



**National Grain
and Feed Association**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 762

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

COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

The National Grain and Feed Association (“NGFA”) hereby submits these Comments on the proposals contained in the Notice of Proposed Rulemaking (“NPRM”) served in this Docket on April 22, 2022. The NGFA commends the Surface Transportation Board (“Board” or “STB”) for issuing the NPRM to address several flaws and hurdles in the regulations promulgated at 49 C.F.R. §1146.1, and to further implement the authority granted to the Board by 49 U.S.C. §11123 to take a broad range of actions in the event of a rail service emergency as defined by the statute. The NPRM demonstrates to NGFA that the Board has closely studied and thoughtfully considered the comments of industry stakeholders on the deficiencies of the current regulations. The NGFA therefore concurs with the Board’s view that

[t] he proposed rule changes would advance the rail transportation policy goals by enabling the Board to order temporary relief in emergency situations more quickly and effectively, to more rapidly ensure that localized problems do not spread to

other parts of the network, and to give parties involved in emergency situations (both rail carriers and shippers) more certainty on the resolution of those issues.¹

I. Identity and Interests of NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations and is co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. Support for NGFA Comments from Other Collaborating Organization

The NGFA has been authorized to convey that these opening comments are supported by the North American Millers' Association ("NAMA") on behalf of its members. NAMA represents millers of wheat, corn, oats, and rye in the U.S. and Canada. NAMA has 37 members with 149 locations across 31 states, Puerto Rico, and Canada, and represents the milling industry before the White House, federal agencies, and Congress.

III. Comments on Specific Aspects of the NPRM

A. Clarification of the Board's Authority Under §11123

The NGFA appreciates the Board's reaffirmation to industry stakeholders that Congress provided the Board with much broader authority under §11123 than directing alternative railroads

¹ NPRM at 4.

to provide service over an incumbent railroad's tracks in a service emergency. As the NPRM explains, this statutory provision gives the Board authority to act in response to a petition or on its own initiative to take actions that do not involve an alternative carrier, including but not limited to (a) directing the handling, routing, and movement of the traffic of a rail carrier and its distribution; (b) prescribing temporary through routes, and (c) giving directions for preference or priority in transportation. During the current nationwide rail freight service crisis some of NGFA's members have actively considered asking the Board to take one or more of these actions and so the Board's confirmation of that such remedies are available is helpful.

NGFA would further note that, pursuant to §11123(b)(1), "[e]xcept with respect to proceedings under paragraph (2) of this subsection, the Board may act under this section on its own initiative or on application without regard to subchapter II of chapter 5 of title 5." This power enables the Board or a Board member to act in response to an "application" from a shipper on an *ex parte* basis that does not have to entail usual administrative review.² The NGFA suggests that, while it is not necessary or even desirable for the Board to adopt formal regulations for such *ex parte* actions, industry stakeholders would benefit from some discussion of the Board's views on its implementation of this power in emergency service situations and how it relates to the modifications made by the NPRM in any decision issuing final rules in this docket.

² See STB Docket No. 42165, *Hasa, Inc. v. Union Pacific Railroad Company* (served August 21, 2019), where a shipper sought an *ex parte* emergency service order pursuant to §11123(a), and the Board - albeit without explicitly stating it was doing so pursuant to §11123 - issued an order one day after the filing that maintained the rail service *status quo* at the shipper's facility. The dispute was eventually resolved by a commercial settlement.)

B. Removal of Requirement of Commitment from Alternative Carrier

The NGFA fully supports the Board's proposal to remove the requirement in 49 C.F.R. §1146.1(a)(iii) that a petition for alternative rail service contain "a commitment from another available railroad to provide alternative service that would meet current transportation needs, and an explanation of how the alternative service would be provided without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service." The requirement that a rail shipper obtain such an advance "commitment" and make the other showings in this regulation are found nowhere in §11123 and the Board has correctly concluded in the NPRM that these requirements in the current regulations have posed a nearly insurmountable hurdle to rail shippers who are considering seeking this emergency relief for rail service failures. Some of NGFA's members experienced the limitations of the "commitment" requirement in recent months, when they sought an alternative Class I railroad's agreement to provide service on an emergency basis over their incumbent carrier's track prior to seeking relief under §1146.1. In a nutshell, they found the potential alternative carrier showed little interest in making such a commitment. But, as the NPRM points out, even if a shipper somehow is able to obtain a commitment from an alternative carrier, its reward would be taking on the additional burdens of §1146.1(a)(iii), *i.e.*, convincing the Board, in a middle of a service crisis adversely affecting the shipper's business, "how the alternative service would be provided without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service." The NPRM's modifications to eliminate the commitment requirement, and to place the needed informational requirements regarding potential operational impacts more on the incumbent railroad and potential alternative railroads - in whose possession and control the information

resides - is an extremely equitable and more efficient way to ensure the Board is presented with the evidence it needs to make a decision in an efficient manner.

