STB EX PARTE NO. 574

REGULATIONS ON SAFETY INTEGRATION PLANS GOVERNING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL; AND PROCEDURES FOR SURFACE TRANSPORTATION BOARD CONSIDERATION OF SAFETY INTEGRATION PLANS IN CASES INVOLVING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Decided March 6, 2002

AGENCIES: Federal Railroad Administration (FRA), Surface Transportation Board (STB).
ACTION: Final rules.
SUMMARY: The Federal Railroad Administration ("FRA") and the Surface Transportation Board ("STB" or "Board"), working in conjunction with each other, hereby issue joint final rules establishing procedures for the development and implementation of safety integration plans ("SIPs" or "plans") by a Class I railroad proposing to engage in certain specified merger, consolidation, or acquisition of control transactions with another Class I railroad, or a Class II railroad with which it proposes to amalgamate operations. The scope of the transactions covered under the two rules is the same.

Under FRA's final rule, Class I railroads seeking to consummate a covered transaction must file a proposed SIP with FRA after they seek authority for the transaction from the Board. (A SIP is a written document explaining how each step in implementing a contemplated transaction would be performed safely.) FRA then reviews the proposed SIP and advises the Board as to whether it provides a reasonable assurance of safety for the transaction. The rule further requires that, once the STB has approved a transaction, a railroad must operate over property subject to the transaction in compliance with a SIP approved by FRA, and authorizes FRA to exercise its full enforcement remedies should a railroad fail to implement the terms of an approved plan. Finally, the rule provides that FRA will consult with the STB at all appropriate stages of SIP

implementation, assuming FRA approves the SIP and the STB approves the transaction.

Under the STB's final rule, rail carriers seeking to carry out a regulated transaction are required to file a proposed SIP with FRA and the Board 60 days after they seek authority for the transaction. FRA will review the proposed SIP and file written comments with the Board's Section of Environmental Analysis ("SEA"), which is responsible for preparing the Board's environmental documents. SEA will then include the proposed SIP, FRA's written comments on the proposed SIP, and any additions or revisions based on continued discussions with FRA in the Board's draft environmental documentation. After reviewing the proposed SIP, SEA's analysis, and comments provided by interested persons during the STB's environmental review process, the Board will then independently evaluate the transaction and decide whether to approve it. Should the Board approve the transaction and adopt the SIP, it will require compliance with the SIP as a condition to its approval. FRA then will oversee the implementation of the SIP, consult with the Board at all appropriate stages of implementation, and advise the Board when the proposed integration has been safely completed.

The final rules are designed to enable the Board and FRA to ensure adequate and coordinated consideration of safety integration issues in covered rail transactions while minimizing the burdens on the applicants. FRA and the STB believe that the joint rules will serve the public interest in promoting safety in the railroad industry, consistency in decisions, and efficiency in compliance, enabling the agencies to employ their areas of expertise to fulfill their respective statutory objectives in a complementary manner.

DATES: *Effective Date*: The final rules become effective 30 days after the date of publication in the *Federal Register*.

ADDRESSES: Petitions for reconsideration of FRA's rule should be submitted to Docket Clerk, Office of Chief Counsel, FRA, 1120 Vermont Avenue, NW, Mail Stop 10, Washington, DC 20590. Petitions for reconsideration of the STB's rule should be submitted to Office of the Secretary, STB, 1925 K Street, NW, Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Jon Kaplan, Trial Attorney, Office of Chief Counsel, FRA, 1120 Vermont Avenue, NW, Mail Stop 10, Washington, DC 20590 (telephone: (202) 493-6053 and E-mail: *jonathan.kaplan@fra.dot.gov*); and Evelyn G. Kitay, Office of the General

Counsel, STB, 1925 K Street, NW, Washington, DC 20423-0001 (telephone: (202) 565-1563 and E-mail: *kitaye@stb.dot.gov*). [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION:

Joint FRA/STB Introduction

On December 31, 1998, FRA and the STB issued a joint notice of proposed rulemaking ("NPRM") establishing procedures for developing and implementing SIPs by railroads proposing to engage in certain specified merger, consolidation, or acquisition of control transactions with another railroad. 63 Fed. Reg. 72,225 (1998). FRA's proposed rule would have required railroads seeking to consummate any mergers, acquisitions, or consolidations of property involving (i) Class I railroads, (ii) Class II railroads when the railroads would directly interchange freight with each other, (iii) transactions in which the consummation of operations would produce revenue in excess of the Class I threshold, (iv) a passenger railroad (intercity or commuter) with another passenger railroad, a Class I railroad, or a Class II railroad; or (v) start-up operations on a rail line or lines in which the commencement of operations would either involve passenger service or produce revenue in excess of the Class II threshold, to file a proposed SIP for the agency's review and approval. (Class I railroads are rail carriers generating operating revenue, measured in inflation-adjusted 1991 dollars, in excess of $250 million per year for a period of three successive years. Class II railroads are rail carriers generating operating revenue, measured in inflation-adjusted 1991 dollars, between $20 million and $250 million.) Concurrently, the STB's proposed rule would have required railroads seeking to engage in all transactions addressed in FRA's NPRM other than start-up operations to file a SIP with the Board for its review and approval.

The proposed rules set out specific procedures governing the development, approval, and implementation of SIPs, and explained that FRA and the Board are jointly responsible for promoting a safe rail transportation system. Under FRA's proposed rules, railroads seeking to consummate a covered transaction would be required to file a proposed SIP with FRA contemporaneously with the filing of the SIP with the STB. FRA would review the proposed SIP and advise the Board as to whether it provides a reasonable assurance of safety for the transaction. The proposed rule required a railroad to have a SIP approved by FRA before it could execute operations over property subject to the transaction.

Where the Board has been involved in authorizing the transaction, FRA would consult with the Board at all appropriate stages of implementation.

Likewise, under the STB's proposed rules, rail carriers seeking to carry out a transaction within the Board's jurisdiction that would require a SIP would file their SIP with the Board and FRA. FRA would review the SIP and file written comments with the Board's SEA. After reviewing the SIP, SEA's analysis, and comments provided by interested persons during the Board's environmental review process, the Board would then independently evaluate the transaction and decide whether to approve it. Should the Board approve the transaction, the railroads would coordinate with FRA in implementing the SIP, including any amendments made to the plan, and FRA would monitor the implementation process and apprise the Board about the railroad's progress in carrying out the plan until FRA advised the Board that the proposed integration had been safely completed. Both FRA and the Board would be authorized to exercise their full independent enforcement remedies should either FRA or the Board reject the proposed SIP or a railroad fail to implement the terms of an approved SIP.

FRA and the STB received written comments on the proposal from 11 entities and conducted a joint public hearing at the request of one of the commenters in Washington, DC, on May 4, 1999. Based on the comments received, the testimony at the public hearing, and further analysis of the rules proposed, FRA and the Board now publish these joint final rules. As will be discussed below, both agencies underscore the importance of SIPs when Class I railroads seek to engage in mergers, consolidations, or acquisitions. These are railroads transporting large volumes of freight, frequently including hazardous materials. Given the size and complexity of their operations, careful advance planning is critical to ensure that safety is maintained as the transactions are implemented.

The agencies, however, agree with certain of the comments that the final rules should be limited to consolidations, mergers, or acquisitions of control involving either two or more Class I railroads or a Class I railroad and a Class II railroad with which it proposes to "amalgamate operations" as defined by FRA at 49 CFR 244.9. (*See also* the STB's final rule at 49 CFR 1106.2.) Only the complexity and difficulty of these very large transactions are now believed to present sufficient dangers to merit a SIP under these rules. This substantially comports with the recommendations of some commenters.

In its final rule, FRA has modified the subject matter areas to be addressed in a SIP to cover those disciplines that a regulated transaction affects, and has decided not to require an applicant to file a SIP when a transaction does not involve an amalgamation of operations. In response to the comments, FRA and

the Board have "fine tuned" their respective procedures governing the filing, review, and approval of a SIP, and their oversight of an approved plan. The final rules also clarify the respective roles of the two agencies. It is made clearer that (i) the STB is regulating the economic transaction and, in the course of doing so, fulfilling its responsibility to assess environmental impacts, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq*., and promote a safe transportation system, and (ii) FRA is regulating the safety of the implementation of any transaction the STB may approve, just as FRA regulates all other aspects of railroad safety. FRA is not approving or disapproving the transaction in any respect, and both agencies state explicitly that FRA has no "veto power," either explicit or implicit as some commenters alleged, over transactions regulated by the STB. If the STB approves a transaction, a railroad must conduct operations over properties that are part of the transaction in compliance with a SIP approved by FRA, just as it must conduct those operations in compliance with the railroad safety statutes and implementing regulations administered by FRA.

Discussion of Comments and Conclusions

FRA and the STB received written comments from various railroads and their representative organizations, labor organizations, and public service organizations. The railroad interests were represented by the Association of American Railroads ("AAR"), American Short Line and Regional Railroad Association ("ASLRRA"), National Railroad Passenger Corporation ("Amtrak"), Guilford Transportation Industries ("GTI"), and the Wheeling & Lake Erie Railway Company ("W&L"). The American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers ("ATDD"), Transportation Trades Department, American Federation of Labor-Congress of Industrial Organizations ("TTD"), Brotherhood of Railway Carmen Division of the Transportation Communications International Union ("BRC"), and Brotherhood of Maintenance of Way Employes ("BMWE") represented the interests of rail labor. The public service organizations were represented by the American Public Transit Association, now the American Public Transportation Association ("APTA"), and the Oklahoma Department of Transportation ("OK DOT"). At the public hearing held on May 4, 1999, two organizations participated: the TTD and the AAR. The commenters raised questions about the proposal itself, suggested alternative language to some of the proposed rule text, and requested clarification about the meaning and application of certain proposed rules. The discussion that follows highlights the principal issues advanced by the

commenters and explains how the final rules reflect the comments received. Because many of the comments focus on the rules proposed by one agency and not the other, FRA and the Board present separate sections addressing the comments and each agency's conclusions.

A. FRA's Response To Comments Concerning The Need to Require SIPs for Mergers, Consolidations, and Acquisitions of Control

Several comments addressed the types of transactions that warrant preparation of a SIP under these rules. The ATDD and TTD, for instance, endorsed the breadth of FRA's proposed rule, asserting that that type of rule is necessary to ensure the safety of railroad employees and the public. The ATDD commented that operational changes, *i.e.*, changes in traffic volume and traffic patterns, timetable schedules, and labor reductions, needed to be evaluated for safety concerns. The TTD added that the rulemaking action should be transferred to FRA's Railroad Safety Advisory Committee ("RSAC") to secure fuller labor input in the development of FRA's final rule. Amtrak also supported the proposition of the SIP rules, agreeing that "mega-mergers" present unique safety issues that should be identified and addressed at the application stage to enable FRA and the Board to handle proposed transactions as safely as possible.

GTI disagreed with the premise of the SIP rules. Specifically, GTI claimed that FRA need not issue any regulations governing mergers, consolidations, or acquisitions of control because the agency already has the regulations necessary to ensure safe operations subject to a proposed regulated transaction. GTI further postulated that FRA is without expertise in regulating these transactions and that self-regulation was most appropriate in this instance because merging railroads recognize that unsafe operations lead to increased costs and decreased returns on an investment. In other words, GTI recommended that the agencies terminate this rulemaking action and apply the existing regulations that govern regulated transactions.

The AAR argued that SIPs should be limited to consolidation, merger, and acquisition of control proceedings involving at least two Class I railroads and not to other less complex proceedings. The AAR also argued that only the Board should have approval authority over SIPs and that FRA's role should be limited to advising the Board. According to the AAR, any regulations purporting to vest FRA with authority to approve a SIP would be contrary to law and in derogation of the Board's "exclusive" authority to approve merger transactions under 49 U.S.C. 11321.

FRA strongly endorses the concept of the SIP rules and their importance in regulating the complex railroad transactions involving mergers, consolidations, and acquisitions of large railroads where operations are amalgamated. As the agencies explained in the NPRM, acquisitions, consolidations, and mergers must be carefully planned and implemented to maintain safety. *See* 63 Fed. Reg. 72,226-27 (1998). Transactions involving Class I railroads significantly change the carrier landscape and raise potential safety issues relating to integrating operations, facilities, personnel, safety practices, and corporate cultures. The NPRM noted FRA's concerns regarding safety problems that resulted from inadequate safety planning before implementation of the merger of the Union Pacific Railroad Company ("UP") and the Southern Pacific Transportation Company ("SP") (collectively referred to as "UP/SP") and the merger of the Burlington Northern Railroad Company ("BN") and the Atchison, Topeka and Santa Fe Railway Company ("ATSF") (collectively referred to as "BNSF"). *See* 63 Fed. Reg 72,227 (1998). The chief executive officers of the Norfolk Southern Railway Company and CSX Transportation, Incorporated, which acquired and divided Consolidated Rail Corporation ("Conrail"), amplified this point when they testified before the STB about the operational and safety difficulties they encountered in implementing their respective transactions, even with the planning and experiences of earlier mergers to guide them and having prepared SIPs. *See Public Views on Major Rail Consolidations*, 4 S.T.B. 546 (2000).

FRA believes that the final SIP rules accomplish the objective of ensuring safe railroad operations during and after implementation of an approved transaction. First, the regulations set out subject matter areas that are critical to railroad safety that an applicant must address in a proposed SIP. These requirements address safety issues unique to the amalgamation of large, complex railroad operations that are not covered in any existing Federal regulations, necessitating their issuance here. Second, FRA has the necessary expertise in railroad safety to review, analyze, approve, and oversee the implementation of a proposed SIP. FRA has officials and inspectors with knowledge, training, and experience in five railroad disciplines–operating practices, motive power and equipment, signal and train control, track safety, and hazardous materials–that cover the ambit of railroad operations. Therefore, the final rules provide for FRA a mechanism to evaluate and approve SIPs and monitor their implementation if the transactions to which they relate are approved by the Board. As discussed in greater detail below, FRA is regulating the safety aspects of how a railroad implements a transaction permitted by the Board and not whether the railroad is permitted to consummate the transaction or on what economic terms. FRA concludes that the SIP rules are a step forward in

providing railroad safety and therefore adopts these final rules. Although FRA entertained TTD's suggestion to add this proceeding to those addressed by FRA's RSAC, the agency decided that a joint rulemaking with the Board, using the complementary authority of both agencies, would be the best way to proceed.

B. FRA's Views On Jurisdiction of FRA and the STB to Issue the Final Rules

The AAR and GTI commented that the STB and not FRA is authorized to issue any regulations governing acquisitions, consolidations, and mergers. Relying on statutory authority, 49 U.S.C. 11321, and decisional law, *Schwabacher v. United States*, 334 U.S. 182, 197 (1948); *Norfolk & Western Rwy. v. ATDA*, 499 U.S. 117, 127-34 (1991); and *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999), the AAR claims that the Board is vested with exclusive authority to issue regulations that are within the STB's jurisdictional purview. GTI echoed the AAR's position, maintaining that an application to consummate an acquisition, consolidation, or merger is an economic transaction, which is fully within the Board's authority. FRA agrees that the Board has sole authority to regulate the economic transactions, but disagrees with these commenters that issuance of FRA's final rule trespasses upon that jurisdiction. FRA believes that it and the STB have so interpreted their respective statutes and jurisdiction as to reconcile them seamlessly, thereby serving the public interest by assuring that all parts of the affected statutes are given effect and the purposes of Congress are fully carried out. *Tyrrell v. Norfolk Southern Rwy. Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (FRA's and the STB's "complementary exercise of their statutory authority accurately reflects Congress's intent for the [Interstate Commerce Commission Termination Act] and the [Federal Railroad Safety Act] to be construed *in pari materia*"). The Supreme Court provides that "it is a cardinal principle of construction that * * * when there are two acts upon the same subject, the rule is to give effect to both." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Congressional intent behind one Federal statute should not be thwarted by the application of another Federal statute if it is possible to give effect to both laws, *id*., and courts should "construe the relevant statutes in a manner that most fully effectuates the policies to which Congress was committed." *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 857 (D.C. Cir. 1974); *see also Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000) (a reviewing court should "examin[e] a particular statutory provision * * * [in] context and with a view to [its] place in the overall statutory scheme"); *Blanchette v. Connecticut General Ins. Corp.*,

419 U.S. 102, 133-34 (1974) (statutory repeals by implication are disfavored). The agencies have done so in a manner entirely consistent with the cases cited by the commenters. *Tyrrell*, 248 F.3d at 523 ("while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, FRA exercised primary authority over rail safety matters under 49 U.S.C. 20101 *et seq*., while the STB handled economic regulation and environmental impact assessment[,]" citing the NPRM at n.2).

As FRA and the Board explained in the NPRM:

> FRA and STB are jointly responsible for promoting a safe rail transportation system.
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> Under Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad Administrator. 49 U.S.C. 20101 *et seq*.; 49 CFR 1.49. FRA has authority to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries. 49 U.S.C. 20101 and 20102. FRA has exercised its jurisdiction to protect the safety of railroad operations through the issuance and enforcement of regulations, partnering with railroad labor organizations and management of particular railroads to identify and develop solutions to safety problems, actively participating in STB rail proceedings, and monitoring railroad operations during the implementation of STB-approved transactions.
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> The Board is also responsible for promoting a safe rail transportation system. The rail transportation policy (RTP), 49 U.S.C. 10101, which was adopted in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and amended in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), establishes the basic policy directive against which all of the statutory provisions the Board administers must be evaluated. The RTP provides, in relevant part, that, "[i]n regulating the railroad industry, it is the policy of the United States Government * * * to promote a safe and efficient rail transportation system" * * * [by allowing rail carriers to] "operate transportation facilities and equipment without detriment to the public health and safety * * * *" 49 U.S.C. 10101(8). The rail transportation policy applies to all transactions subject to the Board's jurisdiction.
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> Thus, both FRA and STB are vested with authority to ensure safety in the railroad industry. Each agency, however, recognizes the other agency's expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations. Concurrently, the Board has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of railroads complement each other's interest in promoting a safe and viable industry.

