

304601

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
May 23, 2022
Part of
Public Record

Docket No. EP 762

REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF FOR SERVICE
EMERGENCIES

**AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
COMMENTS**

American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submits its comments in the above-captioned proceeding in accordance with the Surface Transportation Board (“STB” or “Board”) Notice of Proposed Rulemaking (“NPRM”) served on April 22, 2022.¹ The Board stated that this proposed accelerated process will improve and streamline the petition process to address the most critical service emergencies, and strikes an appropriate balance between the need to act quickly in such situations and maintaining adequate due process for the involved carriers. The Board provided the opportunity for interested parties to submit comments regarding its proposed new regulations under which the Board seeks revisions to its regulations for expedited relief for service emergencies.

¹ See 87 Fed. Reg. 25609, Docket No. EP 762 “Regulations for Expedited Relief for Service Emergencies” published May 2, 2022, [2022-09005.pdf \(govinfo.gov\)](#)

AFPM thanks the Board for this opportunity to voice its strong support for these proposed new rules made even more necessary now by the railroads' recent decision to implement the "Precision Scheduled Railroading" operating model which has caused and amplified the current service crisis across the U.S. rail network. The proposed rule changes in this rulemaking would improve the Board's ability to, more quickly and effectively, order temporary relief in emergency situations. This will ensure localized problems do not spread to other parts of the network, and to give parties involved in emergency situations more certainty on the resolution of those issues.

AFPM INTEREST IN THE PROPOSED RULES

AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. We make the products that make life better, safer, and more sustainable — we make progress. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains. **Approximately 75 percent of refiners and petrochemical manufacturers are only served by a single railroad (e.g., captive) and are negatively impacted by the large degradation in rail service over the past year. These captive shippers do not have other viable transportation options.**²

² See "Why We Need Freight Rail Reform" <https://www.freightrailreform.com/wp-content/uploads/2015/02/Why-Rail-Presentation-32415.pdf> published by the Rail Customer Coalition, accessed May 23, 2022.

Poor service from rail carriers is adversely impacting AFPM members, as noted in AFPM’s testimony at the recent *Urgent Issues in Freight Rail Service* hearing.³ Under the current process for expedited relief for service emergencies, AFPM members do not have confidence that the present process can provide adequate and timely relief. As a result, these members often forgo filing emergency service requests, to the detriment of AFPM’s members and consumers.

AFPM appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve emergency relief during this difficult time in the rail industry. AFPM urges the Board to breathe more life into this remedy that has been underused and to provide rail shippers a better method to seek emergency relief.

BACKGROUND

The STB’s Emergency service order regulations are designed to restore adequate rail service where there has been a substantial rail service issue or failure that requires immediate relief. Under 49 U.S.C. § 11123(a), the Board may issue an emergency service order where there exists “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public[.]” When the Board determines that such a situation exists, it may: “(1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines; (2) require joint or common use of railroad facilities; (3) prescribe temporary through routes; and (4) give

³ See AFPM’s Testimony “Hearing on Urgent Issues in Freight Rail Service” provided on April 26, 2022, https://www.afpm.org/sites/default/files/issue_resources/STB%20Hearing%20Testimony%20Draft%20Remarks.pdf

directions for— (A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits;” or, when the service failure is caused by a cessation of service by Amtrak, direct the continuation of operations and related functions.⁴

The Board may act on its own initiative or pursuant to a petition, and emergency service may be ordered summarily (i.e., without regard to the Administrative Procedure Act).⁵ Board orders under § 11123 are subject to an initial time limit of 30 days but may be extended up to an additional 240 days if the Board finds that emergency conditions continue to exist.⁶

The current regulations at 49 C.F.R. § 1146.1(a) provide, in relevant part, that a petitioner seeking relief must show a substantial, measurable service deterioration or other demonstrated incumbent carrier inadequacy over an identified time period. Any petition for relief must demonstrate that the standard contained in 49 C.F.R. § 1146.1(a) is met, provide a summary of discussions the petitioner has had with the incumbent carrier regarding the service problems and the reasons why the incumbent is unlikely to restore adequate rail service within a reasonable period of time, and include a commitment from an alternative carrier to provide service that can be performed safely without degrading service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent’s overall ability to provide service.⁷ A reply to the petition must be filed by the incumbent carrier within five business days, and a rebuttal by the party requesting relief may be filed within three business days following submission of the reply.