C. Petitioning Requirements

The NGFA also supports the NPRM's proposals to shorten the process for petitions for emergency service orders and to supply a date by which a Board decision can be expected. In most cases the Board can expect shippers to have attempted to exhaust all available commercial remedies prior to seeking Board intervention, often at significant cost to the shipper. For example, in recent months NGFA members have taken many measures to try to mitigate the harm from railroad service failures, including, to name but a few, (1) purchasing commodities that are shipped by truck; (2) shipping commodities on another railroad that cannot serve their facility to a location relatively close by, and then transloading the commodities from railcars to trucks and transporting them to the facility; (3) buying trains and carloads of commodities from other rail customers; or (4) "swapping" trains and cars with other shippers who are often competitors. Since an STB emergency service order is typically the "last resort" for a rail shipper before severe damage to its business and customers occurs, a short timeline for submitting the petition and rendering a decision is imperative. NGFA believes shortening the reply period to three business days and the rebuttal period to two business days and adding that parties should expect the Board to issue a decision within five business days of receiving the rebuttal, are appropriate and necessary modifications.

One suggested modification to the proposed regulations is to make it mandatory for an identified alternative carrier to reply to the petition, instead of making it optional in proposed new §1146.1(b)(2). In today's industry there will likely be only one alternative carrier capable of meeting the needs of the shipper in an emergency. As the Board correctly explains in the NRPM, the alternative carrier is often reluctant to provide emergency service for reasons that are not

related to its operational capability to do so.³ When faced with a request for emergency service from an alternative carrier the Board must weigh all the relevant factors to determine what is in the public interest and do so in a short period of time. Consequently, the STB should err on the side on collecting as much relevant information as possible, as quickly as possible, from the incumbent and an identified alternative carrier.

D. Accelerated Process to Handle Acute Service Emergencies

The NGFA is very supportive of the NPRM's proposal of an accelerated process to handle acute service emergencies in new §1146.2. During the present service emergency in the western United States several NGFA members that rely on the Class I railroads to transport large quantities of corn that the members process into feed for significant numbers of livestock⁴ have been faced with acute shortages of rail deliveries. This has caused the members to temporarily cut off feed supplies to their customers despite the members' efforts to obtain corn or other grain from alternative sources. The consequences of railroads failing to deliver corn supplies can be damaging, and potentially catastrophic, to the health of livestock populations. For this reason, the NGFA asks the Board to clarify that the accelerated process it has proposed may be utilized when there is a clear and present threat to the health of livestock in addition to "food security."

The NGFA supports the procedural aspects of §1146.2, with the exception that, for the reasons discussed above, potential alternative carriers should also be required to raise at the hearing described in §1146.2(a)(2) its views on "whether the remedy proposed by the petitioner is unsafe,

³ NPRM at 5.

⁴ For example, some NGFA members supply feed from corn to the growers of hundreds of thousands of dairy cattle and millions of turkeys and chickens in Arizona and California.

infeasible, or will substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.”⁵

E. Proposed Amendments to Regulatory Language

Attachment A contains several suggested modifications to the proposed regulatory language consistent with these Comments which NGFA offers with the intent of clarifying and improve the proposed regulations.

IV. Conclusion

In conclusion, the NGFA supports the Board's timely issuance of the NPRM and the measures the Board has proposed to make its powers to act during rail service emergencies more accessible and efficient. The NGFA urges the Board to issue final rules in this proceeding as quickly as practicable, given that the current rail service crisis in the United States, and the substantial harm it is causing to NGFA members, other rail shippers, and the country's economy as a whole, is showing no signs of abating anytime soon.

Respectfully submitted,



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⁵ Proposed §1146.2(a)(2)(iii).

ATTACHMENT A

APPENDIX A

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, part 1146 of the Code of Federal Regulations as follows:

PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES

1. The authority citation for part 1146 continues to read as follows:

Authority: 49 U.S.C. §§1321, 11101, and 11123.

2. Revise § 1146.1 to read as follows.
3. Add a new § 1146.2 to read as follows.

The revisions read as follows:

§ 1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.

(a) **General.** Alternative rail service, or directed action by an incumbent carrier, will be prescribed under 49 U.S.C. § 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. In prescribing the relief described herein, the Board may act on its own initiative or pursuant to a petition.

(b)(1) **Petition for Relief.** Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

- (i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;
- (ii) ~~A summary~~ Summaries of ~~both~~ the petitioner's discussions with the incumbent carrier of the service problems and of the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable period of time;
- (iii) In a petition that seeks alternative rail service, identification of at least one possible rail carrier to provide alternative service, based on the petitioner's understanding of other rail carriers' nearby operations, that petitioner believes would could meet its the current transportation needs ~~of the petitioner~~;
- (iv) A detailed explanation of the specific remedy that is being sought; and
- (v) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, any proposed alternative carrier, and the Federal Railroad Administration.

(2) **Reply.** The incumbent carrier ~~must~~, and any proposed alternative carrier ~~may must~~, file a reply to a petition under this paragraph within three (3) business days. If applicable, any reply should address whether the specific remedy proposed by the petitioner would be unsafe, or

infeasible, or would substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

(3) *Rebuttal.* The party requesting relief may file a rebuttal to a carrier reply no more than two (2) business days after the reply is filed.