63 Fed. Reg. 72,225-26 (1998). FRA believes that each agency's interpretation of its statute is reasonable, reflects a plausible construction of the plain language of the statutes, and gives effect to Congress' expressed intent. *Tyrrell*, 248 F.3d at 523 (statutory construction that FRA has primary authority over national rail safety policy and STB is responsible for encouraging "safe and suitable working

conditions" properly reflects Congress's purpose in enacting the Federal railway laws).

FRA has "primary jurisdiction, expertise and oversight responsibility in rail safety matters" under 49 U.S.C. 20101 *et seq*., as delegated by the Secretary of Transportation to the Federal Railroad Administrator at 49 CFR 1.49, and has the authority "to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries" under 49 U.S.C. 20101 and 20102. 63 Fed. Reg. 72,225 (1998). Specifically, 49 U.S.C. 20103 confers authority on FRA to "prescribe regulations" "for every area of railroad safety," 49 U.S.C. 20103(a), and "in prescribing regulations[,]" FRA "shall consider existing relevant safety information and standards." 49 U.S.C. 20103(c). Congress intended that FRA would possess the authority to regulate "all those means of rail transportation as are commonly included within the term * * * in addition to those areas currently regulated." H.R. No. 91-1194, Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, Pub. L. 91-458, *reprinted in* 1970 USCCAN 4104, 4114 (1970). In other words, Congress authorized FRA to promulgate regulations to ensure railroad safety after analyzing safety data.

A key element in the argument of the AAR and other commenters is that, by approving a SIP, FRA is encroaching upon the STB's jurisdiction, supposedly because approving a SIP is equated with approving a transaction and because the NPRM states that the railroad resulting from a covered transaction "shall have an FRA approved Safety Integration Plan before changing its operations to implement a proposed transaction* * * *" *See* proposed 49 CFR 244.21(a) at 63 Fed. Reg. 72,241 (1998). These commenters have misinterpreted both FRA's intentions and the meaning of the text. FRA has amended the text to eliminate the possibility of interpreting it as giving FRA authority to approve a transaction, and to clarify FRA's intentions. *See* the discussion of § 244.21(a) below. This change makes clear that FRA has no intention of approving or disapproving or vetoing a transaction covered by this part. FRA agrees that approving or disapproving a transaction covered by this part is wholly within the jurisdiction of the STB. FRA's role in the STB's process is an advisory one, providing expert advice to the STB on safety issues presented by a transaction. As the STB said in the NPRM, it relies upon FRA's safety expertise, and it is clearly in the public interest that FRA make its expertise available to the STB.

On the other hand, regulation of "every area of railroad safety" is FRA's jurisdiction. In approving or disapproving a SIP under this part, and enforcing one, FRA is regulating *the safety aspects of how* a railroad implements a transaction permitted by the STB and *not whether* the railroad is permitted to

consummate the transaction or on what economic terms. This is an appropriate exercise of the "plenary safety authority with respect to the safety of rail operations–before, during, and after a transaction," which the AAR acknowledges that FRA enjoys. AAR comments at 9. In that regard, approval of a SIP is no different than approval of an engineer certification program under 49 CFR part 240. There is no question that a railroad must have an engineer certification program approved by FRA and operate in accordance with it at all times, whether or not the railroad is involved in a transaction within the STB's jurisdiction. The commenters' view would require a repeal by implication of some portion of the Federal railroad safety laws ("safety laws"), 49 U.S.C. 5101 *et seq*. and 20101 *et seq*., to except from them railroad operations conducted during implementation of transactions approved by the STB. Such repeals by implication are strongly disfavored. *See Tyrrell*, 248 F.3d at 523. Here, there is obviously no need to infer any such repeal.

In FRA's view, it is necessary for safety purposes for the agency to approve or disapprove SIPs to provide a baseline for enforcement. First, FRA approval or disapproval denotes whether a railroad has submitted a proposed SIP meeting the requirements of the rule. Upon disapproval of a proposed SIP, FRA can take enforcement action if the railroad does not change its SIP to bring it into compliance with the law. Upon approval of a SIP, FRA can take enforcement action if the railroad fails to implement the SIP. Absent FRA approval, it is hard to see how FRA could take enforcement action in this arena.

FRA believes that the suggestion that FRA could veto a transaction by disapproving a proposed SIP is a red herring because only the STB can approve and veto a transaction. In any event, the standard set by the rule for approval of a proposed SIP can easily be met by any Class I or Class II railroad, and FRA cannot arbitrarily or capriciously reject a SIP that meets the standard. If FRA disapproves a proposed SIP because it fails to be thorough, complete, or clear, FRA must articulate to the railroad what is missing or unclear. If FRA disapproves a proposed SIP because it fails to describe a logical and workable transition or because it is insufficiently detailed, FRA must articulate how the proposed SIP is illogical or unworkable or lacking in detail. In either of those cases, upon receiving FRA's reasons for disapproval, a railroad can readily remedy its submission. In practice, FRA will continue to work informally with railroads proposing a covered transaction to assure that their proposed SIPs comply. It should be easy for applicants to secure FRA approval of their proposed SIPs in time for the Board's SEA to include the proposed SIP in the draft environmental documentation for the STB proceeding. FRA has no interest

in blocking transactions and has a powerful interest in seeing that transactions are implemented safely.

The text also makes clear that FRA is not prescribing any particular way to implement covered transactions. Instead, FRA is requiring the railroads involved to be thorough and logical, and to maintain a reasonable assurance of safety at every step of the proposed transaction.

Correspondingly, FRA recognizes that the STB is also vested with authority to promote a safe rail transportation system in determining whether a proposed transaction should be permitted and, if so, on what economic terms. As discussed in *Tyrrell* and in the NPRM, the rail transportation policy ("RTP"), 49 U.S.C. 10101, which was adopted in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, and amended in the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. 104-88, 109 Stat. 803 (1995), provides the foundation for which all of the statutory provisions the Board administers must be analyzed. *See Tyrrell*, 248 F.3d at 522-23. The RTP provides, in relevant part, that, "[i]n regulating the railroad industry, it is the policy of the United States Government * * * to promote a safe and efficient rail transportation system" * * * [by allowing rail carriers to] "operate transportation facilities and equipment without detriment to the public health and safety * * * *" 49 U.S.C. 10101(8). The STB applies the RTP to all transactions within its jurisdiction, authorizing it to consider the impact a merger, consolidation, or acquisition of control has on safety of railroad operations. *See Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000) (49 U.S.C. 10101, in part, directs the Board to ensure that safety concerns are addressed in railroad merger cases).

FRA submits that the cases AAR cited are misplaced. Read together, *Schwabacher*, *ATDA*, and *City of Auburn* stand for the proposition that the STB and its predecessor, the Interstate Commerce Commission, have exclusive authority to examine, condition, and approve mergers, consolidations, or acquisitions of control. The statute at issue, 49 U.S.C. 11321 (formerly, 49 U.S.C. 11341), specifically exempts a railroad from complying with all other laws to the extent "necessary to [let that railroad] carry out an approved transaction," *ATDA*, 499 U.S. at 134, thereby preempting any Federal or state law remedies. *City of Auburn*, 154 F.3d at 1030. FRA's SIP rule will not impede or restrict the Board in approving or rejecting a proposed transaction and, since the STB contemplates requiring a SIP when it approves covered transactions, a railroad could not logically assert that an exemption from FRA's rule would be "necessary to carry out an approved transaction." Instead, the rule provides that FRA will determine whether a SIP provides a reasonable assurance

of safety for the subject transaction and provide expert advice to the STB on safety issues presented by a proposed transaction. The Board, in turn, will rule on the application based in part on FRA's recommendations. This process employs FRA's plenary authority over railroad safety and respects and complements the Board's role of determining whether a transaction should be approved. At bottom, FRA believes that it and the Board each are fully exercising their respective statutory authorities by examining a transaction for its safety aspects (FRA), and the impact that safety has on an application as a whole (STB).

In FRA's view, the final SIP rule fulfills this objective. The rule responds to critical safety shortcomings and errors in planning and implementation of significant transactions that may have occurred in the past where no SIP was prepared. FRA documented its concerns in the NPRM by examining the difficulties of the BNSF and UP/SP mergers. *See* 63 Fed. Reg. 72,227-28 (1998). To illustrate, after the UP/SP merger, five employees were killed in accidents during the Summer of 1997, and employee injuries rose nine percent in 1998. FRA determined that the BNSF and UP/SP mergers faced significant challenges in harmonizing information systems; training dispatchers; modifying operational practices and procedures; implementing personnel policies directed toward safety; determining appropriate staffing requirements; and providing adequate rail facilities, infrastructure and rolling stock and equipment.

Likewise, FRA identified serious safety shortcomings in CSX Transportation, Incorporated's ("CSXT"), and the Norfolk Southern Railway Company's ("NS") initial filings in the *Conrail Acquisition*[1] proceeding before the Board. The agency determined that the railroads had not articulated a detailed plan explaining the manner in which they individually and collectively intended to implement the transaction, and thus they had not thoroughly assessed the safety impacts of the proposed acquisition. As a result, FRA requested that the Board require the carriers to provide information detailing how they proposed to provide for the safe integration of their corporate cultures and operating systems, if the Board were to approve the proposed transaction. The Board agreed with FRA's suggestion and directed the applicants to file detailed SIPs

[1] *CSX Corporation and CSXT Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company–Control and Operating Leases/Agreements–Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388 (hereinafter "*Conrail Acquisition*").

pursuant to guidelines developed by FRA.[2] The railroads complied with the STB's order and after FRA approved the respective SIPs, the Board, concluding that applicants had satisfactorily addressed the safety implementation concerns presented by the transaction to date, approved the transaction in 1998. Nevertheless, FRA, while monitoring the railroads' implementation of their respective SIPs,[3] has concluded that more needs to be done, and that, among other things, the railroads should address information technology problems resulting in a lack of hazardous materials documentation on trains, and conduct more advanced safety training of supervisory and operating personnel at designated terminals to ensure adequate staffing and retention of institutional knowledge. *See Conrail Merger Surveillance: NS, CSXT, and CRCX Second Safety Integration Plan/Safety Update*, pp. 1-3 (June 23, 2000) (hereinafter "SIP Update"). In short, FRA believes, based on its experience in recent cases, that "mega-mergers," consolidations, or acquisitions of control present safety challenges during implementation, which are best remedied by requiring SIPs for these complex transactions. FRA concludes that SIPs achieve a safety purpose within the purview of 49 U.S.C. 20103, and thus are within FRA's rulemaking authority. *Tyrrell*, 248 F.3d at 523 (FRA's responsibility in the SIP joint rulemaking action focuses on rail safety matters); *see also Brown & Williamson*, 529 U.S. at 134 ("if Congress has not specifically addressed the [precise question at issue], a reviewing court must respect the agency's construction of the statute so long as it is permissible"); *accord Oklahoma Natural Gas Company v. Federal Energy Regulatory Comm'n*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (agency is afforded *Chevron*[4] deference in interpreting its statutory authority); *Western Coal Traffic League v. Surface Transportation Board*, 216 F.3d 1168, 1171 (D.C. Cir. 2000) (judicial review of agency's statutory jurisdiction is

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[2] *Conrail Acquisition*, STB Decision No. 52 (STB served November 3, 1997).

[3] A detailed explanation of the SIP process in the *Conrail Acquisition*, including the Memorandum of Understanding the Board executed with FRA in establishing an ongoing monitoring process, is set out in the NPRM at 63 Fed. Reg. 72,228 (1998).

[4] *Chevron* is shorthand for the landmark Supreme Court case *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which stands for the proposition that courts must defer to an agency's interpretation of a statute, even if other statutory constructions are more plausible, if the statute is silent or ambiguous with respect to a specific issue.

premised on *Chevron* standards); *Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n*, 225 F.3d 667, 694 (D.C. Cir. 2000) ("it is the law of [the D.C.] [C]ircuit that the deferential standard of *Chevron* applies to an agency's interpretation of its own statutory jurisdiction" (citing *Oklahoma Natural Gas*)), *affirmed sub nom. New York v. FERC*, 2002 U.S. LEXIS 1380 (U.S. March 4, 2002). *See generally Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (regulations issued by an agency must be promulgated pursuant to statutory authority in which "the grant of authority contemplates the regulations issued").

C. FRA's Views On Issuance of a Final Rule v. Guidelines

The AAR commented that the SIP process is best employed through the issuance of policy guidelines adopting the model procedures that were used in the *Conrail Acquisition* and Canadian National Railway Company/Illinois Central Railroad Company[5] control transactions, and embodied in the memoranda of understanding ("MOU") between FRA and the STB entered in these cases. *See* 63 Fed. Reg. 72,228 (1998). Under this approach, the Board would determine when a SIP would be required for a transaction within its jurisdiction.

The AAR based its position on three points. First, this approach would ensure that each agency would respect each other's division of authority and role in overseeing the SIP process. Second, an MOU would offer the flexibility for an applicant to meet changing customer needs and market opportunities, such as staffing levels reached through collective bargaining agreements ("CBAs"), infrastructure improvements for highway-grade crossings, and designating repair facilities and computer software operating systems. Finally, a rule along the lines suggested by the NPRM would, according to AAR, represent government micromanagement of rail operations and implementation programs and could potentially delay integration, leaving an applicant at a competitive disadvantage with other railroads.

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[5] *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated–Control–Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33556 (STB Decision Nos. 5 and 6, served June 23, 1998, and August 14, 1998) (hereinafter "*CN/IC*").

FRA respectfully disagrees with the AAR's proposal. The agency believes that the issuance of final rules ensures that all applicants seeking to consummate a regulated transaction will execute a SIP and complete the SIP process as enunciated in the rules. These final rules codify the prescribed requirements and stake out the legal landscape for regulating complex railroad transactions. *See* Attorney General's Manual on the Administrative Procedure Act 14-15 (1947) ("[t]he object of [a] rulemaking proceeding is the implementation or prescription of law or policy for the future* * * *"). In other words, the rules will prescribe substantive and procedural standards that will govern each application filed with the STB to carry out a transaction and the safety of operations during implementation of transactions the STB approves. *Cf.* the Administrative Procedure Act, 5 U.S.C. 551(4), which, in part, defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." FRA believes that the SIP process should be mandatory in large mergers, acquisitions of control, and consolidations cases because of the unique nature of the transactions involved and the complexity of safely integrating operations that are part and parcel of the transactions.

On the other hand, guidelines are simply recommendations issued by an agency that do not prescribe or mandate any standards on the regulated community. *See Industrial Safety Equipment Ass'n, Inc. v. EPA*, 837 F.2d 1115 (D.C. Cir. 1988). Rather than impose a regimen for conduct or action, guidelines do not "change any law or official policy presently in effect," *id*. at 1119-21, nor do they "implement, interpret, or prescribe law or policy." 5 U.S.C. 551(4); *see also National Ornament & Elec. Light Christmas Ass'n v. Consumer Product Safety Comm'n*, 526 F.2d 1368 (2d Cir. 1975). Without sufficient "effect" to regulate conduct, guidelines have an "advisory character" without any firm commitment to law or policy. FRA believes that the issuance of guidelines would preclude the agencies from mandating standards or binding applicants to meet these requirements, creating an illusion of adequate safety oversight. FRA, like the Board, is committed to safe integration of complex railroad transactions and believes that these rules can best achieve that objective.

FRA also maintains that these rules enable the agencies to articulate interpretations of their respective statutes and reconcile them effectively, thereby preserving and recognizing each agency's authority to regulate aspects of these transactions. *See Tyrrell*, 248 F.3d at 523. The joint rules ensure that the agencies' roles and responsibilities complement each other in establishing SIP procedures and standards, and complete the rulemaking process announced in the NPRM. Lastly, the final rules will provide uniformity in regulating SIPs and

preempt other efforts to regulate the safety of implementing transactions. FRA concludes that the issuance of rules is the most effective instrument in defining each agency's function in the SIP process and requirements a railroad must satisfy for transactions that warrant a SIP.

Concurrently, FRA takes issue with the reasons supporting the AAR's recommendation. First, as previously explained, the final rules cement the division of authority and prescribe textual interface between the agencies in regulating SIPs. Next, FRA believes that the SIP contents and subject matter areas capture the operations that are affected by a complex transaction. Although an applicant may propose a flexible plan to address these topics, the SIP elements themselves should not be compromised to ensure a safe transition of operations.

Finally, FRA rejects the notion that the rules represent government micromanagement of rail operations and implementation programs. The premise of the rules focuses on an applicant's preparation, issuance, and implementation of a plan that provides safe integration of rail operations. FRA's and the STB's individual and collective roles are to review and approve the railroad's SIP, and monitor its implementation. The agencies' oversight is to ensure that the SIP provides a reasonable assurance of safety. It is not to "second guess" the proposed migration or deployment of resources necessary to carry out a plan. Therefore, FRA characterizes its role as that of a "gatekeeper" to cross-check the SIP and its implementation against the safety aspects in integrating operations.

D. FRA's Views on Issues Involving The Framework of the Joint Final Rules

FRA received several comments from interested parties about the framework of the proposed SIP rules. The comments focused on two issues–scope and applicability of the joint rules, and the approval and disapproval process of an application.