⁴ *Id.*

⁵ *Id.* § 11123(b)(1).

⁶ *Id.* § 11123(a) & (c).

⁷ 49 C.F.R. § 1146.1(b).

COMMENTS

As noted in the NPRM, the STB proposes to amend its emergency service regulations.

Specifically, the Board proposes to:

- 1) amend procedures for parties seeking a Board order directing an incumbent carrier to take action to remedy a service emergency;
- 2) indicate that the Board may act on its own initiative to direct emergency service;
- 3) modify the informational requirements for parties in emergency service proceedings;
- 4) shorten the filing deadlines in emergency service proceedings and establish a timeframe for Board decisions; and
- 5) establish an accelerated process for certain acute service emergencies.

In proposing these modifications, the Board explained that rail service adequacy is a key part of the Board's mandate.⁸ Pursuant to the rail transportation policy of 49 U.S.C. § 10101, in regulating the railroad industry, it is the policy of the United States Government to promote a safe and efficient rail transportation system, § 10101(3); ensure the development of a sound rail transportation system to meet the needs of the public, § 10101(4); foster sound economic conditions in transportation, § 10101(5); and provide for the expeditious handling and resolution of all proceedings, § 10101(15).

Poor rail service can harm productivity in important sectors of the economy and can have significant ripple effects throughout the rail network, both of which undermine sound rail

⁸ See, e.g., *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 5 (STB served Nov. 30, 2016) (citing 49 U.S.C. § 10101).

transportation and economic conditions. The 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.

Generally, AFPM supports these proposed improvements to the STB's emergency service regulations, including a specific indication that the Board may act on its own initiative as the statute provides. The Board has acknowledged that a recurring concern expressed by shipper interests is the amount of time it takes to obtain relief for service failures under the existing procedures and the difficulty of satisfying certain informational burdens. AFPM agrees with the Board's concern that these regulatory provisions are not utilized, especially during times of rail service disruptions, and warrants review of these rules.⁹ If the affected rail shippers are not bringing cases, that result implies that the existing process is viewed as ineffective. Even if the process is not actually ineffective, this perception alone makes the process worthy of examination to ensure this statutory remedy is utilized when rail shippers have a need for this remedy because of a substantial rail service failure.

Frustrated by the current processes for both rate disputes and emergency service, rail shippers rarely bring forward cases or petitions and are forced to modify operations to their detriment since there are no other viable options. For example, rather than take the time and effort to develop a petition for emergency service relief, in some instances, refiners will make the tough decision to lower facility throughput or increase product storage or fleet size. Given the

⁹ See 87 Fed. Reg. 25609

uncertainty and complexity of the current regulatory process, shippers often choose temporary disruptions over an emergency service request and the associated ramifications.

In addition to the burdensome process, rail shippers are reluctant to engage the Board, in rate disputes or emergency service petitions, out of concern that a carrier would respond to intervention via commercial mechanisms in a manner that would negate, or worsen, any economic benefit gained from the process. This is particularly concerning for captive shippers. Reprisal from a carrier such as rate increases, reduction in service days, or demarketing other segments of a shipper's business in response to Board intervention would potentially begin a downward spiral of engagements between shipper and carrier rather than encourage collaboration to meet market demand. AFPM urges the Board to investigate this real concern through its investigatory powers.

1. Modifying Petition Requirements

The Board proposes to amend the informational requirements for parties in these proceedings to make them fairer and more in line with who have access to the required information. These changes will encourage rail shippers to bring cases as they will not have to provide information that they do not have.