(4) *Board Decision.* The Board will endeavor to issue a decision five (5) business days after receiving the rebuttal or time has expired for the party requesting relief to file a rebuttal, whichever is earlier.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d)(1) *Petition to terminate relief.* Should the Board prescribe alternative rail service under paragraph (a) of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carriers are admonished not to file such a petition prematurely.

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

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

(e) *Service.* All pleadings under this part shall be served by e-filing on the Board's website, by hand, or overnight delivery on the Board, the other parties, including any proposed alternative carrier, and the Federal Railroad Administration. Decisions issued on the Board's own motion shall also be served by hand or overnight delivery on the Federal Railroad Administration by the Board.

§ 1146.2 Accelerated Process.

(a) *Accelerated Process.* After making a good faith effort to resolve its service issue through an informal dispute resolution process or through the informal services of the Board, an affected shippers or railroads may seek accelerated temporary interim relief for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by ~~the an~~ incumbent carrier that presents ~~potential~~ imminent significant harm and threatens ~~potentially~~ severe adverse consequences to the petitioner, its customers, or the public. Such emergencies exist when there is a clear and present threat to public health, safety, the health of livestock, ~~or~~ food security, or a high probability of business closures or immediate and extended plant slowdowns or shutdowns. The timing of such potential harm and consequences must render potential relief under 49 C.F.R. § 1146.1 ineffective. The relief requested must not clearly avoid any substantially ~~impairment of~~ the ability of a rail carrier to serve its ~~own other~~ customers adequately, or to fulfill its common carrier obligations.

(1) *Standard.* A petitioner seeking accelerated relief must indicate in its petition that it is seeking such relief pursuant to 49 C.F.R. § 1146.2(a) and must demonstrate circumstances that meet the standard set forth in that paragraph. The petition must include a description of specific and particularized action that could be performed by the incumbent or an alternative carrier and ordered by the Board. The petition must also include a summary description of the

efforts taken to resolve the matter prior to filing the petition. The description must be verified by a person or persons with knowledge of the efforts taken to resolve the matter. The petition must include contact information for the incumbent carrier. The petition will be limited to three (3) substantive pages, not including the cover page, verifications, or certificate of service.

(2) Hearing. When the Board receives a petition seeking accelerated relief under 49 C.F.R. § 1146.2(a), the petition ~~will~~shall be assigned to a designated Board Member to be evaluated on its merits. The designation of which Board Member will evaluate the petition under the accelerated process will rotate on a quarterly basis. If a petition is filed and the designated Board Member is unavailable to evaluate the petition, the next Board Member in the rotation will evaluate the petition.

(i) After the designated Board Member receives the petition for accelerated relief, a telephonic or virtual hearing will be held no sooner than twenty-four (24) hours after receipt of the filing, but no later than forty-eight (48) hours after receipt of the filing, if practicable.

(ii) Required parties for the hearing include the petitioner(s), the incumbent carrier, any potential alternative carriers, and any other parties deemed necessary by the designated Board Member. The designated Board Member may deem that portions of the hearing will be closed to certain parties if confidential business information needs to be discussed. The hearing will be recorded and later transcribed (with redactions, if necessary), and placed in the public docket of the proceeding.

(iii) If applicable, the incumbent carrier and any potential alternative carriers shall address at the hearing whether the remedy proposed by the petitioner is unsafe, infeasible, or will unreasonably substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations. The Board Member may order the incumbent carrier to submit, or if no such order is issued, the incumbent carrier may choose to submit, within twenty-four (24) hours of the completion of the hearing, an alternative service plan for the Board Member to consider. The Board Member may choose to receive such information either via written submission or a second virtual or telephonic hearing, if practicable.

(3) Board Decision. The designated Board Member ~~shall~~will endeavor to issue an initial decision on the merits of the petition requesting accelerated relief within two (2) business days of the completion of the hearing. The Board Member shall not award relief for more than 20 days.

(b) Right to Appeal. Initial decisions of a Board Member pursuant to Section 1146.2(a)(3) ~~After the designated Board Member issues an initial decision on the merits of the petition requesting accelerated relief, the decision may~~ can be appealed to the entire Board. The appellate record ~~is to~~shall include any filings by the parties in the proceeding and the unredacted recording of the hearing any second hearing pursuant to (a)(2)(iii). The appeal will be subject to 49 C.F.R. § 1115.2 except that the filing of an appeal will not stay the effect of the initial decision, and appeals must be filed within five (5) days after the service date of the decision or within any further period the Board may authorize; and replies must be filed within five (5) days of the date the appeal is filed.

(c) **Stay of Relief.** Parties seeking a stay of the relief issued by the designated Board Member must concurrently file an appeal of the decision and a petition to stay. The filing of a petition to stay shall not stay the effect of the initial decision.

(d) **Exempted from 49 C.F.R. § 1116.** The accelerated petition process under 49 C.F.R. § 1146.1(c) is exempted from 49 C.F.R. § 1116 (Oral Argument Before the Board).

(e) **Service.** All pleadings under this part shall be served by e-filing on the Board's website, by hand, or overnight delivery on the Board, the other parties, and the Federal Railroad Administration. All pleadings under this part shall also be e-mailed to ServiceEmergency@stb.gov.