FRA proposed to require certain railroads seeking to merge, consolidate, or acquire control of another railroad, or "start-up" operations as a railroad to file proposed SIPs with FRA before consummating the regulated transaction. The NPRM proposed covering the following transactions: (1) a Class I railroad, a railroad providing intercity passenger service such as Amtrak, or a commuter railroad seeking to acquire, merge, or consolidate with a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad; (2) a Class II railroad proposing to consolidate, merge, or acquire another Class II railroad with which it connects so as to involve the integration of operations; (3) any merger, consolidation, or acquisition resulting in operations

that would generate revenue in excess of the Class I railroad threshold, except those transactions involving Class III freight only railroads; and (4) all start-up operations involving the establishment of a new line for passenger or freight service generating revenue that would exceed the Class II railroad threshold. Correspondingly, the Board proposed covering all transactions addressed in FRA's NPRM with the exception of "start-up" operations.

The AAR, Amtrak, and OK DOT commented that the STB lacks jurisdiction to regulate Amtrak or commuter railroads, citing 49 U.S.C. 10501(c) and *Norfolk & Western Railway Company–Petition for Declaratory Order–Lease of Lines*, STB Finance Docket No. 32279 (STB served February 3, 1999), for the proposition that the Board may not regulate any mass transportation provided by any local governmental authority, and arguing that the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570, 2585, amending 49 U.S.C. 24301(c)(1)(C), prohibits the Board from regulating Amtrak. Accordingly, the commenters recommended that the scope of the joint rules be curtailed.

FRA agrees that the scope of the joint rules should be narrowed to cover unique complex transactions. After considering the comments, the agency has determined that acquisitions, consolidations, or mergers involving large railroads present transactions of significant size and complexity that warrant a SIP. These transactions generally involve substantial changes in railroad operations that impact effective communications, coordination, and execution of operations, *i.e.*, all aspects of safety. The final rules narrow the scope and applicability sections to capture these significant transactions because of the correlation between complexity of large rail entities and operational safety. As a result, the joint final rules only apply to transactions in which a Class I railroad proposes to merge, consolidate with, or acquire control of another Class I railroad or a Class II railroad with which it also proposes to amalgamate operations.

Some of the comments addressed each agency's independent approval process for a SIP, and any amendments thereto. The TTD endorsed the proposed two-step disposition process in which FRA and then the Board would review and approve a proposed SIP before an applicant could consummate a transaction. The AAR disagreed, claiming that FRA is without the authority to sanction a transaction that is within the STB's jurisdiction.

FRA believes that the safe transition of integrating operations is best achieved when FRA and the STB work together using their respective jurisdictions. As discussed above and in the NPRM, FRA enjoys primary jurisdiction, expertise, and oversight responsibility in railroad safety matters and is best positioned to ensure that a plan will comply with the safety laws and

otherwise provide for safe railroad operations. *See Canadian Pacific Limited, et al.–Purchase and Trackage Rights–Delaware & Hudson Railway Company*, STB Finance Docket No. 31700, slip op. at 1, 5 (STB served March 2, 2000) (hereinafter "*CP Purchase*") (FRA entitled to "great weight" in identifying potential safety problems before STB imposes conditions on a transaction). At the same time, the Board, which has expertise in economic regulation and assessment of environmental impacts in the railroad industry, *Tyrrell*, 248 F.3d at 523, considers safety in the transactions that it regulates. *Id*. (STB's "duty [is] to encourage 'safe and suitable working conditions' for railway employees through its assessment of individual railway proposals subject to its authority"). FRA believes that these final rules meet the safety objectives of both agencies while interpreting their respective jurisdictions in a complementary way that is in the public interest.

E. Foundation of FRA's Final Rule

FRA received comments from three interested parties about the elements set out in the proposed rule. Generally, the labor organizations supported the subject matter areas contained in the regulatory text because they addressed the "four adequates"–adequate work force, adequate training, adequate rest, and adequate familiarity with the subject territory. In fact, the TTD went further, contending that an applicant should detail information in the subject matter areas that are required in a SIP to prevent a railroad from pledging vague commitments in filing a plan.

The AAR, however, objected to the proposed rule's SIP elements on two grounds. First, the AAR asserted that the subject matter areas go beyond the scope of assuring safe integration. The AAR maintained that a SIP should center on railroad lines that will experience changes in motive power and equipment, signal and train control, dispatching operations, highway-rail grade crossings, personnel staffing, capital investment, and relationships between freight and passenger service; and changes in operations or traffic volume that will affect a railroad's systems or programs. These requirements, the AAR posited, should be captured in a SIP to enable FRA to review an applicant's practices and procedures to ensure that they provide a "reasonable assurance of safety." The AAR added that the proposed SIP rules impose new standards on the railroad industry that are not required under the existing regulations and serves as a "back door" vehicle for issuing substantive regulations that impact selected transactions. These rules, the AAR reflects, impose new burdens, costs, and

delays on an applicant, which leaves it at a competitive disadvantage with other railroads.

FRA agrees in part and disagrees in part with the AAR's comments. The agency has amended the subject matter areas in its proposed rule to require an applicant to focus its SIP on changes in railroad operations during the integration phase. The agency believes that a plan must analyze the major changes that will occur as railroads subject to a regulated transaction integrate their operations from commencement to completion. Advance planning will require an applicant to consider the nature of operations involved in the transaction and the migration or transition from two or more entities to one entity. The final rule satisfies these concerns.

FRA disagrees with AAR's characterization that the SIP rules are a "back door" approach to regulating subject matter areas that are not already covered under the existing regulations. The integration of very large and complex railroad operations present safety hazards not found (or not found to a degree sufficient to merit regulatory attention) either before a transaction or after operations have been successfully integrated. It is entirely appropriate for FRA to address those hazards in the limited context in which they are found. For example, integrating the operations of two railroads will usually require choosing a set of operating rules that differ in important respects from the operating rules used by one of the railroads. The employees of that railroad will have to be trained in the new operating rules and will have to overcome the bias common among railroaders that the railroad on which they started had the best way of running a railroad.

There are several essential tasks that affect railroad safety, *e.g.*, training, qualifications, fatigue, hazardous materials inspection programs, and information system compatibility. Failing to address such issues adequately can jeopardize railroad safety, as some recent mergers have demonstrated. FRA believes that UP/SP, for instance, faced increased exposure to accidents, injuries, and fatalities as overworked officials and employees encountered workforce reductions, inadequate infrastructure and equipment, and service delays and disruptions. Between June 22 and August 31, 1997, UP/SP experienced five major train collisions that resulted in the deaths of five UP/SP employees and two trespassers. These accidents were in addition to a series of yard switching accidents that claimed the lives of four UP/SP train crew employees. In connection with the UP/SP merger, for example, FRA launched a comprehensive review of UP/SP's operations, including its dispatching operations. FRA observed inefficient and unsafe practices by supervisors and dispatchers caused by inadequate training and work overload. FRA made specific

recommendations, which UP/SP accepted, such as creating additional dispatch operations, realigning dispatcher territories to better balance the workload, hiring new dispatchers, tripling the number of dispatching supervisors, making improvements to the software in UP/SP's CAD computer system, and forming a working group consisting of representatives of FRA, rail labor, and UP/SP management to continually monitor and address dispatching issues that may arise. As a result of FRA's effort, UP/SP's safety performance recovered rapidly; UP/SP's fatalities due to train collisions dropped from seven in 1997 to none in 1998.

Similarly, FRA believes that most of the other recent mergers involving Class I railroads had safety integration problems. The BNSF merger, for example, resulted in the merged entity having incompatible electronic database systems used by BN and ATSF. This incompatibility resulted in terminal offices generating and transmitting inaccurate and incomplete train consist lists and waybills, which compromised the safety of train crews transporting the shipments. Even at a very simple level, BN and ATSF each had locomotives bearing the same number; this problem was not addressed before integrated operations began, resulting in dangerous confusion for dispatchers and train crews. In NS's and CSXT's acquisition of Conrail, both railroads also grappled with information technology shortcomings in preparing hazardous materials shipping papers, and training deficiencies in the computer software programs and the safety laws.

Based on observation, professional experience and judgment, and empirical evidence, FRA believes that there is a nexus between safe integration of large railroads and the subject matter areas identified in the SIP rule. Although filing a SIP will involve certain costs, burdens, and delays, FRA reasons that the safety benefits that will result from the SIP process outweigh these impediments.

Finally, there was some confusion within the regulated community that the SIP rules would impose explicit standards for the elements the railroads would have to address in their SIPs. FRA therefore clarifies that its rule only requires a railroad to identify measures, efforts, commitments, and targeted completion dates that it will take to completely integrate those elements identified in § 244.13. *See* § 244.11 for the contents required in a SIP. FRA's review and approval is predicated on whether the details in executing the elements in the plan provide "a reasonable assurance of safety." 49 CFR 244.19. As enunciated in the NPRM, FRA reiterates that:

> [I]t has no intention of operating the railroad or questioning management decisions implementing the SIP. Instead, the agency sees it[s] role as conducting a rational basis review of the SIP, meaning that the plan must be reasonable.

63 Fed. Reg. 72,234 (1998). Provided that the SIP comprehensively explains how an applicant intends to proceed from commencement to completion in executing a transaction, FRA will approve the plan, contingent upon fulfillment of the elements enunciated in the plan and execution of those operations. In summary, a SIP must provide for the safety of operations, systems, practices, and programs that are identified in FRA's final rule before FRA will approve the plan.

FRA's Section-by-Section Analysis of Its Final Rule

The final rule contains significant changes from the proposed rule in response to the written comments received, the testimony at the public hearing, and further review and reflection within FRA. This section of the preamble explains the changes made in the final rule to the provisions of the NPRM. FRA informs interested parties that this section focuses on the specific requirements of FRA's proposed and final rules as applied to the coextensive authority of the STB to regulate the transactions identified, and respectfully refers the regulated community to the agency's Section-by-Section Analysis of the NPRM for a full discussion of those aspects of the proposed rule that remain unchanged in the final rule. *See* 63 Fed. Reg. 72,228-35 (1998).

Subpart A–General

Section 244.1–Scope, Application, and Purpose

Proposed rule: FRA proposed that a railroad seeking to consummate certain discrete transactions would be required to file a SIP. Section 244.1(a)(1) proposed that a Class I railroad, a railroad providing intercity passenger service, or a commuter railroad seeking to acquire, merge, or consolidate with a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad would be subject to this part. The rule further proposed that a Class II railroad applying to acquire, consolidate, or merge with another Class II railroad with which it would connect so as to involve the integration of operations would also be required to file a SIP. Additionally, part 244 would apply to any merger, consolidation, or acquisition, excluding a transaction involving a Class III freight-only railroad, that would result in operations generating revenue in excess of the Class I railroad threshold, and all start-up operations as defined in § 244.9.

Paragraph (b) of this section explained that the proposed rule was designed to mandate that a railroad detail a plan before it would merge, consolidate, or acquire another railroad to ensure that safety interests were advanced before integrating operations of complex transactions. Section 244.1(c) informed the regulated community that part 244 applied only to FRA's disposition of an application filed pursuant to this part, and did not apply to the STB's rules, 49 CFR part 1106, governing transactions under the STB's authority.

Comments: FRA received several comments addressing a wide range of views on the proposed scope of the SIP rule. The AAR recommended that the rule should cover only Class I-Class I or Class I-passenger operations transactions because of the magnitude and complexity of these transactions and the lack of evidence that the other proposed transactions demonstrated a compromise to railroad safety. The ASLRRA and W&L suggested that the rule regulate only Class I transactions given that Class II railroad operations are less complex than their Class I counterparts, *e.g.*, lower volume, slower speeds, shorter consists, and more condensed networks, and the weight of the evidence shows that only Class I railroads need to be regulated. The ASLRRA and W&L added that Class II railroads should be regulated on an *ad hoc* basis and that the proposed coverage of start-up operations should be dropped. Amtrak commented on start-ups as well, expressing its position that a SIP should only be required when a start-up involves a new railroad and not existing railroads commencing operations over newly constructed track. APTA opined that the rule should not apply to start-ups covering existing commuter railroads that commence operations over newly constructed track or extending service on existing track.

Conversely, the BMWE, BRC, and TTD suggested that the scope of the rule be expanded to cover Class II and Class III railroads. The BRC, for instance, asserted that although Class III railroads present less complex operations than their Class I counterparts, shortline railroads use less sophisticated roadway equipment and track maintenance practices because of their lower revenue base, and employ workers who may not understand the complexities of Class I rail traffic control systems with which they interchange. The TTD supported its position by claiming that shortline railroads lack sufficient capital resources, training requirements, and staffing levels to execute transactions, and that these railroads have higher casualty and accident rates than Class I railroads.

Final Rule: Having considered the entire spectrum of comments, FRA believes that the SIP rule should apply only whenever a Class I railroad proposes to merge with, consolidate with, or acquire control of another Class I railroad or a Class II railroad with which it also proposes to amalgamate operations. The

agency has re-examined the anecdotal and empirical evidence and determined that there is a correlation between large-scale transactions and compromises to railroad safety in the absence of advance planning and the preparation of a SIP. As the recent UP/SP and BNSF mergers illustrated, large-scale transactions present unique challenges in operations that can affect the resulting carrier's ability to conduct business while complying with the safety laws. (Indeed, CSXT and NS may have experienced the same shortcomings in the *Conrail Acquisition* had FRA and the STB not required the railroads to file individual SIPs addressing a systematic plan that assessed the safety effects of the transaction and explaining the manner in which they intended to implement the transaction.) Integrating cultures and differing work rules, migrating work forces, deploying capital resources, and adopting information systems are initial steps that must be planned before consummation and implemented during integration to ensure the safety of railroad employees and the public, and the protection of the environment. Therefore, to combat safety and operational problems associated with complex transactions, FRA is requiring a SIP for Class I-Class I transactions and Class I-Class II transactions when there is an amalgamation of operations. The agency believes that advance safety planning by an applicant will promote safety of its lines and minimize exposure to unnecessary accidents, incidents, injuries, or fatalities.

Although FRA recognizes that transactions not involving Class I railroads (*e.g.*, Class II railroads, passenger railroads, and start-ups) can be sophisticated operations, the agency has decided to withhold regulating these transactions for the time being. Nevertheless, FRA reserves the right to revisit the scope section should evidence or experience warrant expanding the reach of the SIP rule.

FRA also notes that paragraph (b) of this section has been modified from the proposed regulatory text to read, "This part does not preclude a railroad from taking additional measures not inconsistent with this part to provide for safety in connection with a transaction." The meaning and application of this paragraph, however, remains unchanged.

Section 244.3–Preemptive Effect

Proposed Rule: FRA proposed this section to inform the public of its views regarding the preemptive effect of the proposed rule. The rule would provide that 49 U.S.C. 20106 preempts any State regulatory agency rule covering the same subject matter as the regulations proposed with the exception of a provision directed at an essentially local safety hazard.

Comments: The AAR commented that FRA's reading of the preemption provision of the safety laws is incompatible with the STB's exclusive jurisdiction over economic regulation of railroads.

Final Rule: The final rule adopts the proposed rule in full. (The AAR's comments and FRA's response are discussed in the preamble above.)

Section 244.5–Penalties

Proposed Rule: FRA proposed § 244.5 to identify the penalties that the agency may assess upon any person, including a railroad or employees of a carrier, that violated any requirement of this part. The provision would provide that any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, and FRA may assess a penalty of up to $22,000 per violation where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury. Each day would constitute a separate offense, and the agency could assess civil penalties against individuals for only willful violations of this part. Criminal penalties would be available for persons knowingly and willfully falsifying entries or reports required by the SIP rule.

Paragraph (b) of this section would authorize FRA to exercise any of its other enforcement remedies available under the safety laws if an applicant failed to comply with this part. For instance, FRA could issue an emergency or compliance order or seek the issuance of a mandatory or prohibitory injunction should a railroad violate § 244.21.

Comments: Two parties commented on this section. The TTD suggested that the agency clarify the penalty provision to reflect that an individual may be subject to the maximum penalty under the safety laws. The AAR restated its jurisdictional argument that was discussed earlier, asserting that FRA lacks the authority to assess penalties against an applicant, and that conditions or remedies imposed by the STB, such as a cease and desist order, would suffice to address a noncomplying condition.

Final Rule: FRA adopts the proposed rule in full. FRA refers the TTD to the definition of "person" contained in § 244.9, which covers individuals such as managers, supervisors, officials, or other employees or agents of a railroad, and independent contractors providing goods or services to a railroad. As explained earlier in the preamble, the agency believes that the safety laws authorize the issuance of this final rule and its penalty provisions. FRA further reasons that enforcement is a necessary and effective tool to promote compliance

with the safety laws. Such enforcement actions include assessing civil penalties, issuing compliance, disqualification, or emergency orders, seeking equitable remedies in Federal court, or referring selected incidents to the Department of Justice for criminal investigation and prosecution. In the SIP rule, these sanctions are necessary to ensure that applicants obtain agency approval of a proposed SIP before implementing a regulated transaction, and execute all measures provided in an approved plan. FRA approval or disapproval of a SIP serves as a baseline for enforcement. Should the agency disapprove of a SIP or portions thereof, this provision provides various remedies if the railroad does not change its SIP to bring it into compliance with the law. Likewise, FRA can take enforcement action if the railroad fails to implement specific requirements of an approved SIP that currently exist under the safety laws. In summary, FRA believes that this section will ensure compliance with the SIP rule by identifying the legal and equitable remedies available.

