under these rules is not foreclosed.

#### *Safe Implementation*

Petitions for relief under these rules must show how the alternative carrier would provide the service safely and without degrading service to its existing

customers or unreasonably interfering with the incumbent's overall ability to provide service. Several of the comments specifically addressed this requirement.

AAR voiced a concern that alternative service remedies could be counterproductive, because the incumbent carrier's crews would have to train the crews of the alternative carrier, or the incumbent carrier's crews might have to be diverted from other service in order to run the trains of the alternative carrier. UTU expressed concern that, particularly where the incumbent's lines are already congested, the inexperience of employees of the alternative carrier on the incumbent's trackage could lead to greater delays or accidents. UTU asks that new crews be given significant training whenever an alternative carrier enters another carrier's lines. BHP and IPC agree that having the crews of the incumbent carrier train the new crews or run the alternative carrier's trains may be necessary for safety reasons, but they argue that we should not deny a request for alternative service relief on that basis. And of course, as NITL notes, there should be little effect on an incumbent carrier's operations and safety when only reciprocal switching or through route/joint rate remedies are sought.

NITL argues that, to avoid delay, it should be the responsibility of the incumbent carrier, not the petitioner, to identify and address likely safety issues, as it would be more difficult for a shipper to anticipate and address operational issues. While the incumbent carrier will undoubtedly wish to address any such issues, the alternative carrier is expected to anticipate and address them as well. Therefore, 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.<sup>19</sup> Moreover, the carriers 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.

Given the importance of safety issues, DOT asks that a copy of petitions be served on the Federal Railroad

<sup>17</sup> We agree with AAR that, as part of the pre-petition communications, the parties should not withhold, but rather should make fully available to each other, any documentation of the service history.

<sup>18</sup> BHP and IPC assert that third-party rail switchers are fully capable of operating on rail lines and moving cars in and out of a shipper's plant and, in emergencies, can safely operate over an incumbent railroad's track for short distances to interchange points.

<sup>19</sup> The simple one-page commitment suggested by US Clay (consisting merely of a pledge to adequately and safely serve the traffic) would not be sufficient. Advance planning will be necessary to assure safe integration of the operations of the alternative carrier and the incumbent carrier. We believe it is appropriate for us to require the respective carriers to demonstrate that they have undertaken the requisite planning.

Administration (FRA) and that the parties be required to cooperate with FRA to ensure that safety is not compromised. We agree and are adding a requirement for service on FRA,<sup>20</sup> and we expect parties to cooperate fully with FRA.

Finally, AAR argues that we should impose the least intrusive remedy that will address the particular service problem presented.<sup>21</sup> Cemex, on the other hand, asks that we provide the best, most expeditious, available relief. We believe it is best to maintain the flexibility to weigh issues of intrusiveness, feasibility, effectiveness, and speed of relief on a case-by-case basis. However, it is worth repeating at this juncture that the remedy provided is designed to most effectively address identified service problems, not to punish the incumbent carrier.

#### *Compensation, Rates and Divisions*

NITL argues that the Board, rather than the carriers, should set the amount of compensation to be paid to the incumbent carrier for the use of its property. However, that would be contrary to the statute, which authorizes the Board to set compensation only if the parties cannot agree on terms. 49 U.S.C. 11102(a), (c), 11123(b)(2).

Various parties address the need for the incumbent carrier to be fairly compensated if it is required to provide services and/or facilities to the alternative carrier. NITL et al. argue that any payment to the incumbent carrier should be limited to costs incurred by the incumbent, including a return on investment, and not include compensation for lost profits. They suggest that fair compensation can be developed from our railroad cost accounting system, known as URCS. We agree that the incumbent railroad is entitled to fair compensation for whatever services and facilities it provides, but not for lost profits for service it is not providing. Because the type of access to an incumbent carrier's facilities and the services the incumbent will be required to provide to an alternative carrier will vary widely, depending on the service inadequacy

and the relief that is fashioned, we will not attempt to prescribe in the abstract a compensation formula applicable to all situations. Rather, where appropriate we will be guided by established precedent, taking into account the circumstances of the particular case.

BHP and IPC argue that affected shippers should not have to pay more for receiving the alternative service than would be paid for the incumbent carrier's service, and NITL argues that affected shippers should not have to pay more than the URCS variable costs for moving their traffic. We do not have the authority, however, to prescribe the rates that a carrier will charge to a shipper unless we first find that the carrier has market dominance over the traffic involved and that the rate selected by the carrier is unlawful. 49 U.S.C. 10701(c), (d), 10704(a)(1), 10709. Thus, the rates to be charged for the alternative service are a matter for discussion between the shipper and alternative carrier. We would note, however, that attempting to limit what the alternative railroad may charge to what the incumbent would have charged, even though the alternative carrier will incur different costs, could disserve the shippers' interests by discouraging carriers from offering to provide alternative service.