Because operational information of the incumbent carrier is not readily accessible to a petitioner, and because relevant facts in this regard will be within the incumbent carrier's control, the Board proposes requiring the incumbent carrier to address in its reply whether, and if so, why, the remedy proposed by the petitioner would be unsafe or infeasible or will substantially impair the incumbent's ability to serve its other customers or fulfill its common carrier obligations.

For the same reasons, the proposed rule would allow any identified possible alternative carrier to file a reply to the emergency service petition and would require such filings to set forth any known problems or concerns perceived by the possible alternative carrier regarding the alternative service. These changes would allow the entity with the most knowledge about its operations to explain to the Board why a proposal regarding its operations is unsafe or infeasible, would unreasonably impair its ability to serve other customers, or fulfill its common carrier obligations.

Regarding the required explanation of reasons why the incumbent carrier is unlikely to restore rail service, the Board proposes to clarify that the explanation need only take the form of a “summary” to the extent that such information is available to the petitioner.

The Board also proposes a change by requiring petitioners to submit only a list of possible alternative carriers, based on the petitioner’s understanding of other rail carriers’ nearby operations. This modification would still allow the Board, with some initial guidance from the petitioner, to determine whether a suitable alternative carrier may be available based on individual circumstances, thereby allowing a petitioner to focus on providing readily available information regarding its service emergency to the Board as expeditiously as possible. While the informational burden on the petitioner would be lessened, the Board would encourage petitioners to include any information available to them that would assist the Board in determining what, if any, relief is available and appropriate.

AFPM strongly supports these attempts by the Board to place the burden of supplying pertinent information on the party with the most knowledge and to make the burden less difficult on the petitioner when it has limited knowledge. These changes would incentivize rail shippers to bring cases that may have gone unfiled in the past for lack of evidence not within its control.

In a proceeding where the discovery process is too slow to allow the Board to act expediently, this procedural shift in the requirements to provide information makes the most sense and follows the intent of Congress by making this remedy available to shippers who now view it as too difficult to obtain.

In addition to these changes proposed by the STB, AFPM supports shifting the burden of proof onto the railroads once a petitioner demonstrates a *prima facie* case of “a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier.”¹⁰ If the petitioner satisfies this initial burden, the incumbent carrier will have the opportunity to reply and provide its reasons why the petitioner’s claims are not sufficient to show a service deterioration or inadequacy, or why the remedy proposed by the petitioner would be unsafe or infeasible or will substantially impair the incumbent’s ability to serve its other customers or fulfill its common carrier obligations. The alternative carrier could also submit information in support or opposition to the request. Then, the petitioner will have the opportunity to rebut any claims by these parties. This burden shift will place more of the onus on the incumbent carrier who has better access to service and capacity information in a proceeding where discovery is ineffective due to the urgency of the matter.

Moreover, the Board should provide a defined standard for a petitioner to demonstrate this *prima facie* case or a service deterioration. The Board could use a standard based on first mile/last mile (*e.g.*, missed switches 30 percent of the time), trip plan compliance data,¹¹ or based

¹⁰ See 9 C.F.R. Section 1146.1(a)

¹¹ In *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub-No. 1) (STB served May 6, 2022), the Board required all Class I rail carriers to report on first mile / last mile and trip plan compliance data. The availability of this information should make this proposed standard easier to determine. Moreover, the Board in *First-Mile / Last-Mile Service*, EP 767 (STB served Sept. 2, 2021) sought comments on this type of data. Hopefully, service metrics reporting from this proceeding could also help with these types of determinations about an emergency.

on a plant/facility shutdown or slowdown in the past, present, or future. This clearer standard would encourage shippers to bring these types of cases in these dire circumstances because they will better understand their likelihood of success.

The Board should also consider creating a reasonable railroad standard for the incumbent railroad if an emergency relief order is issued. This standard should require the incumbent railroad to cooperate in a reasonable manner with the petitioner and the alternative carrier, while the order is in effect. Otherwise, an uncooperative incumbent railroad could hamper service by the alternative railroad, thereby hindering the effectiveness of the remedy.