At this time, FRA has decided not to include a schedule of civil penalties for this rule. The agency received no comments from interested parties about the appropriate penalties corresponding to the sections violated in the rule. Therefore, FRA will reserve Appendix A to 49 CFR part 244 until further notice. Because such penalty schedules are statements of policy, notice and comment are not required before their issuance. *See* 5 U.S.C. 553(b)(3)(A).

Section 244.7–Waivers

Proposed Rule: Proposed § 244.7 would provide the procedures for seeking a waiver of compliance with the requirements of the SIP rule. Any railroad subject to part 244 could petition for such a waiver, and FRA would conduct its own independent investigation to determine whether an exception to the general criteria existed to warrant granting the waiver, provided that the waiver would not compromise or diminish rail safety.

Comments: The AAR suggested that FRA's waiver provision be modified to meld it with the STB's waiver provision.

Final Rule: The proposed rule is adopted with the addition of paragraph (d). FRA believes that its rule text is closely aligned with the STB's counterpart, but informs interested parties that its waiver provision governs only FRA's disposition of a petition for a waiver. An applicant must still seek a waiver from the STB to be free and clear of any SIP requirements under 49 CFR parts 244 and 1106. This caveat is spelled out in paragraph (d) of this section.

Of special note, FRA informs applicants that a petition for a waiver in which a Class I railroad seeks to consummate a transaction with a small Class II

railroad with which it proposes to amalgamate operations may be received more favorably than a waiver request in a transaction involving two Class I railroads. Presently, FRA intends to focus its energies on monitoring transactions involving Class I and large-scale Class II railroad operations, *e.g.*, the Canadian National Railway Company's acquisition of the Wisconsin Central Transportation Corporation,[6] where it believes systemic operating deficiencies are most likely to manifest themselves during the integration phase if no SIP is prepared and implemented. Although transactions involving smaller-scale Class II railroads may present safety challenges, FRA opines that not every merger, consolidation, or acquisition covered in this rule should face a comprehensive SIP review. Rather, FRA invites applicants seeking to execute less complex transactions to petition for a waiver of this rule's requirements. FRA will then review the petition on an *ad hoc* basis and may grant it should the agency determine that it is in the public interest and is consistent with rail safety.

FRA reminds the regulated community that it reserves the right to impose any conditions as it believes are necessary to promote rail safety. The agency further advises that it has plenary authority to approve or reject a petition for a waiver of this rule, and its decision is "agency discretion by law." 5 U.S.C. 701(a)(2); *see also Heckler v. Chaney*, 470 U.S. 821 (1985).

Section 244.9–Definitions

Proposed Rule: The NPRM proposed an extensive set of definitions that would introduce the regulations. As FRA explained in the proposed rule, the definitions were issued to clarify the meaning of important terms as employed in the rule text and were designed to minimize any possible misinterpretation of the rule. Because the commenters only responded to two proposed definitions, FRA will focus on these terms. The agency refers interested parties to the NPRM for a complete recitation of the meaning and application of those definitions that are adopted as proposed. *See* 63 Fed. Reg. 72,230 (1998).

FRA proposed defining "corporate culture" to mean the attitudes, commitments, directives, and practices of railroad management with respect to

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[6] A SIP was prepared and adopted in that case. *See Canadian National, et al.–Cont.–Wisconsin Central Transp. Corp., et al.*, 5 S.T.B. 516 (2001) (STB order mandates the preparation of a SIP) (hereinafter "*CN/WCTC*"); and *CN/WCTC*, 5 S.T.B. 890 (2001) (STB adopts the SIP and approves the transaction).

safe railroad operations. The concept was to cover a railroad management's attitudes, directives, planning and resource allocations when safety was at issue. "Best practices" was defined to mean the safest and most efficient rules or instructions governing rail operations that a railroad issued.

Comments: FRA received two comments on "corporate culture." The AAR represented that the definition as applied could not be quantified in an objective fashion to place an applicant on notice about the measures that must be taken to comply with this element. At the same time, the BMWE wanted to expand the definition to include modifications or changes to CBAs that were not negotiated under the Railway Labor Act that the applicants wished to have the STB impose under the authority of 49 U.S.C. 11321 (commonly referred to as "cram downs"). *See* 49 U.S.C. 11324(c).

The AAR also questioned the definition of "best practices," asserting two reservations. First, the AAR asserted that the clause "railroad industry standards" is code for FRA practices. Second, the railroad organization claimed that the proposed definition invited the agency to formulate business decisions. In response, the AAR recommended qualifying the definition to permit an applicant to select the "best practices" of the parties that are subject to the transaction, which would best promote the safety interests.

Final Rule: FRA amends the proposed definitions. "Corporate culture" is now defined as "the totality of the commitments, written and oral directives, and practices that make up the way a railroad's management and its employees operate their railroad." The notion is to capture the business directives issued by a railroad's management and the practices implementing these directives by labor to encompass a wide range of field operations. These activities include the formulation, development, issuance, and execution of measures and programs related to safe railroad operations that involve consultations between railroad management and railroad employees. The heart of the safety issue involved is that FRA has observed (1) that a railroad tends to operate more safely when all of its employees understand that the railroad has a defined way of operating and comply with it and (2) that employees coming from different railroads will tend to continue to do their jobs as they learned them on their first railroad until they are taught to operate differently. This part of the rule is intended to get the railroads subject to a covered transaction to observe their differences, choose how the resulting railroad is to operate, and assure that their employees adopt the chosen culture. FRA does not intend to impose its own choice of corporate safety culture, but insists that the railroad choose and implement its choice.

FRA grappled with "corporate culture" in light of the AAR's comments about how objectively the agency could apply its meaning in evaluating a

proposed SIP, and in light of BMWE's suggestion that it be expanded to include "cram downs." FRA believes that "corporate culture" quantifies sufficient elements to provide for meaningful and objective agency review, and given the spirited debate over cram downs, and the recent settlement among most Class I railroads and labor organizations representing most rail employees, including the BMWE, on the issue of CBA overrides, FRA cannot adopt the BMWE's suggestion that cram downs be considered a part of the definition of corporate culture.

"Best practices" is modified to read those "measures that are tried, tested, and proven to be the safest and most efficient rules or instructions governing railroad operations." This amended definition incorporates the change recommended by the AAR. To reiterate, FRA does not intend to substitute its judgment for that of a railroad in determining which legally permissible safety and efficiency measures to use, but instead will defer to a railroad's construction and application of its operating rules and practices that promote these interests. Put another way, the agency believes that the railroad has the prerogative in identifying the best practices to be employed within the law.

Subpart B–Safety Integration Plans

Section 244.11–Contents of a Safety Integration Plan

Proposed Rule: FRA proposed § 244.11 to frame the structure of a SIP that a railroad must file. The section would require an applicant to prepare a roadmap or playbook detailing the practices and procedures, financial commitment, and timetable for integrating or commencing field operations identified as subject matter areas under § 244.13. In particular, the NPRM would require a plan to propose a timetable from commencement to completion to implement the transaction.

Comments: Only one interested party commented on this section. The AAR generally agreed with FRA's proposal with one exception. The railroad organization opposed the timetable provision in paragraph (f) because it was perceived as being too rigid to afford flexibility in reaching proposed milestones in the plan. The AAR countered with its own textual proposal to require a general overview of steps and order in which the steps would be implemented.

Final Rule: The rule is adopted as proposed with minor textual changes and paragraphs (c)-(e) redesignated as paragraphs (d), (e), and (c), respectively. Paragraph (a) replaces the conjunctive clause "and the best practices of these railroads" with "including the rules or instructions governing railroad operations

of these railroads," and paragraph (b) adds the text "including a reconciliation of the differing rules or instructions governing railroad operations of the railroads involved in the transaction" at the end of the provision to narrow the scope of the information on integrating operating practices a SIP must provide. Paragraph (f) inserts the word "targeted" in lieu of "stated" to enable an applicant to set benchmarks for completing the specified elements. FRA understands the dynamics of assimilating disparate operating practices and procedures and recognizes the flexibility needed to achieve their integration. The change of the operative word "stated" to "targeted" thus assuages the AAR's concern. FRA intends to hold a railroad accountable for conducting front-end planning measures and executing the same within identified milestones to complete the integration of operations.

FRA believes that the final rule should delineate the SIP contents and SIP subject matter areas as separate regulatory functions. The contents provision provides the basis for identifying and addressing the subject matter areas and facilitates a well organized plan that will articulate the execution and implementation of these elements. Section 244.11 best exemplifies the roadmap or playbook concept necessary to address the subject matter areas provided in § 244.13. Accordingly, the section's regulatory heading and introductory text remain unchanged.

Section 244.13–Subjects To Be Addressed in a Safety Integration Plan Involving an Amalgamation of Operations

FRA received several comments expressing a wide variety of opinions about the contents of § 244.13. To improve the flow of this analysis, each paragraph will be treated as a separate section, summarizing the proposal, comments, and final rule. FRA refers interested parties to the NPRM's Section-by-Section Analysis for the background of the elements identified in this section, and the justification for requiring these subject matter areas for transactions that involve an amalgamation of operations. Because FRA received no comments about the basis for or scope of proposed § 244.13, the introductory text of the regulation is adopted as proposed.

Section 244.13(a)–Corporate Culture

Proposed Rule: FRA proposed paragraph (a) to require an applicant to explain the basis for its safety culture. Specifically, the regulation would require a railroad to identify and describe differences in corporate cultures for each

safety-related area; describe how these cultures lead to different practices governing rail operations; and explain how the proposed integration of corporate cultures would result in a system of "best practices" when the proposed transaction was implemented.

Comments: Management and labor organizations commented on the "corporate culture" provision. APTA wanted "corporate culture" to address the safety of passenger operations, and the TTD suggested that a railroad detail similarities and differences in corporate culture to avoid issuing "boilerplate language" in its proposed SIP. Concurrently, the AAR agreed with the proposed rule text because it provided sufficient flexibility in accounting for different organizational structures, styles, and operations.

Final Rule: The proposed rule is adopted with revisions to § 244.13(a)(1), and (3). Subparagraph (1) is refined to mandate that an applicant "[i]dentify and describe differences for each safety-related area between the corporate cultures of the railroads involved in the transaction[,]" and subparagraph (3) is changed to read that the railroad must "[d]escribe, in step-by-step measures, the integration of these corporate cultures and the manner in which it will produce a system of 'best practices' when the transaction is implemented." These provisions draw a closer nexus between safety and corporate culture than the proposed rule and require a railroad to detail the incremental measures it will take to integrate disparate cultures that will culminate in adopting safe and efficient standards governing railroad operations.

As FRA explained in the proposed rule, safety culture is an instrumental element in achieving rail safety. Acquisitions, consolidations, and mergers of large rail operations are complicated transactions that require a railroad to adopt an operating structure that underscore safety and good communications among management, employees, and the employees' union representatives. Such a structure should unify the different cultures under which railroads operate that draw upon the best practices of each to facilitate the formulation, development, issuance, and implementation of safety practices and procedures within a seamless merged company.

To carry out this task, an applicant needs to describe how it will successfully integrate the underlying priorities, practices, and philosophies while implementing the transaction. For example, UP recently published a three-step directive to its officials. First, the railroad indicated that it would focus, in part, on adequate staffing levels and predictable work schedules. Second, it would direct its attention to values, leadership development, training, and quality. Finally, the railroad pledged that it would build a new relationship with its employees. At the same time, NS has established a culture that elevates training,

professionalism, commonality of purpose, and rules compliance to achieve safety on its railroad. NS has acknowledged that rules compliance is most fundamental to avoid accidents or incidents, and has stressed effective communications between management and the rank-and-file workers to implement this measure. CSXT has amplified the importance of safety culture by establishing a cooperative program comprising management officials and labor union members that educates, counsels, and improves the performance of safety-sensitive employees who commit operating rules violations, and instituting safety culture offices that ensure that safety is foremost in job performance. *See* SIP Update at 22.

At bottom, FRA posits that it will not dictate attitudes, directives, planning, or resource allocation criteria under this part. Rather, the agency intends to defer to proposed and implemented planning processes that promote and value railroad safety. It is incumbent on a railroad to resolve different cultures, direct and carry out programs that emphasize safety practices, and engage management and labor to develop, issue, and implement an iteration process to execute these programs. To this end, FRA endorses the corporate culture concept and incorporates the textual standards accordingly.

Section 244.13(b)–Training

Proposed Rule: The proposed rule would require a railroad to discuss its training and educational programs to ensure that its employees and supervisors who are responsible for field operations would be proficient and qualified. FRA identified the employment crafts that would be covered in the NPRM, which were train and engine service employees, dispatchers or operators, roadway workers, signal employees, mechanical officials, and hazardous materials personnel.

Comments: FRA received diverse comments from interested parties. The TTD, for example, wanted the rule to set minimum qualifications and training requirements, and require an applicant to detail the number of class and on-the-job training hours and file a report on hazardous materials training. At the same time, the BRC wanted to establish qualification and training standards for car inspectors when defect ratios exceed three percent for an applicant, and the ATDD suggested training and qualification requirements for dispatchers. The AAR agreed with the regulatory concept, but opposed new training requirements that are not prescribed under the safety laws because such standards do not present an integration issue.

Final Rule: FRA adopts the proposed rule with some substantive changes to the introductory text and paragraph (b)(6). The rule centers on ensuring that designated employees, including information technology personnel affecting hazardous materials transportation, are proficient, qualified, and familiar with the operating rules and operating tasks of territory assigned when these employees are moved to a new territory or the operating rules on a given territory are changed. Training impacts integration of operations when employees are either transferred to new divisions or subdivisions, or when operating rules, timetables, or timetable special instructions, *e.g.*, superintendent bulletins, are changed in an assigned territory. In other words, when operating circumstances change, the "front line" employees must be familiar with all aspects of their crafts or occupations. A SIP should also include details identifying the scope and depth of the type of training operating personnel will receive, discuss the resources allocated to conduct and complete training, and a proposed schedule for reaching this milestone.

FRA and the AAR are in agreement about the concept of the SIP rule. It is not the agency's intention to prescribe new substantive standards in this rulemaking action. Instead, the rule requires a railroad seeking to consummate a transaction to inaugurate and implement certain programs when integration commences. In this instance, an applicant needs to make certain that its operating employees are conversant in logistics, operations, and equipment handling in unfamiliar localities, and when operating rules, timetables, or timetable special instructions are changed in an assigned territory. Although FRA is receptive to the labor organizations' recommendations, the agency believes that training standards are more appropriate in another rulemaking action and therefore, declines the invitation.

Section 244.13(c)–Operating Practices

Proposed Rule: FRA proposed requiring a railroad to provide operating practices information that would address operating rules, accidents/incidents, hours of service laws, and the alcohol and drug and locomotive engineer qualification and certification programs. The regulation would also require an applicant to discuss the efforts taken to minimize fatigue of covered service employees, *i.e.*, employees who perform train and engine service, dispatching, or signal system service, to enhance safety in the field and reduce the likelihood of committing errors while performing safety-sensitive functions.

Comments: Four parties filed comments on this proposal. The labor union commenters supported the proposal, but suggested changes. The BMWE wanted

the rule to also require a railroad to consider fatigue management of roadway workers because of the physical demands of their labor and the travel necessary to carry out their assigned tasks. The BRC recommended that the proposed accident/incident reporting procedures be amended to require an applicant to certify the integrity of electronic data entered and a security system to reflect any amendments to initial data entries. The TTD supported the provision, but suggested four changes. First, the labor organization wanted a railroad to identify the size of current operating crews and detail the injuries, fatalities, and expenditures on safety-related claims. Second, it recommended that an applicant file a compilation of all alcohol and drug tests performed and their results for the previous three years, and an explanation of its options for substance abuse treatment. Next, it wanted a railroad to specify the measures necessary to minimize employee fatigue. Lastly, the TTD wanted a SIP to identify how an engineer would be qualified on the physical characteristics to operate over any new territory.

The AAR also commented on paragraph (c). The railroad organization agreed with the operating rules provision because of its integral nature in governing operations on a new railroad system, but opposed the accident/incident reporting and alcohol and drug testing provisions on the ground that they are not integration issues unique to regulated transactions.

Final Rule: FRA adopts the proposed rule with two modifications. The agency amends § 244.13(c)(1) to add "freight and passenger service" to the provision requiring a railroad to identify the operating rules, timetables, and timetable special instructions that govern railroad operations. The inclusion of this proviso renders § 244.13(l) redundant, which substantiates its withdrawal from the final rule. FRA also drops proposed paragraph (c)(2) from the final rule, agreeing with the AAR that there is no correlation between accident/incident reporting procedures and safe integration of operations. The agency has determined that accidents/incidents reporting is not a safety problem with the transactions it has reviewed. FRA believes that the current regulations under 49 CFR part 225 achieve the interests of safety for reporting accidents or incidents and establishing an internal control plan under § 225.33. Therefore, the accidents/incidents provision is unnecessary and is withdrawn.

FRA believes that the final rule captures the information a railroad needs to address in a SIP to ensure that operations are performed safely during the integration phase. Although the agency considered expanding the reach of the operating practices area, it decided to focus on those employees and practices that will be most affected by a transaction, particularly those aspects that involve logistics, operations, and equipment handling in unfamiliar territories, and the

need to retain institutional knowledge on lines experiencing operational changes. A railroad, for instance, needs to identify the alcohol and drug testing programs that will apply after it consummates operations to facilitate continuity and consistency during the transition period. Again, the rule's objective is to require an applicant to conduct advance planning of operations that impact rail safety. The operating practices enumerated in the rule text are such critical operations that mandate detailed planning. This rationale thus undergirds the requirements contained in this provision.

