

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

304602

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

Docket No. EP 762

REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF FOR SERVICE
EMERGENCIES

**PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION
COMMENTS**

Private Railcar Food and Beverage Association (“PRFBA”) 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. The Board stated that it believes 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. PRFBA thanks the Board for this opportunity to voice its strong support for these proposed new rules made even more necessary now by the massive job cuts by the rail industry since early 2017 and the recent service crisis that has spread across the U.S. rail network.

PRFBA INTEREST IN THE PROPOSED RULES

PRFBA is comprised of 18 global food and beverage companies and manufacturers headquartered in North America. These members include PepsiCo, Inc., Molson Coors Beverage Company, KraftHeinz Food Company, General Mills, Inc., McCain Foods USA, Inc, Sysco Corporation, Bonduelle America, Boardman Foods, Inc., G3 Enterprises, Inc., JD Irving/Cavendish Farms, The Martin-Brower Corporation, Lamb Weston Holdings, Inc., Univar Solutions, Darigold, Inc., Kellogg Company, Land O' Lakes, Inc., National Sugar Marketing, LLC, and Leprino Foods. They are major rail shippers that rely on the railroads to produce and distribute their food and beverage products that are vital to the health and welfare of our nation. These companies are responsible for feeding the citizens of this nation. Without adequate rail service, their food and beverages will not be on store shelves in the US.

PRFBA members meet regularly to discuss opportunities and solutions to their “similar” challenges with railcar service. The membership collaborates with

other trade associations with regard to industry changes and proposed legislation and regulations that directly impact the association's food and beverage transportation needs. PRFBA meets with the Class I North American railroads where group discussions are held on rail service issues unique to its membership. PRFBA provides its members with a forum to work together to harness the railroad service challenges ultimately providing a better industry foundation for private railcar food and beverage shippers in North America.

PRFBA members continue to be adversely impacted by horrendous rail service as it testified at the *Reciprocal Switching* and *Urgent Issues in Freight Rail Service* hearings held by the Board over the last few months. PRFBA emphasized that its member companies have been subjected to numerous plant shutdowns and slowdowns over the past eight months and numerous other service-related problems. Under the current process for the emergency service remedy, PRFBA members do not bring forward these types of cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain ultimately impacting not only PRFBA members, but their customers and then their consumers.

PRFBA 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 the emergency service remedy in line with the intent of

Congress. PRFBA urges the Board to breathe new life into this remedy that has been underutilized for decades and to provide a method to counter the Class I railroads' lack of focus on the service needs of their customers.

BACKGROUND

Emergency service orders are designed to preserve 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 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.¹ The Board may act on its own initiative or pursuant to a

¹ *Id.*

petition, and emergency service may be ordered summarily (i.e., without regard to the Administrative Procedure Act).² 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.³

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 inadequacy over an identified period of time by the incumbent carrier. 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.⁴ A reply to the petition must be filed by the incumbent carrier within five business days, and a rebuttal by the party

² *Id.* § 11123(b)(1).

³ *Id.* § 11123(a) & (c).

⁴ 49 C.F.R. § 1146.1(b).

requesting relief may be filed within three business days following submission of the reply.

As noted, these procedures have been underutilized by PRFBA member companies even during the major rail service crises that have adversely impacted their ability to move their product to their customers.

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.⁵ Pursuant to the rail transportation policy of 49 U.S.C. § 10101, in regulating the railroad industry, it is the policy of

⁵ 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).

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 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, PRFBA is highly supportive of these proposed improvements to the STB's emergency service regulations, including a specific indication in the rules that the Board may act on its own initiative as the statute provides. The concern that these regulatory provisions are not utilized warrants a close review of these rules that could help the U.S. during these more and more common rail service disruptions that can slow down the entire economy. If the affected rail shippers are not bringing cases, that result usually infers that the existing process is

viewed as ineffective.⁶ This perception alone makes the process worthy of examination to ensure this statutory remedy is utilized when rail shippers need it; otherwise, nothing will improve in a timely manner as the existing rail service issues demonstrate.

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 has 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.

⁶ In addition, rail shippers also do not bring these cases to the STB because of fear of retribution from their rail carriers, especially when they are captive. PRFBA urges the Board to investigate this real concern through its investigatory powers or a rulemaking.

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 or 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.

PRFBA 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 use of 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, it also seems sensible to shift the burden of proof onto the railroads if the petitioner can demonstrate a prima facie case of “a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier.” 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 of 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% of the time) or trip plan compliance data⁷ or based 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.

While not directly related to the petition, the Board should also create 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

⁷ 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 a rail service emergency.

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.

PRFBA fully supports these Board modifications to the emergency service process and seeks these proposed additional changes to the burden of proof and the standard for relief as well as the reasonable railroad standard. These changes in the eyes of PRFBA and its member companies would make this process more likely to be used going forward in line with the intent of the statute when rail service reaches this dire level as it has all too often recently.

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, PRFBA 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, PRFBA 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.

Additionally, with respect to a proceeding where the petitioner demonstrates a prima facie case or better in its petition, and the incumbent railroad does not adequately rebut this case in its reply, PRFBA urges the Board to provide its decision within five business days after the reply is filed whenever possible, understanding some cases will be more complicated than others. This could expedite the process by two days which could be the difference between a plant shutdown or not.

Overall, PRFBA commends the Board for 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

The Board noted the most serious issue identified by stakeholders was the timeliness of regulatory action in situations involving acute service emergencies, 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 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. The Board asserts that 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 evidentiary process, for relief in effect up to 240 days, if necessary.

Again, PRFBA fully supports this accelerated process for the most acute situations. Like with respect to PRFBA's request above for a clearer standard for service deterioration, it 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 "immediate and extended" with respect to plant shutdowns. Any plant shutdown in the eyes of a shipper is acute.

Under these extreme circumstances, delay could mean disaster like plant shutdowns to PRFBA member companies that could impact the availability of crucial food and beverages across the U.S. These are the types of circumstances that cannot occur without great harm to our country and its economy. Therefore, this accelerated process can only help to stop this from happening.

CONCLUSION

PRFBA commends the Board for looking for ways to make this emergency service remedy more usable for shippers. PRFBA has provided its thoughts on how this process as proposed could be improved. It is evident that the present process is not being used because it is too slow or burdensome based on the limited number of cases filed when there are massive rail service issues in our country. In addition, shippers may not be aware of the process at all, so the Board should consider ways to engage in more education of the shipper community to make them aware of their rights and options when inadequate rail service has resulted in an emergency.

Respectfully submitted,

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Dated: May 23, 2022