

BEFORE THE
SURFACE TRANSPORTATION BOARD

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REVISIONS TO REGULATIONS FOR
EXPEDITED RELIEF FOR SERVICE EMERGENCIES

OPENING COMMENTS

submitted by

THE COALITION ASSOCIATIONS

The Coalition Associations¹ hereby submit these Opening Comments in response to the Notice of Proposed Rulemaking that the Surface Transportation Board (“STB” or “Board”) served in this docket on April 22, 2022 (“NPRM”). Through the NPRM, the Board proposes to amend its rules, published at 49 C.F.R. Part 1146, for requesting emergency service orders under 49 U.S.C. 11123(a).

The Coalition Associations strongly support the proposed amendments as critical improvements that will enhance the utility of emergency service orders for some circumstances. The Coalition Associations nevertheless caution the Board not to consider the proposed amendments to be a solution for all, or even most, service problems. The benefits of these amendments will extend only to select situations; the proposed rules will be ineffective when the

¹ The “Coalition Associations” are the American Chemistry Council (“ACC”), the Corn Refiners Association (“CRA”), and The Fertilizer Institute (“TFI”).

available remedies are infeasible or cannot be implemented safely or without impairing the affected carriers' ability to serve other customers; and the rules still contain gaps that could discourage their use even when those other impediments can be surmounted. The Board thus should consider this rulemaking and the EP No. 711 (Sub-No. 1) rulemaking on reciprocal switching to be complementary tools for addressing rail service concerns. Reciprocal switching will enhance rail competition, thereby encouraging railroads to be more customer-focused and reduce the potential for service disruptions in the first place.

I. THE NPRM ADDRESSES MULTIPLE DEFICIENCIES THAT HAVE RENDERED PART 1146 AN INEFFECTIVE REMEDY FOR GENUINE RAIL SERVICE EMERGENCIES.

The NPRM proposes welcome and much needed modifications to the emergency service rules in Part 1146. The Coalition Associations recognize many of the proposals from their ex parte meetings with Board members in 2018 and are gratified that this Board has chosen to advance several of them. These improvements are needed to effectively redress true service emergencies, which have become all too common over the past decade. Although Part 1146 is titled "Expedited Relief for Service Emergencies," the current process is too lengthy and burdensome to remedy genuine emergency situations. The NPRM appropriately addresses key issues that make the current rules ineffective.

First, Section 1146.1(a) requires the Board to determine 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." [emphasis added] A service emergency can arise in very short order in addition to occurring over time. If a shipper must wait for some period of time to pass before petitioning for relief under Part 1146 in such circumstances, the remedy will be too late. The Coalition Associations are concerned that the Board has retained

this requirement in Section 1146.1(a), but are pleased that the new accelerated process proposed in Section 1146.2 does not contain this deficiency.

Indeed, the single most impactful proposal in the NPRM is the addition of a new accelerated process in Section 1146.2. By omitting the requirement in Section 1146.1(a) that a service failure occur “over a period of time,” the proposed Section 1146.2 recognizes that emergencies can arise from singular one-time events and establishes a remedy for such situations. Of equal importance, the accelerated process could produce a decision in as few as three, and no more than seven, calendar days from the filing of a petition for relief.² This timetable is more commensurate with a true rail service emergency that could result in a facility shutdown in just days. The NPRM reasonably restricts this process to circumstances that threaten severe consequences to the shipper, its customers, or the public that cannot be avoided using the Section 1146.1 procedures.

Second, Section 1146.1(a) currently refers only to “alternative rail service” as a remedy, although the Board’s authority to act under 49 U.S.C. 11123(a) is much broader. A remedy, for example, could entail an order to the incumbent carrier to prioritize certain traffic or to direct a different routing on the incumbent. Such remedies do not require service from an alternative carrier. This has caused uncertainty among shippers as to whether Part 1146 can be invoked for remedies other than alternative rail service. The NPRM states that the Board never intended to restrict Part 1146 to alternative service and adds clarifying language to the rule to avoid that misinterpretation.