Section 244.13(d)–Motive Power and Equipment

Proposed Rule: Section 244.13(d) would require an applicant to identify the qualification standards for employees who inspect, maintain, or repair rolling stock and designate the facilities that will repair the rolling equipment, and provide adequate assurances that mechanical officials who are responsible for performing required inspections and tests of the equipment are proficient in mechanical practices to safeguard the use of freight or passenger cars and locomotives on a railroad.

Comments: The AAR, BRC, and TTD shared their respective comments with FRA about the proposed rule. The AAR agreed that the regulation should be adopted with the proviso that a railroad be afforded flexibility to change the designation of repair facilities without the need of agency approval. The BRC took issue with the provision "designation of facilities that will repair such equipment" because it implies that a railroad would be authorized to assign repair facility locations irrespective of safety concerns. The BRC recommended that the sentence read, in part, that an applicant must identify "all facilities being used, and that will be used following consummation of the transaction, to repair such equipment," to enable FRA to determine whether a railroad is eliminating redundant repair facilities or increasing the distance noncomplying cars may be permitted to travel. The TTD also wanted to amend the provision to require a railroad to identify the average and mean age of engines owned by an applicant and the location of new repair facilities.

Final Rule: FRA agrees with the BRC that a SIP must identify all repair facilities that are being used or will be used after a transaction is consummated. The agency is concerned about the safety of rolling stock and believes that the modification will enable it to determine whether an applicant is eliminating redundant repair facilities or increasing the distance in which noncomplying rolling equipment may travel, thereby compromising rail safety. FRA thus

rewords the last clause in the provision to read "the designated facilities used, or to be used, to repair such equipment" to reflect this amendment.

Section 244.13(e)–Signal and Train Control

Proposed Rule: The NPRM would require a railroad to identify the signal and train control systems used, and maintenance, capital improvement, and research and development projects planned for signal and train control operations.

Comments: The TTD supported the proposed requirement, but recommended that the rule should also require an applicant to identify signal malfunctions and false signal reports, dark territory, and accidents in signal and non-signal territory. The AAR opposed the TTD's suggestion to require a railroad to identify signal malfunction reports, asserting that it does not present an integration issue.

Final Rule: FRA agrees with the AAR that the TTD's proposal does not present an integration issue but instead, an operational issue affecting the routine movement of engines, equipment, or trains. The TTD's suggestion is therefore not adopted. The final rule tailors the proposed rule text to require a railroad to address "any planned amendments or modifications to capital improvement" to focus an applicant on advance planning of signal systems integration to prevent any incompatibility between signal and train control systems and reconcile or harmonize signal practices and standards when dissimilar systems exist.

Section 244.13(f)–Track Safety Standards and Bridge Structures

Proposed Rule: FRA would require a railroad to identify the maintenance and inspection programs for track and bridges to ensure that its infrastructure was safe or would be repaired, rehabilitated, or replaced, if necessary.

Comments: The labor organizations, led by the BMWE and TTD, wanted the regulation to require an applicant to identify the qualification standards for trackside workers to track the requirements contained in § 244.13(d). The AAR opposed the NPRM, claiming that Track Safety Standards and bridge structures do not present an integration issue.

Final Rule: Based on FRA's recent assessment of the *Conrail Acquisition*, the agency believes that track safety does present an integration issue that should be addressed in the final rule. FRA's audit found that CSXT experienced track maintenance and inspection practices shortcomings after the implementation of the *Conrail Acquisition*. In 1999, FRA determined that the railroad's track

defects ratios did not improve from the previous year, and track-related accidents remained a problem on its lines. These accidents were caused by wide gage and defective switch points and track hardware at turn-outs, which were easily preventable and evidence the need for the railroad to redouble its efforts in upgrading its track program. *See* SIP Update at 24. Because track maintenance and inspection programs are essential elements to promote safe rail operations during integration, FRA believes that the roadway or trackside workers should be qualified in carrying out these tasks. As a result, the final rule adopts the labor organizations' recommendation by requiring a SIP to identify the qualification standards for these workers.

Section 244.13(g)–Hazardous Materials

Proposed Rule: Section 244.13(g) proposed requiring an applicant to address hazardous materials in a SIP. First, a railroad would have to identify a hazardous materials inspection program that covered field inspection practices, communication standards, and emergency response procedures. Second, the applicant would have to discuss its development and deployment of an automated system at designated locations for immediate retrieval of hazardous materials shipping papers.

Comments: Three parties commented on the proposal. The BMWE and TTD wanted an applicant to provide an emergency action hazardous materials plan. Conversely, the AAR opposed the requirement of developing and delivering computer software operating systems because there was insufficient evidence that the regulation would promote the safe integration of hazardous materials safety programs.

Final Rule: FRA has reorganized paragraph (g) by requiring a railroad to identify a hazardous materials inspection program that covers four discrete areas. The first three are identical to the proposed rule. The fourth area reconfigures proposed § 244.13(g)(2) to require the program to address information technology ("IT") systems and employees who are responsible for shipping papers accompanying hazardous materials shipments. The provision also stipulates that a SIP should identify preventive measures that an applicant will use in responding to IT integration and hazardous materials documentation problems.

FRA believes that IT systems that transmit and receive hazardous materials information must employ programs that properly place cars in train consists and identify the contents of hazardous materials shipments to the hostler and train and engine crews. The agency documented several IT deficiencies in

implementing the *Conrail Acquisition*, finding improper hazardous materials shipping papers and inaccurate train consists hauling hazardous materials shipments because of, in part, the lack of familiarity with the data systems used to process hazardous materials documentation. *See* SIP Update at 2, 25, and 28. To prevent recurrences, FRA believes that a railroad should test the computer systems that will be responsible for handling hazardous materials paperwork to detect and eliminate any incompatibility problems found and provide for information accuracy. FRA's revision captures the lesson learned from a recent transaction.

Section 244.13(h)–Dispatching Operations

Proposed Rule: Paragraph (h) would require a railroad to identify the dispatching system to be adopted, the migration of the existing system to the adopted one, if applicable, the qualifications for determining duties performed by dispatchers or operators, and the volume of work assigned to the dispatchers or operators.

Comments: The ATDD and AAR provided disparate comments on this proposal. The ATDD opined that a railroad should be required to address the familiarity of the dispatchers with the territory that is subject to the transaction, whereas the AAR opposed this recommendation because no current substantive regulation exists and proper training alone may provide adequate territory familiarization. The AAR also asserted that the dispatching requirements should apply only to operations that are affected by the transaction.

Final Rule: FRA adopts the suggestions that were provided. The proposals are incorporated in § 244.13(b) introductory text and § 244.13(b)(4) by requiring a SIP to identify training programs for dispatchers to ensure familiarity with the operating tasks of the territory assigned when these employees are assigned to a new territory or the rules governing an assigned territory are changed. Otherwise, the term "workload" is added to paragraph (h)(3) and paragraph (h)(4) is withdrawn. This cosmetic change retains the sum and substance of the information on dispatcher workloads in a SIP without setting out a separate regulatory function.

Section 244.13(i)–Highway-Rail Grade Crossing Systems

Proposed Rule: The NPRM would require a SIP to address highway-rail grade crossing signal system safety, emergency response measures, public

education initiatives, and proposals to improve grade crossings and grade crossing system warning devices.

Comments: Only one party commented on the proposal. The AAR maintained that the proposed regulation was inappropriate because railroads already discuss grade crossing issues and upgrades with state highway departments, and FRA's insertion into the process may create conflicts with these government agencies and impose unnecessary burdens on an applicant. Alternatively, the AAR suggested that a SIP require a railroad to discuss grade crossing safety programs and the integration of the programs in a transaction.

Final Rule: The final rule adopts the AAR's suggestion in part and breaks out the information required in a SIP in more detail. The regulation mandates that an applicant identify the grade crossings that will experience an increase in traffic as a result of the transaction, the existing grade crossing programs of the railroads as they apply to these crossings, the integration of the grade crossing programs of the railroads that are subject to the transaction to the extent the programs differ, emergency response action plans, measures to avoid blocking or obstructing grade crossing systems, and signs used for changes to rail traffic patterns.

FRA believes that grade crossing safety is a critical element that a SIP must address. As was explained in the NPRM, statistics show that the vast majority of fatalities and injuries during railroad operations occur at grade crossings due to collisions or trespass incidents. 63 Fed. Reg. 72,233 (1998). A complex transaction presents its own challenges given that a railroad acquiring, consolidating, or merging with another railroad will dedicate traffic on certain corridors or lines. The SIP rule requires an applicant to consider the impact of increased traffic density in a territory on the safety of grade crossings.

Again, FRA's role is not to approve or reject specific measures, such as upgrading grade crossings, a railroad may take during the course of a transaction. Rather, the agency reviews the applicant's proposed plan within the context of providing a "reasonable assurance of safety." FRA does not foresee that such a review process will interfere with a railroad's consultations with a state highway agency or impose a substantial burden on the railroad. The interests of safety direct an applicant to develop and implement a grade crossing program that will reduce accidents, incidents, injuries, and fatalities that occur at crossings. The grade crossing element is thus retained in the final rule.

The rule also sets out discrete new items–avoidance of blocked crossings and signs used for changes in traffic patterns–that a railroad must address in its grade crossing program. Blocked crossings are of particular concern to FRA and communities that will experience increased rail traffic over its crossings. To

illustrate, the agency found that a significant number of NS crossings were blocked for extended periods of time in the State of Ohio during the end of 1999. *See* SIP Update at 20. The agency has determined that this deficiency is more systematic and frequent than previously believed, creating unnecessary challenges for emergency response vehicles and creating congestion at crossings. To reduce the likelihood of similar problems occurring in the future, FRA believes that a railroad should identify in its SIP practices to alleviate blocked crossings, which may include identifying additional sidings required, crew change points, and other actions or construction needed. (The agency notes that this requirement is similar to the STB regulations requiring applicants to submit evidence about potentially blocked grade crossings as a result of anticipated merger-related traffic increases. *See* 49 CFR 1105.7(e)(7) and 49 CFR 1180.1(f)(3)(ii) and 1180.8(a)(2), requiring an applicant to identify specific measures to be employed to avoid blocking crossings that may result otherwise due to the consummation of a transaction, at 66 Fed. Reg. 32,582, 32,585 and 32,589 (2001). The SIP must also discuss the signs used for changes in traffic patterns. FRA believes that these signs serve to advise motorists and pedestrians of the frequency of rail traffic traversing crossings to protect them from possible collisions.

Section 244.13(j)–Personnel Staffing

Proposed Rule: Paragraph (j) would require a SIP to cover personnel staffing in terms of the number of employees, both current and proposed, for certain occupations carrying out safety-sensitive service in the railroad industry.

Comments: FRA received two comments to this proposal. The ATDD agreed with the regulatory text as proposed. The AAR wanted to clarify the proposal by authorizing a railroad to file a copy of its Labor Impact Exhibit that is filed with an application to the STB under 49 CFR part 1180 to avoid any redundancies in information provided pursuant to an application.

Final Rule: FRA adopts the proposed rule with one minor modification. An applicant need only address the personnel staffing element when it projects a change of operations that will impact workforce duties or responsibilities. A railroad may omit this section if it expects operations will remain constant after the transaction is consummated. Otherwise, it must address the full litany of job functions that are provided in subparagraphs (1)-(8).

FRA declines to accept AAR's suggestion in authorizing a railroad to file a copy of its Labor Impact Exhibit to satisfy this provision. Under 49 CFR 1180.6(a)(2)(v), also known as the Labor Impact Exhibit requirement, the

STB only requires an applicant to address projected changes that a transaction will impact on its employees by class or craft, the geographic locations where the impact will occur, the timeframe of the impact, and whether any employee protection agreements have been reached. The Board's regulation thus does not cover current employees and does not enunciate specific job duties that are prescribed here. Because the two regulations are not congruent, the filing of a Labor Impact Exhibit alone will fall short of the requirements enumerated in this section. Nevertheless, a railroad may use the same information provided in its Labor Impact Exhibit to meet portions of this regulation where appropriate.

Section 244.13(k)–Capital Investment

Proposed Rule: Paragraph (k) would require an applicant to explain its capital investment program by describing its intended investments in the company's infrastructure and addressing changes to existing investment forecasts.

Comments: The TTD agreed with the capital investment proposal.

Final Rule: FRA adopts the rule as proposed.

Section 244.13(l)–Relationship Between Freight and Passenger Service

Proposed Rule: FRA proposed requiring a railroad to describe the relationship of freight and passenger service on railroad lines subject to a transaction.

Comments: The agency received comments from APTA and OK DOT about proposed paragraph (l). APTA requested that the regulation enunciate the schedule changes involving commuter and freight service on operations subject to the transaction. OK DOT, on the other hand, wanted the provision to require an applicant to address the density of combined freight and passenger operations.

Final Rule: Upon further consideration, FRA has concluded that freight and passenger service should be addressed within the context of the operating rules that will govern their operations. The agency reasons that safe integration is premised on identifying those rules and practices that will govern these services on property that is the subject of a transaction. Service alone does not present an integration issue that warrants separate analysis and requiring a railroad to address schedule changes or density concerns serves to "micromanage" an application, which is contrary to the purpose of the SIP rule. Service falls within the rubric of railroad operations that must be evaluated to identify the potential safety impact and the measures directed to minimize any consequences during

integration. Based on this analysis, FRA withdraws proposed paragraph (l) and transfers "freight or passenger service" to paragraph (c)(1).

Section 244.13(m) (Now Section 244.13(l))–Information Systems Compatibility

Proposed Rule: Section 244.13(m) proposed requiring a railroad to address the steps it intended to execute to provide a single interface of data on train consists, freight car and locomotive movements and movement history, also known as "wheel reports," dispatching operations, accident/incident reporting and recordkeeping requirements, and emergency cessation of operations.

Comments: Both the BMWE and TTD suggested expanding the regulation to require information systems to address movement and movement history of roadway equipment and hi-rail vehicles.

Final Rule: FRA adopts the proposed rule, now redesignated as § 244.13(l), with two changes. First, the final rule removes proposed subparagraph (4), which addressed accident/incident reporting and recordkeeping requirements within the information systems context. As explained in its discussion of Section 244.13(c)(2) above, FRA has concluded that accidents/incidents reporting is not a problem warranting a SIP. The agency therefore believes that requiring an applicant to explain the transmission and receipt of such information when integrating computer technologies is unnecessary. Consequently, the provision is withdrawn.

Second, this section adds one provision. A SIP must also address the compatibility of information systems that are responsible for transporting hazardous materials to ensure their safe movement while a railroad is switching or converting hardware, software, or program systems. The agency found that both NS and CSXT experienced difficulties in identifying and tracking hazardous materials shipments through their respective computer systems after they switched over from Conrail's "CATS" system in June 1999. *See, e.g.*, SIP Update at 25, 28, and 32. For example, CRCX employees, who work for the Shared Assets Areas in the *Conrail Acquisition*, reportedly had difficulty in obtaining documentation from CSXT and NS computer systems to properly place hazardous materials shipments in train consists. *Id.* at 32. Hazardous materials shipping papers must represent the contents of shipments being transported on the railroad. To this end, the IT systems must be capable of receiving and transmitting accurate hazardous materials documentation to ensure the seamless and efficient flow of information during the interchange of shipments. FRA, however, disagrees with expanding the regulation to include roadway equipment or hi-rail vehicles. There has been no evidence of problems associated with

these service vehicles during the integration of complex transactions. Therefore, FRA demurs on the suggestion.

Section 244.15–Subjects to be Addressed in a Safety Integration Plan Not Involving an Amalgamation of Operations

Proposed Rule: FRA proposed, in part, requiring a railroad engaging in a transaction that did not involve an amalgamation of operations to file a SIP that covered only the training, personnel staffing, and capital investment elements.

Comments: The AAR opposed requiring a SIP for a "paper transaction" because such a transaction does not present operational changes and only serves to impose an unnecessary burden on an applicant without any consummate safety benefit. In response, the AAR proposed revising the provision to require a SIP on an *ad hoc* basis when no operational changes exist.

Final Rule: FRA agrees with the AAR's rationale that a "paper transaction" presents minimal changes in operations that will affect rail safety and revises the regulation as suggested. An applicant seeking to consummate a transaction that does not propose an amalgamation of operations need not file a SIP unless FRA directs the railroad to do so.

As we explained in the NPRM, FRA distinguishes "operational transactions" that present a migration of personnel or equipment, or infrastructure changes from "paper transactions" that are limited to changes in company letterhead. *See* 63 Fed. Reg. 72,234 (1998). FRA advises interested parties, however, that changes in operating rules, timetables, bulletins, special instructions, or any other written directives that affect the movement of locomotives or rolling stock impact safety and are therefore designated as "operational transactions," requiring the filing of a SIP. FRA thus adopts a broad interpretation of "amalgamation of operations" by mandating a SIP for transactions that propose only changes in practices or procedures governing railroad operations.

Section 244.17–Procedures

Proposed Rule: The NPRM proposed a set of procedures that would govern the filing and handling of an application to carry out a transaction. Section 244.17(a) provided that a railroad would be required to file a SIP with FRA and the STB no later than the date it submitted its request for authority to the Board. Under paragraphs (b) and (c), FRA would review and comment on the proposed SIP, and the railroad would provide additional information

supporting its plan should the agency require it. Paragraph (d) proposed requiring FRA to issue its factual findings and conclusions on the proposed SIP to the STB before the Board ruled on the application. Section 244.17(e) would require a railroad to coordinate with FRA in implementing a proposed SIP approved by FRA and the STB until integration was complete. The proposed rule also set out the interplay between FRA and the Board during the implementation phase of the transaction in paragraph (f).