Finally, ACE asks that we set standards for determining the division between the carriers of any joint rates. We have such standards in place, at 49 CFR 1137, and see no need to revise them at this time. We note, however, that those regulations are meant to serve as a last resort only; carriers are encouraged to negotiate divisions among themselves.<sup>22</sup>

#### *Case Procedures*

We proposed very short time frames for the development of a record under Part 1146—with a reply by the incumbent railroad due in 5 business days, and any rebuttal by the petitioner due 3 business days later—to enable us to provide prompt relief for service emergencies. As noted above, we have decided to lengthen the time periods in Part 1147 applicable to petitions for temporary, service-based access under sections 10705 and 11102 of the statute—with a reply by the incumbent railroad due in 30 days, and any rebuttal by the petitioner due 15 days later.

With respect to the abbreviated time frames proposed for Part 1146, some commenters seek to lengthen the

schedule,<sup>23</sup> while others would have us shorten it even more.<sup>24</sup> We 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. By the same token, we are not persuaded that a longer time frame is necessary or appropriate given the emergency nature of the situations for which the Part 1146 rules are reserved. (We remind the commenters that parties will actually have additional notice of the controversy, because they are required to discuss the service problems prior to the filing of the petition.) To ensure that the limited time provided can be used effectively, however, we adopt the NITL suggestion that service of all pleadings be by hand or by overnight delivery.

Finally, several parties ask that we set a time for Board action on a petition for temporary alternative service.<sup>25</sup> Our goal is to issue a decision as soon as possible after the record closes, taking into account the degree of urgency involved in the particular request before us. We are not persuaded that this goal will be furthered by prescribing in advance an arbitrary deadline for Board action in all such cases.

#### *Duration of Relief*

The relief available under Part 1146 is, of course, subject to both the 30-day reappraisal requirement and the maximum 270-day time limit for actions taken under section 11123. Part 1146 contains a rebuttable presumption that an emergency for which relief is granted will extend beyond the initial 30-day period, unless otherwise indicated in the Board's initial order. AAR argues against such a presumption, on the ground that we cannot avoid the requirement in section 11123 for a reappraisal of the situation at the end of the first 30 days. Contrary to AAR's impression, the presumption was not intended to obviate the need for a

<sup>20</sup> UTU-IL asks that petitioners also be required to serve their petitions on employee organizations and to include unspecified employee information in the petition. However, UTU-IL—a local legislative body located in Illinois—would not be the entity to receive such petitions under its proposal, and no entity that would have joined in the request. We are reluctant to impose unnecessary burdens on the filing of these petitions. Moreover, we are confident that safety issues can and will be addressed fully without these additional requirements.

<sup>21</sup> AAR notes that a new through route can be less disruptive or costly than other remedies, and that in most cases reciprocal switching is less intrusive than trackage rights.

<sup>22</sup> *Official-Southwestern Divisions In the Matter of Joint Rates Between Official and Southwestern Territories*, Docket No. 29886 (Sub-No. 1) (ICC served Jan. 28, 1987).

<sup>23</sup> AAR suggests that the reply be due in 14 days, and petitioner's rebuttal 7 days thereafter. As NITL points out, that would serve to triple the originally proposed time frame. North Dakota suggests that petitioners have 5 business days for rebuttal.

<sup>24</sup> BHP and IPC would have us require the filing and service of pleadings (on a designated "service officer" for the incumbent railroad) by facsimile, with a reply due within 2 calendar days. To further speed the process, they suggest that we appoint an ombudsman of the Board to receive and quickly act on such petitions, with appeals available to the Board.

<sup>25</sup> The dates suggested ranged from 5 (Shell and CPUC) to 7 (CLC) to 15 (US Clay) days after rebuttal.

further Board order at the end of the 30-day period. Rather, it is designed to simplify and expedite the 30-day reexamination by avoiding a rehashing of the original inquiry into whether relief is appropriate and limiting the evidentiary presentations and our analysis to the issue of whether the emergency is over so that the relief is no longer needed. The presumption can be rebutted by the incumbent railroad. Moreover, the presumption will not apply in those cases where the Board in its original order finds that the emergency is unlikely to continue for more than 30 days.

Of course, under both Parts 1146 and 1147, the incumbent railroad will be free to petition to terminate the relief as soon as the emergency is over, regardless of when that occurs. The statement in the proposed rules that would have discouraged carriers from filing a petition to terminate relief less than 90 days after the relief is granted, absent special circumstances, would not have barred earlier termination petitions. Rather, we intended for it to serve as an admonition to carriers not to file such petitions too hastily or prematurely. Accordingly, we have changed the language to express that purpose more directly and clearly.

Some shippers seek a minimum period of relief to which the petitioner would be entitled.<sup>26</sup> While we appreciate their concern, we do not believe that establishing a minimum time would be appropriate, given the nature and (non-punitive, restorative) purpose of actions taken under Parts 1146 or 1147.<sup>27</sup> As discussed above, parties desiring alternative service that extends beyond correction of any serious service problems may proceed under Part 1144.