² Three calendar days assumes a hearing is held within 24 hours and a decision is rendered within 2 business days with no intervening weekend. Seven calendar days assumes a hearing is held within 48 hours, the incumbent carrier submits an alternate plan within 24 hours, and a decision is rendered within 2 business days that span an intervening weekend.

Third, Section 1146.1(b)(1)(ii) currently requires a shipper's petition to include information that shippers are unlikely to know. For example, shippers are unlikely to know "if" the incumbent carrier is likely to restore adequate service in a reasonable time, much less "why" such restoration is unlikely. The NPRM clarifies that a shipper need only provide this information to the extent the shipper knows. Lack of knowledge will not foreclose an appropriate remedy.

Fourth, Section 1146.1(b)(1)(iii) currently requires shippers to provide a commitment from another carrier to provide alternative service. Alternative carriers, however, are unlikely to provide such commitments for various reasons, which ultimately forecloses an alternative service remedy under the current iteration of Part 1146. Because an alternative service remedy under Part 1146 is short-term, the shipper cannot make volume and other commitments necessary to entice an alternate carrier to voluntarily disrupt its existing operations and expend time and effort to modify its operating plans to serve the shipper. Furthermore, Class I railroads may be reluctant to offer their services as an alternate carrier, which could establish precedent for the future when they may be the incumbent. Similarly, Class II and III rail carriers may not want to affront a Class I carrier upon which they depend for their own business. Therefore, any relief that involves alternative rail service may require the Board to order a reluctant alternative carrier to provide that service. The NPRM acknowledges this fact by eliminating the commitment requirement, instead permitting the shipper to identify one or more railroads to provide alternative service that would meet the shipper's needs, without having a commitment from such carrier(s) to provide that service.

Fifth, Section 1146.1(b)(1)(iii) currently also requires shippers to explain how alternative service would be provided safely without degrading service to the alternative carrier's existing

customers or unreasonably interfering with the incumbent carrier's ability to provide service. Shippers, however, are unlikely to possess the knowledge or expertise required to provide this information. Moreover, shippers almost certainly would require discovery of the incumbent and alternative carriers even to attempt this showing. In recognition of this fact, the NPRM would place the burden upon the incumbent and alternative carriers to demonstrate that such adverse operational impacts would result from an STB alternative service order.

Finally, the process for obtaining emergency service relief under the current rules, which requires a minimum of two weeks, is incongruous with a true service emergency. Moreover, the actual time required is much longer when considering that the current rules require a certain amount of engagement with the incumbent carrier and an alternative carrier before a shipper may even file its petition. The NPRM shortens some of this time by eliminating the requirement to have a service commitment from the alternative carrier, placing the burden of proof of operational impacts upon the carriers, and reducing the overall time from filing a petition to a decision by approximately three business days so that the total time will be a maximum of 10 business days, if the Board takes the full five business days it has granted itself to issue a decision. As noted above, the Board also has proposed an even faster, accelerated process for specific types of emergencies that threaten severe consequences to the shipper, its customers, or the public in a new Section 1146.2.

II. THE NPRM DOES NOT ADDRESS SOME ISSUES THAT COULD CONTINUE TO IMPAIR THE ABILITY OF SHIPPERS TO INVOKE PART 1146.

The NPRM clearly improves the current Part 1146 rules by making emergency service remedies more accessible and beneficial to shippers. There remain gaps, however, that will continue to impair the ability of shippers to use Part 1146 to the full extent desirable.

First, when the remedy entails service from an alternative carrier, the rules do not address the resolution of disputes between the incumbent and alternative carriers over the service terms. In an expedited proceeding to address an emergency service need, there is insufficient time to thoroughly consider such matters. This is especially true for the Section 1146.2 accelerated process.³ The priority is the restoration of adequate service to avoid imminent harm and severe consequences to shippers, their customers, or the public. One solution the Coalition Associations propose for the Board to consider is a “final offer” decision-making process for resolving such disputes between carriers to encourage reasonable proposals from which the Board can choose in an expedited setting.