Comments: The AAR maintained that the proposal to require the contemporaneous filing of a proposed SIP and a request for authority with the STB was unrealistic, as the same employees generally would write both the operating plan for the STB application and the SIP. The organization also questioned the proposal because it may compromise the quality of the SIP and was inconsistent with the *Conrail Acquisition* proceeding in which the STB gave NS and CSXT four months to file their separate plans after they filed their respective applications. As an alternative, the AAR proposed that the rule provide a railroad 30-90 days after it files its application with the Board to file a proposed SIP.

The AAR further opposed proposed paragraph (b) on the ground that the regulatory text called for information that was beyond the scope of the rule. The organization recommended amending the text to authorize FRA to obtain additional information on matters that address specific safety concerns. Finally, the AAR requested that proposed paragraph (f) be amended to establish a three-year window of regulatory oversight of a railroad's SIP implementation, and that the section add a provision covering the confidential treatment of information provided by an applicant to the agency to safeguard proprietary and competitively sensitive information.

Final Rule: FRA revises Section 244.17 to reflect the proposals advanced by the AAR and to clarify the procedural requirements governing the SIP process. Paragraph (a) is amended to give a railroad up to 60 days after it files an application with the STB to file a proposed SIP with FRA. FRA believes that a two-month interim will provide sufficient time for the company to complete its SIP after filing its operating plan. The agency also adds the phrase "to satisfy the requirements of this part" to paragraph (b) to assuage the AAR's concerns. Restated, the regulation now requires a railroad to provide additional information in a SIP that FRA may require to meet the rule's requirements, such as the operational elements within the framework of the plan's contents as provided in § 244.11. The final rule also has been revised to delete the reference to "exemptions" filed with the STB, because Class I carriers typically file applications in consolidation transactions.

FRA adds paragraph (f) to § 244.17 to require a railroad to communicate with the agency about any changes and refinements to its plan in response to unfolding developments, and file any amendments to its plan with FRA for approval. Proposed paragraph (f) is redesignated paragraph (g), and the last sentence of the proposed provision is amended to reflect that FRA will oversee the implementation of a SIP for a period of five years, for a period prescribed by an order issued by the Board, or when FRA advises the Board in writing that the integration of operations is complete, whichever is shorter. The oversight period is necessary to ensure that the SIP is being implemented as intended, that the railroads are adhering to the representations made in the SIP, that no unforeseen circumstances have arisen requiring FRA to exercise any of its enforcement remedies, and that the milestones established in the SIP are being met in a timely fashion.

Finally, the agency adds paragraph (h) to provide a procedural mechanism for an applicant to request that advance drafts of a proposed SIP and information filed in support of the proposed or approved plan receive confidential treatment should an outside party submit a request for the documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. The regulation directs the railroad to comply with the procedures enumerated under 49 CFR 209.11 to petition for such treatment. Nevertheless, FRA reminds the regulated community that the agency alone will decide whether to grant or deny a request, but that it will afford a company whose request was denied an opportunity to respond no less than five days before the agency discloses the information. *See* 49 CFR 209.11(e). It should be noted, however, that FRA, like the STB, will not treat a proposed or approved SIP that is filed pursuant to the regulations prescribed under 49 CFR 244.17(a) and 1106.4(a) as confidential because the proposed plan will be incorporated in the Board's environmental documentation, which will be made available for public review and comment.

Section 244.19–Disposition

Proposed Rule: Section 244.19 would enunciate FRA's review and approval process of a proposed SIP. The regulation proposed requiring a plan that detailed a logical and workable transition from conditions existing before the proposed transaction to conditions intended to exist after the transaction was consummated. FRA would review the SIP on a "reasonable assurance of safety" standard, meaning that the agency would conduct rational basis review of the plan to ensure that it was reasonably sufficient to comply with the safety laws, provide for safe railroad operations, and satisfy expectations of integration of

operations. The agency would then issue its notice of approval should the SIP prove satisfactory, provided that the railroad implemented the plan as proposed.

The rule also would authorize amendments to a SIP. A railroad could amend its plan as needed with FRA's approval or the agency could mandate changes consistent with rail safety should it identify deficiencies during implementation of an approved plan that were unforeseen while the plan was under review. Again, SIP approval would be contingent on a railroad's fulfillment of the subject matter elements in the plan and the execution of operations necessary to implement the plan.

Comments: The AAR was the only commenter to the proposed section. The railroad organization opposed FRA's formal review and approval process of a SIP, and any amendments thereto, on the grounds of the agency's lack of jurisdiction to consider transactions within the STB's scope of authority, and the need to maximize flexibility in updating and improving safety plans and minimize the burdens imposed by the rule. The AAR proposed four revisions to the section. First, FRA would advise the Board in reviewing a proposed SIP on practices and procedures relating to rail safety, with the STB to determine whether to approve or disapprove of a plan based on its adequacy after FRA comments on it. Second, an applicant would be permitted to file any amendments with FRA and explain the need for the changes should the agency request the same. Third, the section would authorize amendments to take effect within 20 days after they are filed with the agency and remove the review process of amendments. Finally, the AAR recommended modifying paragraph (b) by replacing "later developments" with "amendments to a SIP."

Final Rule: FRA adopts the core of the proposed rule and certain changes advanced by the AAR. Paragraph (a) is rewritten to articulate the standard of review for a proposed SIP, and any amendments thereto, up front. The rule further explains the structure of the plan to be filed, which the NPRM set out. Recast, the SIP must be thorough, complete, and clear; and address a logical and workable transition of railroad operations from conditions before the transaction to conditions intended after the transaction is consummated that provide a reasonable assurance of safety at every step during implementation. FRA intends to work informally with an applicant both before and after the transaction is approved and consummated to ensure that the SIP complies with the regulations and that the transaction is safely implemented.

Consistent with the AAR's proposal, FRA amends paragraph (b) by inserting "any amendments to the plan approved by FRA" in lieu of "all later developments subject to FRA approval that could not be completed before approval of it." This revision clarifies an applicant's role in fulfilling the

elements of an approved SIP by requiring it to implement all of the plan's measures and any amendments to the plan. The agency notes that it may approve portions of a SIP while disapproving other portions if it concludes that the actions under the plan can be segregated without jeopardizing safety.

Section 244.19(c) is also amended by requiring a railroad to substantiate any changes to its SIP and communicate with the agency to resolve any comments about the amendments. The regulation also prescribes that any amendments approved by FRA will take effect within 20 days of approval, and the agency may "request" rather than "require" a railroad to amend its approved plan should circumstances dictate. The operative word "request" is inserted to afford the agency discretionary review of the plan while it is being implemented and sufficient leverage to proffer a change that promotes safety interests.

FRA takes issue with the AAR's suggestion that the agency lacks authority to adopt a formal review and approval process of SIPs. As FRA explained earlier, the agency believes that it has the authority to regulate railroad safety during implementation of mergers, consolidations, and acquisitions that are approved by the STB. FRA has always done so for the hazards presented by railroading generally. In this rule, FRA is exercising its existing jurisdiction and expertise in regulating the safety hazards presented by the proposed integration of operations of different railroads. *See* 49 U.S.C. 20103. In short, the transaction that is approved by the STB is the context within which the potential safety hazards are presented and dealt with, but the transaction itself is not regulated by FRA. The rule does not authorize FRA to sanction or veto a transaction subject to STB approval or to impose conditions upon which approval of the transaction is authorized because those functions are exclusively vested with the STB. *See* 49 U.S.C. 11321-24.

FRA believes that there is a need to codify an ongoing SIP approval process to allow for appropriate enforcement. There are two parts to this process. First, a railroad must submit a proposed SIP for agency review and approval to determine whether the plan meets the requirements of the rule. Second, assuming the proposed SIP, including any amendments thereto, is approved, the railroad must implement the SIP as approved. Should FRA disapprove a SIP, or portions thereof, or the railroad fail to implement the SIP, the rule authorizes the agency to take enforcement action to ensure safety. *See* 49 CFR 244.21(b).

Section 244.21–Compliance and Enforcement

Proposed Rule: Proposed 244.21 would require a railroad to have an FRA-approved SIP before it could change its operations to implement a

transaction. Additionally, the rule would authorize the agency to use any of its enforcement remedies available under the safety laws should the railroad either change its operations without an approved plan or fail to execute any measure in an approved plan. The regulation also provided that FRA would consult with the STB at all appropriate stages of SIP implementation for a transaction that involved Board authorization.

Comments: The AAR objected to this proposal, asserting that FRA is not authorized to take any enforcement action against a railroad under this part because the STB is the only agency with jurisdiction to approve or disapprove a proposed SIP.

Final Rule: FRA revises § 244.21(a) to clarify that, in approving a SIP, FRA is regulating the safety of railroad operations and is neither approving nor disapproving the transaction before the STB nor exercising an alleged veto over whether that transaction can be consummated if it should be approved by the STB. FRA also withdraws proposed paragraph (c) because it duplicates the requirements provided under § 244.17(g). The regulation now requires a railroad implementing a transaction to operate in compliance with the SIP approved by FRA until all of its operations are completely integrated. The rule is rewritten in this fashion to eliminate the possibility of interpreting the rule, as some commenters did, to equate FRA's approval or disapproval of a SIP with approving or disapproving an application to the STB to approve a transaction. As explained above, FRA agrees that the STB has exclusive authority to approve or disapprove a transaction covered by this part.

Correspondingly, FRA's role in the STB's process is to advise the Board on safety issues identified in a transaction. Indeed, the Board's own proposed and final rule relies upon the FRA's safety expertise as the Board evaluates the merits of a transaction and disposes of an application. *See* 49 CFR 1106.4; *see also Tyrrell*, 248 F.3d at 523; *CP Purchase*, slip op. at 5-6 (the STB gives "great weight" to FRA's expert view on rail safety in determining whether to impose any conditions on a proceeding).

Briefly stated, regulation of "every area of railroad safety" is FRA's jurisdiction. *Tyrrell*, 248 F.3d at 523 ("FRA exercise[s] primary authority over rail safety matters under 49 U.S.C. 20101 *et seq*."). In approving or disapproving a SIP under this part, and enforcing one, FRA is regulating *the safety aspects of how* a railroad operates while implementing a transaction permitted by the STB, *not whether* the railroad is permitted to consummate the transaction or on what economic terms. This is an appropriate exercise of the "plenary safety authority with respect to the safety of rail operations–before, during, and after a transaction" which the AAR acknowledges that FRA has.

AAR comments at 9. In that regard, approval of a SIP is no different than approval of an engineer certification program under 49 CFR part 240. There is no question that a railroad must have an engineer certification program approved by FRA and operate in accordance with it at all times, whether or not the railroad is involved in a transaction within the STB's jurisdiction.

In summary, FRA is authorized to exercise any of its legal or equitable enforcement remedies should a railroad either not operate in accordance with an approved SIP or not comply with any element provided in that plan.

Regulatory Impact of FRA's Final Rule

Executive Order 12866 and DOT Regulatory Policies and Procedures

The FRA is adopting rules that will require merging or acquiring railroads to adopt SIPs before commencing merged operations. Two railroads, NS and CSXT, prepared such plans for their acquisition of the Conrail system. One of those railroads has informed FRA that its SIP cost $300,000, the other said it cost $212,000. The main difference is that the more expensive plan was developed almost exclusively by a contractor, while the other was mostly done in-house. It is unlikely that any SIP would cost much more. It is possible that a SIP for a smaller Class I railroad might cost less. A likely range for the cost of a SIP is $150,000 to $400,000. A SIP for a Class II railroad might cost much less. The Class II railroad's business plan will be smaller, and the safety information will be easier to gather. A SIP for a Class II might cost $25,000 to $100,000. It is a one-time expense for any railroad. The assumed total cost of the SIP rule to a railroad is twice the initial cost of preparing the SIP, to account for such vagaries as SIP modifications and restrictions on training.

Although FRA cannot with certainty say which of the several accidents following mergers were the result of poor planning, it appears extremely likely that at least one of them could have been prevented with a SIP. Assuming that the SIP would prevent two fatalities and $600,000 in damage implies that a SIP for the UP/SP merger would have saved at least $6,000,000 in accident costs. FRA believes that one or more of these accidents could have been prevented based on its findings when it did a detailed analysis of the UP/SP operations. For other railroads the accident savings might vary. For a larger railroad, the accident savings might be twice as much ($12,000,000), while for smaller Class I railroads the safety benefits might be one-fourth that much ($1,500,000). FRA does not have as much information on Class II railroads, but it appears that the accident savings on a Class II railroad might be one percent ($60,000) or as

much as twenty percent ($1,200,000) of the savings that would have been available for the UP/SP. These figures are roughly based on ratios of reported accidents, noting that when railroads merge, they become larger entities than they are now.

FRA's careful review of the impacts of mergers that have taken place in the recent past has clearly revealed that mergers and acquisitions disrupt existing safety and operating patterns. Because these transactions are generally justified in significant part by cost savings, there is pressure to close redundant facilities and eliminate positions. This can lead to degradation of safety programs unless formal, written, systematic, and detailed plans are prepared to ensure that safety programs are continued and closely followed. Any less attention to safety could produce catastrophic results, both in terms of economic cost and, more importantly, loss of life.

The final rule will cost $300,000 to $800,000, and will prevent $1,500,000 to $12,000,000 in accident costs for Class I railroads, and will cost $50,000 to $200,000, and will prevent $60,000 to $1,200,000 for Class II railroads. The final rule will not apply to small entities, *i.e.*, the Class III railroads. In addition, the railroad may avoid substantial service difficulties by carrying through the safety planning process. This could save the railroad hundreds of millions or billions of dollars. In the first three quarters of 1998, UP reported losses exceeding $900,000,000 due to service difficulties. The societal losses of these delays is probably much greater, as the figures only account for costs to UP. FRA notes that although numerous parties have submitted data to the STB regarding the impact of the service difficulties, the Board has not attempted to quantify the societal costs of these service problems. *See Rail Service in the Western United States*, 3 S.T.B. 44 (1998).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, requires an assessment of the impact of rules on "small entities." The final rule relates to acquisitions, consolidations, and mergers involving only Class I railroads and a Class I railroad with a Class II railroad where there is a proposed amalgamation of operations. Given FRA's recently published interim policy establishing "small entities" as being railroads that meet the line haulage revenue requirements of a Class III railroad, FRA certifies that this proceeding will not have a significant economic impact on a substantial number of small businesses. *See* Interim Statement of Policy Concerning Small Entities Subject to the Railroad Safety Laws, 62 Fed. Reg. 43,024 (1997).

Paperwork Reduction Act

The information collection requirements ("ICRs") in this final rule have been submitted for approval to the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the ICRs and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours	Total Annual Burden Cost
244.13 - Subjects to be addressed in a Safety Integration Plan (SIP) involving an amalgamation of operations	**8 Railroads**	**1 SIP (plan)**	**360 hours**	**360 hours**	**$22,224**
244.17 - Procedures **- Coordinating Implementation of Approved SIP with FRA** **- Request For Confidential Treatment**	**8 Railroads** **8 Railroads** **8 Railroads**	**25 reports** **50 phone calls** **.5 request**	**40 hours/ 2 hours** **10 minutes** **8 hours**	**92 hours** **4 hours** **8 hours**	**$5,152** **$ 224** **$1,224**
244.19 - Disposition	**8 Railroads**	**2 communications**	**16 hours**	**32 hours**	**$1,792**

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning whether these ICRs are necessary for the proper performance of the agency's function, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Organizations and individuals desiring to submit comments on the ICRs should direct them to the Office of Management and Budget, FRA Desk Officer, Washington, DC 20503. OMB is required to make a decision concerning the ICRs contained in this final rule between 30 and 60 days after publication of this

document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA hereby notices that it cannot impose a penalty on persons for violating ICRs that do not display a current OMB control number, if required. FRA intends to obtain a current OMB control number for any new ICRs resulting from this rulemaking action before the effective date of the agency's final rule. The OMB control number, when assigned, will be announced by separate notice in the *Federal Register*.

Environmental Impact

FRA has evaluated the final rule in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions, as required by NEPA, other environmental statutes, Executive Orders, and related directives. This rule meets the criteria that establish this action as a non-major action for environmental purposes.

Federalism Implications

The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Statement of Energy Effects

The final rule has been reviewed in accordance with Executive Order 13211 (66 Fed. Reg. 28,355 (2001)), which requires agencies to prepare a Statement of Energy Effects describing the effects of certain regulatory actions on energy supply, distribution, or use when such measures are identified as "significant energy actions." FRA certifies that this rulemaking action is not a significant energy action to warrant the preparation of such a statement.

STB's Statement of Basis

The circumstances that led to the promulgation of these rules are set out in the NPRM. As explained there, in the advance notice of proposed rulemaking ("ANPRM") published in the *Federal Register*, at 62 Fed. Reg. 64,193 (1997), the Board requested comments on the extent to which railroads should be

required to provide information pertaining to the manner in which they intend to provide for the safe implementation of merger and acquisition authority granted by the Board. The Board explained that for several years the Board and its predecessor agency, the Interstate Commerce Commission ("ICC"), have considered the issue of safety along with other relevant issues in individual cases. As particularly pertinent here, in the *Conrail Acquisition* proceeding,[7] the Board for the first time required applicants to submit detailed information on how they proposed to provide for the safe integration of their corporate cultures and operating systems, if the Board were to approve the proposed transaction.[8] (The Board required the same type of showing in the CN/IC merger,[9] which the Board approved on May 25, 1999. A SIP also was prepared and adopted in the *CN/WCTC* merger proceeding.[10])

Specifically, the Board's practice in recent railroad merger proceedings involving Class I and Class II railroads has been to require applicants to file detailed SIPs based on guidelines issued by FRA. The railroads' submissions are made part of the environmental record in those proceedings and addressed in the ongoing environmental review process in those proceedings. This allows review and comment by FRA, other interested parties, and the public. The Board's environmental staff, SEA, also independently reviews the plans.