AFPM fully supports Board's proposed modifications to the emergency service process and seeks these additional changes to the burden of proof and the standard for relief as well as the reasonable railroad standard. These changes would improve the expedited relief process and make it more likely to be used going forward. Most importantly, these changes more closely align the regulations with the intent of the statute.

2. Modifying the Regulatory Timeframe

In order to resolve emergency service matters more efficiently and expeditiously, the Board proposes (1) shortening the filing deadlines set forth in part 1146 and (2) establishing a target timeframe for a Board decision on the petition. The reply period for an incumbent or any alternative carrier to respond to a petition under § 1146.1(b)(2) would be reduced from five business days to three, and the rebuttal period under § 1146.1(b)(3) would be reduced from three business days to two. Additionally, the Board proposes language stating that it expects to issue a decision within five business days after receiving the rebuttal. By shortening the timeframe and

indicating when the parties can expect a decision by the Board, the proposed amendments would further streamline the process for all parties involved in an emergency service proceeding.

Again, AFPM fully supports these changes to the regulatory timeframe. These changes will expedite the proceeding where time is clearly of the essence. In the event a party needs more time, it can always seek leave to file late. However, AFPM urges the Board to only grant such requests in extraordinary circumstances, especially because the modifications discussed in the previous section have placed the informational requirements on the appropriate parties.

In the event the petitioner demonstrates a *prima facie* case, and the incumbent railroad does not adequately rebut this case in its reply, AFPM urges the Board to provide its decision within five business days after the reply is filed when possible. This could expedite the process by two days which could be the difference between a plant shutting down or continuing to operate. Overall, AFPM thanks the Board for offering these improvements to the timing of these proceedings and encourages it to expedite the process even further as suggested here.

3. Establishing an Accelerated Process to Handle Acute Service Emergencies

Stakeholders identified the timeliness of regulatory action in situations involving acute service emergencies as the most serious issue, such as those involving public health or safety issues and imminent and extended potential plant shutdowns. To address the most urgent service emergencies more efficiently and in a more expeditious manner, the Board proposes to establish an accelerated process for certain acute service emergencies that present potential imminent harm and threaten potentially severe adverse consequences to the petitioner, its customers, or the public. Such emergencies would arise when there is a clear and present threat to public health, safety, or food security, or a high probability of business closures or immediate and extended

plant shutdowns. Given the accelerated nature of this process, the Board also proposes a time limit for relief of 20 days. This should provide sufficient time to allow petitioners to file a case under 49 C.F.R. § 1146.1, which would involve a more extended and detailed evidentiary process, for relief in effect up to 240 days, if necessary.

Again, AFPM fully supports this accelerated process for the most acute service emergencies. Like its request above for a clearer standard for service deterioration, AFPM also suggests a clearer standard for an acute service emergency. It urges the Board to allow any type of plant shutdown to qualify for this relief and remove the words “and extended” with respect to plant shutdowns. Any plant shutdown is acute.

Under these extreme circumstances, delay could mean a refinery shutdown that would create gasoline, diesel, or jet fuel shortages in parts of the U.S. These are the types of circumstances that cannot occur without great harmful impact to our country and its economy. Therefore, this accelerated process can only help to stop this from happening. Since an accelerated process may help prevent the shortages of gasoline, diesel, and jet fuels resulting from rail service impacts.

CONCLUSION

AFPM commends the Board for considering ways to make its emergency service remedy more usable for shippers. AFPM agrees with the Board’s concerns that the present process is not being used because it is too slow or burdensome. Further, AFPM notes the present process is also not being used because captive shippers fear reprisal from the railroads should they seek out a remedy from the Board. Improving the Board’s ability to, more quickly and effectively, and order temporary relief in emergency situations is essential given the service disruptions rail

shippers are currently experiencing. Clearer and more effective emergency service regulations will also prevent future disruptions from spreading across the rail network.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 620
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for American Fuel & Petrochemical
Manufacturers

Dated: May 23, 2022