Second, emergency service remedies come with additional costs for both the incumbent carrier and an alternate carrier. An important question, after the dust of the emergency settles, will be which entity – the incumbent carrier, alternate carrier, or shipper – should be responsible for those costs. The answer may differ depending upon fault. Some emergencies may be attributable to force majeure events, in which case it may be reasonable for the shipper to bear the cost. But other emergencies may be caused by railroad business decisions, such as occurred in 2017, when CSX service failures resulted from its hasty roll-out of precision scheduled railroading, or in 1995 and 2000, when rail merger integration issues caused service meltdowns. In such circumstances, the incumbent rail carrier should be responsible for its own costs and the

³ For this reason, in their 2018 ex parte meetings, the Coalition Associations suggested that because an accelerated process limits the presentation of the types of detailed information implicated by more complex operating solutions, a grant of trackage rights for service by an alternative carrier may not be feasible and prescriptions of through routes or reciprocal switching could be limited to locations where interchange already occurs between the incumbent and alternative carriers so that there would be a strong presumption of feasibility. Although the proposed rules do not contain such restrictions, they may nevertheless become *de facto* limits upon relief under the accelerated process for those same reasons.

costs of an alternate carrier. The shipper should pay no more than it would have owed but for the service failure. Although a determination of fault is fact specific, the Board nevertheless can and should use this proceeding to express its intent to hold incumbent carriers responsible for the additional costs of emergency service unless such carriers are without fault and could not have taken reasonable measures to prevent the service failure that necessitated the emergency service order.⁴

Third, a shipper will be at a significant disadvantage when either the incumbent or alternative carrier claims that a remedy is unsafe, infeasible, or will interfere with their ability to serve their other customers. This Board has witnessed, most recently, in the EP 711 (Sub No. 1) public hearing, how railroads exaggerate negative operating impacts based on unrealistic or worst-case scenarios to oppose remedies that they find objectionable. It is very difficult for shippers to challenge such claims without engaging a rail service expert and obtaining discovery of the railroads to verify their claims. Of course, those steps are incompatible with an expedited proceeding. The Board has taken a step in the right direction by placing the burden on railroads to prove such claims. It may be desirable as well to require railroads to provide certain minimum information to validate their claims. Unfortunately, for the same reasons shippers will be at a disadvantage when railroads make such claims, the Coalition Associations are at a disadvantage even proposing types of information that railroads should provide to support their claims. They can only ask that the Board be vigilant for over-stated claims and perhaps the experience gained from actual petitions will lead to the development of a more specific proposal in the future.

⁴ Even when the incumbent carrier is without fault as to the initial cause, the carrier nevertheless may not have responded in a reasonable time or manner to prevent or mitigate the service failure and, thus, should be responsible for additional costs associated with implementing the emergency service order.

Fourth, the Board should clarify that, just because a remedy for one shipper may affect service to another shipper, such facts will not automatically defeat an emergency service petition. Rail service failures often reflect a regional or, sometimes, a system-wide capacity shortage for the incumbent carrier. In such circumstances, the requested remedy inevitably will require the Board to allocate more of that finite capacity to one shipper over another. Section 11123(a) clearly contemplates such action by authorizing the Board to prioritize traffic. Factors that could justify such prioritization include commodities that are critical to food security (e.g., fertilizer that must be applied within a specific time window, grain that must move before it rots), public health and safety (e.g., chlorine for water treatment), and energy (e.g., fuel supplies). In addition, even when the foregoing factors are not implicated, it may be desirable to prioritize traffic of a shipper whose facility is about to shut down over that of a shipper whose production is curtailed but not in danger of imminent shut down due to a rail service failure. The proposed rules implicitly recognize the foregoing factors in Section 1146.2(a). However, the final sentence could be interpreted to mean that any impairment of a remedy upon service to other customers would defeat a request for relief. The Coalition Associations ask the Board to clarify that it is not tying its hands to that extreme, but instead will balance the severity of the impacts of the requested remedy upon all relevant stakeholders to promote the overall public interest and minimize the net potential harm.

III. THE NPRM IS NOT A SUBSTITUTE FOR ENHANCING COMPETITION THROUGH RECIPROCAL SWITCHING AS PROPOSED IN EP 711 (SUB NO. 1).