Moreover, the Board has entered into an MOU with FRA, with DOT's concurrence, to establish an ongoing monitoring process during implementation of these transactions. The MOU clarifies the actions that FRA and the Board will take to ensure the successful implementation of the SIP. Under the terms of the MOU, FRA monitors, evaluates, and reviews the applicants' progress in implementing the approved SIP. The MOU provides that FRA may request action by the Board in the exercise of its oversight authority over the applicants to correct safety deficiencies identified and to address other safety-related concerns resulting from the approved transaction. FRA also agrees to report to the Board at least on a biannual basis regarding the applicants' implementation

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[7] *Conrail Acquisition*, STB Finance Docket No. 33388 (STB Decision No. 52, served November 3, 1997).

[8] The Board did so at the suggestion of FRA and rail labor interests.

[9] *CN/IC*, STB Finance Docket No. 33556 (STB Decision Nos. 5 and 6, served June 23, 1998, and August 14, 1998).

[10] *See CN/WCTC*, 5 S.T.B. 516 (2001), *CN/WCTC*, STB Finance Docket No. 34000, Decision No. 9, (STB served August 2, 2001) and *CN/WCTC*, 5 S.T.B. 890 (2001) (hereinafter "*CN/WCTC Decisions*").

of the SIP. In those circumstances in which FRA informs the Board of safety deficiencies that may require Board action, FRA will identify the deficiencies and provide recommendations for correcting them. FRA's reporting will continue until FRA advises the Board in writing that the proposed integration of operations has been safely completed.

The Board's ANPRM explained that, having developed a vehicle by which to evaluate safety integration issues in the *Conrail Acquisition*, it was appropriate to consider promulgating rules extending this process to other rail transactions subject to the Board's jurisdiction. Accordingly, the Board solicited comments from FRA and any other interested persons on how the Board should proceed to ensure the safe implementation of rail transactions subject to its jurisdiction (*i.e.*, whether the STB should proceed broadly by general rule or exclusively on a case-by-case basis, and whether procedures other than those adopted in *Conrail Acquisition* might be preferable in Board-approved transactions outside the merger area).[11]

Based on the comments received and the Board's experience with the SIP process in *Conrail Acquisition*, the Board issued its decision served on July 27, 1998, finding sufficient merit to warrant further exploration of establishing regulations addressing the safe implementation of Board approved transactions. *Safe Implementation of Board-Approved Transactions*, STB Ex Parte No. 574 (STB served July 27, 1998). The Board directed its staff to develop a joint notice of proposed rulemaking with FRA that would address the issues that have arisen in this proceeding and that are of concern to FRA.

Following the issuance of the Board's July 27, 1998, decision, the Board's staff met informally with FRA staff regarding the development of an appropriate proposal that would accomplish the objectives of both agencies, avoid gaps and inconsistencies in the two agencies' regulatory requirements, and impose as little burden as possible on the participating parties. The NPRM was published in the *Federal Register*, at 63 Fed. Reg. 72,225 (1998). On May 4, 1999, a public hearing was held jointly with FRA to hear testimony on the proposed rules.[12]

As noted, eleven parties representing labor, freight and passenger railroads, and state departments of transportation filed comments on the NPRM. Many of

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[11] The administrative process permits the Board to proceed either on a case-by-case basis or by rule, and to address some kinds of transactions by rule and some by reliance on the development of precedent.

[12] AAR and TTD presented testimony at the oral hearing. AAR filed supplemental comments following the hearing.

the commenters endorsed the objectives of the SIP rules and indicated that they were generally satisfied with the approach used in the *Conrail Acquisition* and *CN/IC* proceedings.[13] However, they offered a number of recommendations on how the proposed rules could be clarified and improved. In issuing final rules, the Board has taken into account all the concerns raised in the parties' written comments and presented at the hearing. As discussed below, the Board is adopting some of the suggestions offered.

STB's Analysis of the Comments Pertaining to the Scope of the Rules

A number of commenters expressed concerns about the scope of the STB's proposed rules. The AAR and Amtrak asserted that the proposed inclusion of transactions that involve a passenger railroad or commuter service in a metropolitan area would exceed the Board's jurisdiction.[14] (*See* proposed 49 CFR 1106.2.) In response to the comments, the definitions of "applicant" and "transaction" in section 1106.2 have been amended. The new definitions clarify

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[13] *See also Major Rail Consolidation Procedures*, 5 S.T.B. 539, at 574-575 (2001) ("*Major Rail Consolidation Procedures*"), (practice of requiring applicants to work with FRA to formulate SIPs in major mergers received wide public support, and no opposition, in proceeding adopting new rules for major rail consolidations). Indeed, some commenters including the AAR questioned whether formal rules in this area were necessary because the Board could continue to work with FRA on a case-by-case basis, as in the *Conrail Acquisition* and *CN/IC* proceedings. The Board agrees with the AAR that the SIP process used in these proceedings generally has been successful and is publishing final rules to codify existing practices and FRA's role in advising the Board on safety integration matters in transactions that the Board regulates.

[14] Under 49 U.S.C. 10501(c), the Board does not have jurisdiction over mass transportation (commuter service) provided by a local governmental entity. Thus, a transaction involving a railroad subject to the STB's jurisdiction and a commuter railroad "is now a one-railroad transaction over which [the Board does] not have jurisdiction under 49 U.S.C. 11323." *Norfolk and Western Railway Company – Petition for Declaratory Order – Lease of Line in Cook and Will Counties, IL, to Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois*, Finance Docket No. 32279 (STB served February 3, 1999). Moreover, except for certain provisions not relevant here, Amtrak is not subject to the Board's jurisdiction. 49 U.S.C. 24301(c).

that the SIP requirement applies only to a Class I railroad proposing to merge, consolidate, or acquire another Class I railroad or a Class II railroad with which it proposes to "amalgamate operations," as defined in FRA's regulations at 49 CFR 244.9. (The Board also adds FRA's definition of "amalgamation of operations" to its rule.) The changed definitions coincide with the scope of the transactions covered by FRA's final rule, which will promote consistency and efficiency in the interplay between FRA and the Board.

Rail labor interests took the position that the Board's SIP rule should apply to transactions involving Class III carriers,[15] *i.e.*, those railroads that generate revenue, measured in 1991 dollars, of less than $20 million per year, whereas the railroad interests argued that it is not necessary to require the preparation of a SIP for transactions that do not involve two or more Class I railroads.[16] Commenters also suggested that freight traffic density or combined freight and passenger traffic (rather than the Class of railroad) could serve as a benchmark for determining the necessity of a SIP.[17]

The Board's final rule covers Class I railroads and Class II railroads that will have their operations amalgamated by a Class I railroad. The Board believes that this scope of coverage is reasonable because it is consistent with the scope of FRA's rule and Congress has treated Class II railroads more like Class I railroads than like Class III railroads in ICCTA.[18] The Board believes that it would be

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[15] *See* the comments of TTD, ATDD, BRC, and BMWE.

[16] *See* the comments of AAR, ASLRRA, and W&LE.

[17] For example, OK DOT notes that the Board's environmental regulations at 49 CFR 1105.7(e)(5) consider the amount of increased traffic on a line in determining whether there is a need for environmental review.

[18] The Board's recently adopted new rules for major railroad mergers and consolidations involving two or more Class I railroads, published at 66 Fed. Reg. 32,582 (2001), require Class I applicants to bear a substantially heavier burden in demonstrating that a merger proposal is in the public interest. The agency concluded that the current merger regulations at 49 CFR part 1180, subpart A, are not adequate to address future major rail merger proposals that, if approved, would likely result in the creation of two North American transcontinental railroads. But although the economic and service issues that drove the Board's action in *Major Rail Consolidation Procedures* are of concern principally when two Class I railroads merge, the safety considerations underlying SIPs also apply to mergers, consolidations, and acquisitions involving a Class I railroad and a

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unduly burdensome to expand the proposed rules to cover transactions involving Class II railroads or Class III railroads as a matter of course. Under sections 1106.5 and 1106.6 of the final rule, however, the Board retains the flexibility to require a SIP for such transactions if warranted, or to waive or modify SIP requirements on a case-by-case basis, if it concludes that doing so is appropriate for particular transactions.[19]

AAR indicated that the Board should allow an additional 30 to 90 days for preparing and filing a proposed SIP, rather than requiring the SIP to be submitted simultaneously with the application. This request is reasonable. Therefore, section 1106.4(a) of the STB's final rule provides 60 days from the date of the application[20] for the filing of a proposed SIP.

The BMWE urged that the Board clarify proposed section 1106.4(b)(4), which, it argued, could be construed to give the Board discretion to approve a transaction without a SIP or without requiring compliance with the SIP. To eliminate any possible confusion, the Board's final rule has been clarified to specifically state that, if the Board approves the transaction and adopts the SIP, the Board will require compliance with the SIP as a condition to its approval of the transaction.

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[18](...continued)
Class II railroad with which it proposes to amalgamate operations.

[19] In the NPRM, the Board specifically solicited comments from interested parties as to whether the final rule should cover Class III railroads. The comments did not persuade the Board that transactions involving Class III railroads typically create sufficient safety problems to warrant requiring the preparation of a SIP. However, the Board's final rule at 49 CFR 1106.6 would allow the agency to require a SIP in particular cases involving Class III railroads if it concluded that doing so is necessary in its proper consideration of the proposed transaction.

[20] Because the Board is narrowing the scope of transactions that require a SIP to those filed under 49 U.S.C. 11323(a) involving Class I railroads and Class II railroads that will have their operations amalgamated with Class I railroads, the final rule eliminates the reference to "exemptions" in section 1106.4(a)(1). The reference to "applications" and "other requests for authority" in the definition of "transaction" in section 1106.2, and in the reservation of jurisdiction provision in section 1106.6, however, give the Board the flexibility to require a SIP in cases filed by exemption as well as by application should it be appropriate to do so.

STB's Section-By-Section Analysis of Its Final Rule

§ 1106.1 Purpose.

The regulations are designed to assure adequate and coordinated consideration of safety integration issues by the Board and FRA in implementing certain transactions subject to the Board's jurisdiction.

§ 1106.2 Definitions.

This section sets forth definitions used in this part; these definitions are self explanatory.

§ 1106.3 Actions for which Safety Integration Plan is Required.

This section explains which transactions require a railroad to file a SIP with the Board. As noted above, a Class I railroad proposing to merge, consolidate, or acquire another Class I railroad, or a Class II railroad with which it proposes to amalgamate operations, as defined in FRA's rule at 49 CFR 244.9, will be subject to the requirements of this rule. Where the filing of a SIP is required by the Board's rules, the Board will enforce the requirement with appropriate sanctions, including suspending the processing of the application or, in extreme cases, dismissing the application itself.

§ 1106.4 The Safety Integration Plan Process.

Section 1106.4 sets out the procedures for an applicant to file a proposed SIP, and the procedures by which the Board will consider a proposed SIP in connection with its approval of transactions for which the Board has concluded such consideration is required. A railroad seeking to carry out a covered transaction must file a proposed SIP prepared in accordance with FRA's regulations with the STB's SEA and FRA no later than 60 days from the date the application is filed with the Board. The proposed SIP will become part of the environmental documentation in the Board proceeding, and will be considered in the Board's environmental review process conducted in accordance with NEPA and the Board's environmental rules at 49 CFR part 1105. Generally, covered transactions will be subject to environmental review because the nature of the transaction involves operational changes that exceed the regulatory thresholds established under 49 CFR 1105.7(e)(4) or (5). *See* 49 CFR

1105.6(b)(4)(i). In the event that a SIP should be required in a transaction that would not be subject to environmental review, *see* 49 CFR 1105.6(c)(2), the Board intends to develop appropriate case-specific SIP procedures.[21]

After FRA reviews the proposed SIP, FRA will issue its findings and conclusions on the adequacy of the plan and will provide its analysis of the proposed SIP early enough to permit incorporation in the Board's draft environmental assessment or draft environmental impact statement. Nevertheless, recognizing that the SIP is an ongoing and fluid process, as in the *Conrail Acquisition* proceeding, FRA may comment on the plan and on an applicant's progress in completing a SIP, without endorsing the plan in full. The Board agrees with FRA that flexible procedures for FRA's response are necessary to enable an applicant to complete a comprehensive plan.

Additionally, this approach will enable the Board to incorporate FRA's comments in its draft environmental documentation, which, in turn, will encourage the public to review and comment on the proposed SIP. SEA will then independently review the proposed SIP and respond to comments received on the plan in its final environmental documentation. Finally, the Board will consider the entire environmental record, including information concerning the SIP, in deciding whether to approve the proposed transaction. Should the Board approve the transaction and adopt the SIP, it will require that the applicants comply with the SIP as a condition to its approval and require each applicant to coordinate with FRA in implementing the SIP, including any amendments to the plan, if necessary. (*See* FRA's Section-By-Section Analysis discussing amendments to 49 CFR 244.17 for a more complete discussion.)

As explained in FRA's Section-By-Section Analysis of § 244.17(g), FRA will advise the Board about its findings on the ongoing implementation process in accordance with an agreement that the agencies will enter into and execute (1) over a five-year period, (2) during any other oversight period for the transaction established by the Board, or (3) until FRA advises the Board that, in its view, the proposed integration of the applicants' operations has been safely completed, whichever is shortest.[22] Should FRA identify shortcomings or

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[21] *See CN/WCTC Decisions*, 5 S.T.B. 516 (2001), STB Finance Docket No. 34000 (STB served August 2, 2001), 5 S.T.B. 890 (2001) (SIP prepared even though no environmental review was required).

[22] The Board's new rules at 49 CFR 1180.1(g) provide for at least a five-year oversight period for major railroad mergers and consolidations involving (continued...)

deficiencies during the integration process, the Board reserves jurisdiction to reopen the proceeding and impose terms and conditions on the transaction to ensure that the transaction is safely implemented.

§ 1106.5 Waiver.

The Board can waive or modify the requirements of this part where a carrier shows that relief is warranted or appropriate.

§ 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require the filing of a SIP in transactions other than those provided in this part or to adopt modified SIP requirements in individual cases if it concludes that doing so is necessary to properly consider an application or other request for authority.

Regulatory Flexibility Act

The Board certifies that its decision to adopt regulations requiring Class I and Class II railroads to prepare safety integration plans under certain circumstances will not have a significant effect on a substantial number of small entities.

Environmental Impact

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Statement of Energy Effects

Even though the Board is an independent regulatory agency, it recognizes the importance of the policy objective in Executive Order 13212 to expedite consideration of projects that would increase the production, transmission, or conservation of energy. The SIP rulemaking action, however, should not affect the production, transmission, or conservation of energy.

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[22](...continued)
two or more Class I railroads.

Federal Railroad Administration 49 CFR Chapter II

List of Subjects

49 CFR Part 244

Administrative penalties, practice and procedure, Railroad safety, Railroads, Safety Integration Plans.

In consideration of the foregoing, FRA amends chapter II of title 49, Code of Federal Regulations, to read as follows:

1. Part 244 is added to read as follows:

PART 244—REGULATIONS ON SAFETY INTEGRATION PLANS GOVERNING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Subpart A—General

Sec.

Subpart B—Safety Integration Plans

Authority: 49 U.S.C. 20103, 20107, 21301; 5 U.S.C. 553 and 559; Sec. 31001(s)(1), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note); and 49 CFR 1.49.

Subpart A–General

§ 244.1 Scope, application, and purpose.

(a) This part prescribes requirements for filing and implementing a Safety Integration Plan with FRA whenever a Class I railroad proposes to consolidate with, merge with, or acquire control of another Class I railroad, or with a Class II railroad where there is a proposed amalgamation of operations.

(b) The purpose of this part is to achieve a reasonable level of railroad safety during the implementation of transactions described in subsection (a) of this section. This part does not preclude a railroad from taking additional measures not inconsistent with this part to provide for safety in connection with a transaction.

(c) The requirements prescribed under this part apply only to FRA's disposition of a regulated transaction filed by an applicant. The transactions covered by this part also require separate filing with and approval by the Surface Transportation Board. *See* 49 CFR part 1106.

§ 244.3 Preemptive effect.

Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that: (a) is necessary to eliminate or reduce an essentially local safety hazard; (b) is not incompatible with a law,

regulation, or order of the United States Government; and (c) does not unreasonably burden interstate commerce.

§ 244.5 Penalties.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500, but not more than $11,000 per day, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this part.

(b) As specified in section 244.21, FRA may also exercise any of its other enforcement remedies if a railroad fails to comply with section 244.21.

(c) Any person who knowingly and willfully makes a false entry in a record or report required by this part shall be subject to criminal penalties under 49 U.S.C. 21311.

§ 244.7 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with any requirement of this part. The filing of such a petition does not affect that person's responsibility for compliance with that requirement pending action on such a petition.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

(d) The procedures governing a petition for a waiver that are prescribed under this part apply only to FRA's disposition of such a petition. A person seeking a waiver of a Surface Transportation Board regulation would need to file a petition for a waiver with the Board. (*See* 49 CFR 1106.5.)