#### *Railroad Petitioners*

We agree with AAR that the rules as originally proposed did not preclude railroads (of any size) from seeking relief under the rules, and the rules will so specify. As ASLRRRA points out, there may well be situations where a railroad is seriously affected by the service disruptions of a connecting (incumbent) carrier and may need to obtain a

connection with a second (alternative) carrier and access (by either the petitioning or alternative carrier) over track of the incumbent carrier for a reasonable distance to reach the alternative carrier. The primary issues<sup>28</sup> regarding railroad- (as opposed to shipper-) initiated petitions relate to mandatory interchange requirements and relief from "paper barriers"<sup>29</sup> or other contractual impediments to access.<sup>30</sup>

ASLRRRA asserts that a railroad-petitioner should not need an advance commitment from an alternative carrier, in view of the mandatory interchange requirements applicable to all railroads in 49 U.S.C. 10742. AAR argues against compelling an unwilling second railroad to participate in an emergency service arrangement. AAR asserts that the principal, if not only, reason that a second railroad would decline to handle additional traffic via a new connection would be operating considerations, which are a significant factor in determining whether to grant relief. AAR argues that requiring the willingness of the second carrier will filter out those situations where there are operational problems. DOT suggests an intermediate position short of requiring a binding commitment from a prospective connecting railroad—that the prospective railroad be consulted to ensure that any relief granted would not unduly affect its operations.<sup>31</sup> ASLRRRA concedes that as a practical matter the petitioning railroad will need to work closely with the alternative carrier to work out the details of how traffic would be handled efficiently and safely in a manner acceptable to each. We agree and thus we would expect the carriers normally to have worked out an agreement. If for some reason they have not been able to reach agreement, we will take that into consideration, on a case-by-case basis, in determining

<sup>28</sup> ASLRRRA's suggestion that we assess qualifying service disruptions based upon a preset (30-day) time period, and AAR's attempt to remove car supply issues from the service problems for which relief may be granted, are rejected for the reasons discussed above under "Nature and Extent of Service Problems."

<sup>29</sup> "Paper barriers" refer to contractual restrictions that limit the ability of some small carriers to interchange traffic with carriers other than their primary connecting carrier. See Review, at 8.

<sup>30</sup> DOT and Farmrail agree that there may be other contractual impediments that limit the service that a small railroad can provide, such as car supply requirements and exclusive rate making authority by the larger, connecting carrier.

<sup>31</sup> WCTL agrees that the petitioning railroad should be required to show, as any petitioner would, that the requested relief is operationally feasible, but should not be required to "pre-clear its petition with the second carrier's marketing department." WCTL Supplemental Comments at 6.

whether the relief sought is operationally feasible and safe and will not harm service to existing customers.

AAR agrees that contract terms that would directly prevent the exercise of the remedy granted by the Board should be superseded, but argues that broader relief is inappropriate. Such issues are likely to be fact-dependent, and are thus best left to consideration on any individual case basis.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources. Moreover, we certify that this action will not have a substantial impact upon a significant number of small entities.

#### **List of Subjects in 49 CFR Parts 1146 and 1147**

Railroads, Service.

Decided: December 18, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

**Vernon A. Williams,**  
*Secretary.*

For the reasons set forth in the preamble, the Board adds new parts 1146 and 1147 to title 49, chapter X, of the Code of Federal Regulations, to read as follows:

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

**Authority:** 49 U.S.C. 721, 11101, and 11123.

##### **§ 1146.1. Prescription of alternative rail service.**

(a) *General.* Alternative rail service 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.

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

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the

<sup>26</sup> NITL argues for a 90-day minimum period, arguing that any shorter period will be insufficient to justify the time and expense spent by alternative carriers in providing service. Others proposed minimum periods ranging from 30 days (AL&M) to 180 days (SPI) to one year (PP&L and AmerenUE).

<sup>27</sup> For the same reason, we do not believe it is necessary or appropriate to place an outside limit on the duration of relief that is provided under Part 1147. (Relief granted under Part 1146 is statutorily limited to 270 days.) Until the incumbent railroad is ready to provide adequate service on its own, the basis and need for relief continue.

petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply*. The incumbent carrier must file a reply to a petition under this paragraph within five (5) business days.

(3) *Rebuttal*. The party requesting relief may file rebuttal no more than three (3) business days later.

(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)(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 subsection within five (5) business days.

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

(e) *Service*. All pleadings under this part shall be served by hand or overnight delivery on the Board, the other parties, and the Federal Railroad Administration.

#### **PART 1147—TEMPORARY RELIEF UNDER 49 U.S.C. 10705 AND 11102 FOR SERVICE INADEQUACIES**

**Authority:** 49 U.S.C. 721, 10705, 11101, and 11102.

##### **§ 1147.1. Prescription of alternative rail service.**

(a) *General*. Alternative rail service will be prescribed under 49 U.S.C. 11102(a), 11102(c) or 10705(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.

(b)(1) *Petition for Relief*. Affected shippers or railroads may seek 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 the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does

not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply*. The incumbent carrier must file a reply to a petition under this paragraph within thirty (30) days.

(3) *Rebuttal*. The party requesting relief may file rebuttal no more than fifteen (15) days later.

(c)(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 to affected shippers. Carriers are admonished not to file such a petition prematurely.

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

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

(d) *Service*. All pleadings under this part shall be served by hand or by overnight delivery on the Board, other parties, and the Federal Railroad Administration.

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