The Board's proposals will be immensely helpful in select situations, but still will not benefit most shippers that are experiencing rail service failures more regularly. It is important therefore that the Board understand the limits of these rules. The Coalition Associations highlight this fact not to criticize the Board, but to note the practical obstacles to doing more on

an expedited basis and to demonstrate how the Board's reciprocal switching proposals in EP No. 711 (Sub-No. 1) complement this proceeding.

First, there are several significant hurdles to any remedy that entails service by an alternative carrier that provides trackage rights over the incumbent carrier's lines. The greater the distance, the more difficulties that are presented. The alternative carrier must deploy crews and equipment further afield of its home territory and the crews may lack familiarity with the incumbent's operating territory. The alternative carrier also will lack any economies of scale to provide alternative service via trackage rights because it must incur the cost of crews and equipment to serve just a single shipper. In addition, when the incumbent is experiencing congestion, as opposed to experiencing crew shortages or some similar hindrance, the alternative carrier will experience that same congestion and contribute to it when operating via trackage rights. For the foregoing reasons, remedies involving an alternative carrier are more likely to take the form of directing a route that short hauls the incumbent carrier instead of granting the alternative carrier trackage rights over the incumbent. That is not to say that trackage rights never can be a good alternative, but that the Board must be realistic about the practicality and efficacy of that option in most situations.

Second, first-mile/last-mile remedies are the most difficult to remedy for several reasons. First-mile/last-mile segments are bottlenecks that cannot be circumvented by using alternative routes on alternative carriers. Many shippers also do not have an alternative carrier nearby that can provide first-mile/last mile service via trackage rights. Even if there is a nearby alternative, the foregoing problems identified with trackage rights will apply. Thus, the most effective remedy for first-mile/last-mile service problems may be for the incumbent to prioritize service to the affected shipper, which will require the Board to balance the benefits to the shipper against

the impacts upon the incumbent carrier's service to other customers and its ability to restore normal operations in a timely manner.

Ultimately, these limits upon the efficacy and broad application of emergency service remedies to most situations will mean that such remedies will benefit shippers only in select circumstances that will be the exception rather than the norm. This fact should not deter the Board from adopting the proposed rules, as those modifications still will make the emergency service rules more accessible than they are today. Rather, the Coalition Associations make this point to ensure the Board understands the limits of its proposed actions.

The Coalition Associations firmly believe that the strongest measure that the Board can take to reduce the impact and recurrence of service issues is to adopt its proposals in EP No. 711 (Sub-No. 1) to modify the reciprocal switching rules. Those proposals will foster better service in two distinct ways.

First, reciprocal switching imposes competitive discipline upon an incumbent carrier's behavior by providing long-term incentives for it to compete for its long-haul on service terms that include the negotiation of more balanced contract terms with remedies for service failures.⁵ Furthermore, knowing that more of their customers have competitive options, railroads may give greater consideration to the impacts that their operating decisions have on customers, whereas they currently have greater incentives to advance Wall Street objectives, such as lower operating ratios, which can lead to reductions in surge capacity that is needed to absorb abnormal traffic fluctuations and handle unanticipated events that cause network congestion.

⁵ This particular competitive benefit also has the ability to mitigate harm from first-mile, last-mile service issues because the possibility of losing its long-haul may render the incumbent more willing to accept accountability for its first-mile, last-mile service failures in a contract if it retains the business.

Second, a shipper with reciprocal switching already granted under the rules will be able to respond more quickly to an incumbent carrier's service failures resulting from congestion. Although only shippers with reciprocal switching will have this ability, the benefits nevertheless will extend to other traffic that remains captive to the incumbent by alleviating congestion on the incumbent carrier when traffic shifts to alternative carriers. Such traffic shifts and their corresponding reduction of congestion can expedite the incumbent carrier's service recovery. Moreover, such recovery can occur more quickly because shippers that already have access to reciprocal switching can make those traffic shifts without having to petition the Board for an order.

Therefore, the Board should view the NPRM proposals as one part of a larger set of actions that are needed to address rail service failures.

Respectfully submitted,

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