§ 244.9 Definitions.

As used in this part—

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Amalgamation of operations means the migration, combination, or unification of one set of railroad operations with another set of railroad operations, including, but not limited to, the allocation of resources affecting railroad operations (*e.g.*, changes in personnel, track, bridges, or communication or signal systems; or use or deployment of maintenance-of-way equipment, locomotives, or freight or passenger cars).

Applicant means a Class I railroad or a Class II railroad engaging in a transaction subject to this part.

Best practices means measures that are tried, tested, and proven to be the safest and most efficient rules or instructions governing railroad operations.

Class I or Class II railroad has the meaning assigned by regulations of the Surface Transportation Board (49 CFR Part 1201; General Instructions 1-1), as those regulations may be revised by the Board (including modifications in class thresholds based on the revenue deflator formula) from time to time.

Corporate culture means the totality of the commitments, written and oral directives, and practices that make up the way a railroad's management and its employees operate their railroad.

Control means actual control, legal control, or the power to exercise control through (1) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (2) any other means. *See* 49 U.S.C. 10102.

Consolidation means the creation of a new Class I railroad by combining existing Class I railroads or a Class I railroad and a Class II railroad where there is an amalgamation of operations, or by a railroad or a corporate parent of a Class I railroad taking over the assets or assuming the liabilities, or both, of another Class I railroad such that the resulting unified entity has the combined capital, powers, and subsidiaries and affiliates, if applicable, of all of its constituents.

Environmental documentation means either an Environmental Assessment or Environmental Impact Statement prepared in accordance with the Surface Transportation Board's environmental rules at 49 CFR part 1105.

Merger means the acquisition of one Class I railroad or Class II railroad where there is amalgamation of operations by a Class I railroad such that the acquiring railroad or a corporate parent of that railroad acquires the stock, assets, liabilities, powers, subsidiaries and affiliates of the railroad acquired.

Person means an entity of any type covered under 1 U.S.C. 1, including the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment,

track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including:

(1) Commuter or other short-haul rail passenger service in a metropolitan or suburban area; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads. The term does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Safety Integration Plan means a comprehensive written plan submitted to and approved by FRA in compliance with this part that demonstrates in required detail how an applicant will provide for safe railroad operations during and after any transaction covered by this part, and otherwise assure compliance with the Federal railroad safety laws.

Section of Environmental Analysis or "SEA" means the Section of the Surface Transportation Board that prepares its environmental documentation and analyses.

Transaction means a consolidation, merger, or acquisition of control subject to the requirements of this part.

Subpart B—Safety Integration Plans

§ 244.11 Contents of a Safety Integration Plan.

Each Safety Integration Plan shall contain the following information for each subject matter identified in § 244.13 or § 244.15:

(a) A detailed description of how the applicant differs from each railroad it proposes to acquire or with which the applicant proposes to consolidate or merge, including the rules or instructions governing railroad operations of these railroads;

(b) A detailed description of the proposed manner of operations of the resulting railroad, including a reconciliation of the differing rules or instructions governing railroad operations of the railroads involved in the transaction;

(c) The measures to be taken to comply with applicable Federal railroad safety laws and regulations;

(d) The proposed specific measures, expressed step-by-step, for each relevant subject matter that the applicant believes will result in safe implementation of the proposed transaction consistent with the requirements of this part;

(e) The allocation of resources, expressed as human and capital resources within designated operating budgets, directed to complete safety-relevant operations subject to the transaction; and

(f) The timetable, targeted in specific terms from commencement to completion, for implementing paragraphs (c), (d) and (e) of this section.

§ 244.13 Subjects to be addressed in a Safety Integration Plan involving an amalgamation of operations.

Each Safety Integration Plan involving an amalgamation of operations shall address the following subjects for railroad operations conducted on property subject to the transaction:

(a) *Corporate culture*. Each applicant shall:

(1) Identify and describe differences for each safety-related area between the corporate cultures of the railroads involved in the transaction;

(2) Describe how these cultures lead to different practices governing rail operations; and

(3) Describe, in step-by-step measures, the integration of these corporate cultures and the manner in which it will produce a system of "best practices" when the transaction is implemented.

(b) *Training*. Each applicant shall identify classroom and field courses, lectures, tests, and other educational or instructional forums designed to ensure the proficiency, qualification, and familiarity with the operating rules and operating tasks of territory assigned of the following employees, either when these employees are assigned to a new territory or the operating rules on a given territory are changed:

(1) Employees who perform train and engine service;

(2) Employees who inspect and maintain track and bridges;

(3) Employees who inspect, maintain and repair any type of on-track equipment, including locomotives, passenger cars, and freight cars of all types;

(4) Dispatchers or operators;

(5) Employees who inspect and maintain signal and train control devices and systems;

(6) Hazardous materials personnel, including information technology personnel who affect the transportation of hazardous materials;

(7) Employees who maintain or upgrade communication systems affecting rail operations; and

(8) Supervisors of employees enumerated in paragraphs (b)(1) through (7) of this section.

(c) *Operating practices*. (1) *Operating rules*. Each applicant shall identify the operating rules, timetables, and timetable special instructions to govern railroad operations, including yard or terminal operations and freight or passenger service.

(2) *Alcohol and drug*. Each applicant shall identify the post-accident toxicological testing, reasonable cause testing, and random alcohol and drug testing programs as required under 49 CFR part 219.

(3) *Qualification and certification of locomotive engineers*. Each applicant shall identify the program for qualifying and certifying locomotive engineers under 49 CFR part 240.

(4) *Hours of service laws*. Each applicant shall identify the procedures for complying with the Federal hours of service laws and related measures to minimize fatigue of employees covered by 49 U.S.C. chapter 211.

(d) *Motive power and equipment.* Each applicant shall identify the qualification standards for employees who inspect, maintain, or repair railroad freight or passenger cars and locomotives, and the designated facilities used, or to be used, to repair such equipment.

(e) *Signal and train control*. Each applicant shall identify the signal and train control systems governing railroad operations and maintenance, and any planned amendments or modifications to capital improvement and research and development projects for signal and train control operations.

(f) *Track Safety Standards and bridge structures*. Each applicant shall identify the maintenance and inspection programs for track and bridges, and the qualification standards for roadway workers.

(g) *Hazardous Materials*. Each applicant shall identify an inspection program covering the following areas:

(1) Field inspection practices;

(2) Hazardous materials communication standards;

(3) Emergency response procedures; and

(4) Information technology systems and personnel employed for transmitting or receiving information accompanying hazardous materials shipments. The inspection program should identify preventive measures that will be employed to respond to potential information technology integration and hazardous materials documentation deficiencies.

(h) *Dispatching operations*. Each applicant shall identify:

(1) The railroad dispatching system to be adopted;

(2) The migration of the existing dispatching systems to the adopted system, if applicable; and

(3) The criteria used to determine workload and duties performed by operators or dispatchers employed to execute operations.

(i) *Highway-rail grade crossing systems*. Each applicant shall identify a program, including its development and implementation, covering the following:

(1) Identification of the highway-rail grade crossings at which there will be an increase in rail traffic resulting from the transaction;

(2) An applicant's existing grade-crossing programs as they apply to grade crossings identified in subsection (i)(1) of this section;

(3) Integration of the grade crossing programs of the railroads subject to the transaction to the extent the programs may be different;

(4) Emergency response actions;

(5) Avoidance of blocked or obstructed highway-rail crossing systems by trains, locomotives, railroad cars, or other pieces of rolling equipment; and

(6) Signs employed for changes in rail traffic patterns.

(j) *Personnel staffing*. Each applicant shall identify the number of employees by job category, currently and proposed, to perform each of the following types of function when there is a projected change of operations that will impact workforce duties or responsibilities:

(1) Train and engine service;

(2) Yard and terminal service;

(3) Dispatching operations;

(4) Roadway maintenance;

(5) Freight car and locomotive maintenance;

(6) Maintenance of signal and train control systems, devices, and appliances;

(7) Hazardous materials operations; and

(8) Managers responsible for oversight of safety programs.

(k) *Capital investment*. Each applicant shall identify the capital investment program, clearly displaying planned investments in track and structures, signals and train control, and locomotives and equipment. The program shall describe any differences from the program currently in place on each of the railroads involved in the transaction.

(l) *Information systems compatibility*. Each applicant shall identify measures providing for a seamless interchange of information relating to the following subject matters:

(1) Train consists;

(2) Movements and movement history of locomotives and railroad freight cars;

(3) Dispatching operations;

(4) Emergency termination of operations; and

(5) Transportation of hazardous materials.

§ 244.15 Subjects to be addressed in a Safety Integration Plan not involving an amalgamation of operations.

If an applicant does not propose an amalgamation of operations conducted on properties subject to the transaction, the applicant shall not be required to file a Safety Integration Plan unless directed to do so by FRA.

§ 244.17 Procedures.

(a) Each applicant shall file one original of a proposed Safety Integration Plan with the Associate Administrator for Safety, FRA, 1120 Vermont Avenue, N.W., Mail Stop 25, Washington, DC 20590, no later than 60 days after the date it files its application with the Surface Transportation Board.

(b) The applicant shall submit such additional information necessary to support its proposed Safety Integration Plan as FRA may require to satisfy the requirements of this part.

(c) The applicant shall coordinate with FRA to resolve FRA's comments on the proposed Safety Integration Plan until such plan is approved.

(d) FRA will file its findings and conclusions on the proposed Safety Integration Plan with the Board's Section of Environmental Analysis at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(e) Assuming FRA approves the proposed Safety Integration Plan and the Surface Transportation Board approves the transaction and adopts the Plan, each applicant involved in the transaction shall coordinate with FRA in implementing the approved Safety Integration Plan.

(f) During implementation of an approved Safety Integration Plan, FRA expects that an applicant may change and refine its Safety Integration Plan in response to unforeseen developments. An applicant shall communicate with FRA about such developments and submit amendments to its Safety Integration Plan to FRA for approval.

(g) During implementation of an approved Safety Integration Plan, FRA will inform the Surface Transportation Board about implementation of the plan at times and in a manner designed to aid the Board's exercise of its continuing jurisdiction over the approved transaction in accordance with an agreement that FRA and the Board will enter into and execute. Pursuant to such agreement, FRA will consult with the Board at all appropriate stages of implementation, and will advise the Board on the status of the implementation process (1) for a period of no more than five years after the Board approves the transaction, (2) for an oversight period for the transaction established by the Board, or (3) until FRA advises the Board in writing that the integration of operations subject to the transaction is complete, whichever is shorter.

(h) *Request for Confidential Treatment*. Each applicant requesting that advanced drafts of the proposed Safety Integration Plan and information in support of the proposed and approved plan that are filed with FRA receive confidential treatment shall comply with the procedures enumerated at 49 CFR 209.11.

§ 244.19 Disposition.

(a) *Standard of review*. FRA reviews an applicant's Safety Integration Plan, and any amendments thereto, to determine whether it provides a reasonable assurance of safety at every step of the transaction. In making this determination, FRA will consider whether the plan:

(1) Is thorough, complete, and clear; and

(2) Describes in adequate detail a logical and workable transition from conditions existing before the transaction to conditions intended to exist after consummation of the transaction.

(b) *Approval of the Safety Integration Plan and Amendments Thereto*. FRA approves a Safety Integration Plan, and any amendments thereto, that meets the standard set forth in paragraph (a) of this section. The approval will be conditioned on an applicant's execution of all of the elements contained in the plan, including any amendments to the plan approved by FRA.

(c) *Amendment*. (1) *By the applicant*. The applicant may amend its Safety Integration Plan, from time to time, provided it explains the need for the amendment. Any amendment is subject to the approval of FRA as prescribed in paragraph (b) of this section, and shall take effect within 20 days of approval. The applicant shall communicate with FRA to resolve any FRA comments on the proposed amendment until it is approved.

(2) *By FRA.* FRA may request an applicant to amend its approved Safety Integration Plan from time to time should circumstances warrant.

§ 244.21 Compliance and Enforcement.

(a) After the Surface Transportation Board has approved a transaction subject to this part, a railroad implementing a transaction subject to this part shall operate in accordance with the Safety Implementation Plan approved by FRA until the properties involved in the transaction are completely integrated into the form contemplated in the Surface Transportation Board's approval of the transaction.

(b) FRA may exercise any or all of its enforcement remedies authorized by the Federal railroad safety laws if a railroad fails to comply with paragraph (a) of this section or to execute any measure contained in a Safety Implementation Plan approved by FRA.

Allan Rutter, Federal Railroad Administrator.

Surface Transportation Board 49 CFR Chapter X

List of Subjects

49 CFR Part 1106

Railroad Safety, Railroads, Safety Integration Plans.

For the reasons set forth in the preamble, a new title 49, subtitle IV, part 1106 of the Code of Federal Regulations is added as follows:

PART 1106—PROCEDURES FOR SURFACE TRANSPORTATION BOARD CONSIDERATION OF SAFETY INTEGRATION PLANS IN CASES INVOLVING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Sec.

1106.1 Purpose.

Authority: 5 U.S.C. 553; 5 U.S.C. 559; 49 U.S.C. 721; 49 U.S.C. 10101; 49 U.S.C. 11323-11325; 42 U.S.C. 4332.

§ 1106.1 Purpose.

This part is designed to ensure adequate and coordinated consideration of safety integration issues, by both the Board and the Federal Railroad Administration, the agency within the Department of Transportation responsible for the enforcement of railroad safety, in the implementation of rail transactions subject to the Board's jurisdiction. It establishes the procedures by which the Board will consider safety integration plans in connection with its approval and authorization of transactions for which the Board has concluded such consideration is required.

§ 1106.2 Definitions.

The following definitions apply to this part:

Act means the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

Amalgamation of operations, as defined by the Federal Railroad Administration at 49 CFR 244.9, means the migration, combination, or unification of one set of railroad operations with another set of railroad operations, including, but not limited to, the allocation of resources affecting railroad operations (*e.g.*, changes in personnel, track, bridges, or communication or signal systems; or use or deployment of maintenance-of-way equipment, locomotives, or freight or passenger cars).

Applicant means a Class I railroad or a Class II railroad engaging in a transaction subject to this part.

Board means the Surface Transportation Board.

Class I or Class II railroad has the meaning assigned by the Board's regulations (49 CFR Part 1201; General Instructions 1-1), as those regulations may be revised by the Board (including modifications in class thresholds based on the revenue deflator formula) from time to time.

Environmental documentation means either an Environmental Assessment or an Environmental Impact Statement prepared in accordance with the National Environmental Policy Act and Board's environmental rules at 49 CFR part 1105.

Federal Railroad Administration ("FRA") means the agency within the Department of Transportation responsible for railroad safety.

Safety Integration Plan ("SIP") means a comprehensive written plan, prepared in accordance with FRA guidelines or regulations, explaining the process by which applicants intend to integrate the operation of the properties involved in a manner that would maintain safety at every step of the integration process, in the event the Board approves the transaction that requires a SIP.

Section of Environmental Analysis ("SEA") means the Section that prepares the Board's environmental documents and analyses.

Transaction means an application by a Class I railroad that proposes to consolidate with, merge with, or acquire control under 49 U.S.C. 11323(a) of another Class I railroad, or with a Class II railroad where there is a proposed amalgamation of operations, as defined by FRA's regulations at 49 CFR 244.9. "Transaction" also includes a proceeding other than those specified above if the Board concludes that a SIP is necessary in its proper consideration of the application or other request for authority.

§ 1106.3 Actions for which Safety Integration Plan is required.

A SIP shall be filed by any applicant requesting authority to undertake a transaction as defined under § 1106.2 of this part.

§ 1106.4 The Safety Integration Plan process.

(a) Each applicant in a transaction subject to this part shall file a proposed SIP in accordance with the informational requirements prescribed at 49 CFR part 244, or other FRA guidelines or requirements regarding the contents of a SIP, with SEA and FRA no later than 60 days from the date the application is filed with the Board.

(b) The proposed SIP shall be made part of the environmental record in the Board proceeding and dealt with in the ongoing environmental review process

under 49 CFR part 1105. The procedures governing the process shall be as follows:

(1) In accordance with 49 CFR 244.17, FRA will provide its findings and conclusions on the adequacy of the proposed SIP (*i.e.*, assess whether the proposed SIP establishes a process that provides a reasonable assurance of safety in executing the proposed transaction) to SEA at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(2) The draft environmental documentation shall incorporate the proposed SIP, any revisions or modifications to it based on further consultations with FRA, and FRA's written comments regarding the SIP. The public may review and comment on the draft environmental documentation within the time limits prescribed by SEA.

(3) SEA will independently review each proposed SIP. In its final environmental documentation, SEA will address written comments on the proposed SIP received during the time established for submitting comments on the draft environmental documentation. The Board then will consider the full environmental record, including the information concerning the SIP, in arriving at its decision in the case.

(4) If the Board approves the transaction and adopts the SIP, it will require compliance with the SIP as a condition to its approval. Each applicant involved in the transaction then shall coordinate with FRA in implementing the approved SIP, including any amendments thereto. FRA has provided in its rules at 49 CFR 244.17(g) for submitting information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has agreed to advise the Board when, in its view, the integration of the applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented.

§ 1106.5 Waiver.

The SIP requirements established by this part may be waived or modified by the Board where a railroad shows that relief is warranted or appropriate.

§ 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require a SIP in cases other than those enumerated in this part, or to adopt modified SIP requirements in individual cases, if it concludes that doing so is necessary in its proper consideration of the application or other request for authority.

By the Board, Chairman Morgan and Vice Chairman Burkes.