

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REVISIONS TO REGULATIONS FOR	)	
EXPEDITED RELIEF FOR SERVICE	)	Ex Parte No. 762
EMERGENCIES	)	
	)	

**COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, FREIGHT
RAIL CUSTOMER ALLIANCE, NATIONAL COAL TRANSPORTATION
ASSOCIATION, AND PORTLAND CEMENT ASSOCIATION**

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The Western Coal Traffic League (“WCTL”), Freight Rail Customer Alliance (“FRCA”), National Coal Transportation Association (“NCTA”), and Portland Cement Association (“PCA”) (collectively, “Shipper Groups”) submit these comments in response to the Notice of Proposed Rulemaking (“Notice” or “Proposal”) that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on April 22, 2022.

I. INTRODUCTION AND SUMMARY

Shipper Groups strongly support the Board’s Proposal in EP 762. The measure is especially timely in light of the widespread service problems that are afflicting railroad shippers, receivers, customers, and end-users. Unfortunately, the railroads’ current operational problems, which stem largely from their pursuit of lower operating ratios under the guise of so-called Precision Scheduled Railroading (“PSR”), create a substantial risk that the problems will manifest in widespread and even more severe

service failures. Those service failures in turn create a substantial possibility that emergency service requests will become more frequent in the very near future.

The Proposal will bring needed clarity in the substantive standards as well as improved procedures for obtaining emergency relief on an expedited basis to address those service failures. At the same time, some aspects of the Proposal would benefit from further elaboration, particularly confirming that the Board's existing ability to act quickly is not being curtailed, and limiting the potential ability of railroads to defeat requests by claiming that a substantial detriment in service to others would result from granting the proposed remedy. Shipper Groups also recommend that the Board refine the procedures for invoking the accelerated process to handle acute service emergencies.

These matters are discussed further below.

II. IDENTITY AND INTEREST

WCTL is a voluntary association formed in 1976, whose regular membership consists of utility shippers of coal mined west of the Mississippi River. WCTL members currently ship by rail, receive, and pay freight charges on more than 90 million tons of coal each year.¹ WCTL members depend on rail deliveries of coal to generate electric power for their customers, and railroad service failures force members to buy natural gas or purchased power at higher prices and also present reliability risks.

¹ The members of WCTL are Ameren Missouri, Arizona Electric Power Cooperative, Inc. CLECO Corporation, CPS Energy, Entergy Services, Inc., Evergy, Inc., Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, and Western Fuels Association, Inc.

WCTL is the only organization whose primary purpose is protecting and advancing the interests of rail-dependent coal shippers.

The Freight Rail Customer Alliance (FRCA), www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies, and their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

The National Coal Transportation Association, www.movecoal.org, is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities, and entities that produce, repair, and manage all facets of railcar component parts and systems, as well as provide services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal.

PCA, www.cement.org, founded in 1916, is the leading voice for the U.S. cement manufacturing industry. Its members represent 91% of the United States' cement production capacity, with manufacturing plants in 33 states and distribution terminals in all 50 states. PCA members rely on the railroads to move hydraulic cement from manufacturing plants to distribution facilities to market and frequently have no practicable, feasible modal alternatives to railroad service. PCA members ship using both unit train and carload/manifest service.

III. DISCUSSION

A. **The Board already has the authority to direct incumbent carriers to provide emergency service on an expedited basis and to act on its own initiative**

Shipper Groups fully agree that the Board already has the authority to direct an incumbent to provide service, without any involvement of an alternative carrier.

Notice at 4-5. Indeed, the Board has exercised that authority previously. In *Hasa, Inc. v. Union Pacific R.R. Co.*, NOR 42165 (STB served Aug. 21, 2019), the Board directed Union Pacific to provide five-day-a-week service to an existing receiver in response to a petition. No alternative carrier was involved. Furthermore, the Board granted the application on an interim basis the day after it was submitted. Furthermore, the Board issued an emergency service order on its own initiative in *Canexus Chems. Canada L.P. v. BNSF Ry. – Emergency Serv. Order*, NOR 42131 (STB served Oct. 14, 2011) (“*Canexus*”). The Proposal thus does not create any new authority for the Board, but instead codifies in the regulations the authority that the Board already has and has previously exercised.

Formal codification in the regulations of the Board’s already existing authority, including the availability of relief in the absence of a second carrier, much less that second carrier’s statement of willingness, will be helpful, as will be codification of the Board’s ability to act on its own initiative. Shippers and receivers affected by service problems will have a more complete understanding of the available remedies and procedures when they review the Board’s regulations. The availability of such information will become more needed and important if service meltdowns, such as the

one that is currently taking place, afflict a broader swath of shippers and receivers. As some shippers and receivers may lack access to relief, the Board may need to act on its own initiative on their behalf in some instances, particularly in order to limit disruptions and ensure that service is allocated equitably.

Furthermore, removal of obstacles to obtaining service relief is in the public interest and furthers the national rail transportation policy “to require fair and expeditious regulatory decisions when regulation is required” and “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” 49 U.S.C. § 10101(2), (15). *See also* Notice at 4 (explaining how those and other elements of the national rail transportation policy support the Board’s proposed action).

B. The proposed modifications of the petition requirements are appropriate

Shippers Group support the Board’s proposals: (a) to eliminate any requirement that the petitioner have secured a commitment from an alternative carrier before filing the petition; (b) to require the carrier(s), not the petitioner, to address in the first instance whether the relief would substantially impair the carrier(s)’ ability to serve others or fulfill their common carrier obligations; and (c) to clarify that the petitioner need only present a “summary” explanation of why the incumbent is unlikely to restore rail service to the extent such information is available to the petitioner. Notice at 5-7.

Each of the proposed changes assigns the associated burden where it appropriately belongs, *i.e.*, to the entity that will likely have direct knowledge of the pertinent information. Assigning the burden in this manner will lead to the development

of a better evidentiary record and more efficient and expeditious decision-making. In particular, railroads will be less able to deploy “gotcha” tactics to defeat emergency service requests. The proposals thus further the national rail transportation policies noted above “to require fair and expeditious regulatory decisions when regulation is required” and “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” 49 U.S.C. § 10101(2), (15).

As noted, there is no requirement that a second carrier be involved at all for emergency relief to be granted. *Hasa, supra*. In situations where a replacement carrier is needed to provide the emergency service, that second carrier may be more willing and able to express its interest and availability in the presence of a Board proceeding, as opposed to an earlier request or inquiry from an affected shipper that might seek relief, particularly where the second carrier might be concerned about offending the incumbent carrier or inviting some form of retaliation.

The petitioner is similarly at an informational disadvantage with respect to: (a) why the incumbent is unlikely to restore, or be able to restore, adequate service within a reasonable period of time, and even more so with respect to (b) any claims that the specific remedy proposed would be unsafe, infeasible, or substantially impair the replying carrier’s ability to serve its other customers adequately or fulfill its common carrier obligations. These are matters that the petitioner should be required to address only after the incumbent carrier has identified a substantial problem or obstacle with some specificity. The petitioner can reasonably be expected to present a summary showing of the service problems and the reasons why, from the petitioner’s perspective,

the incumbent appears unlikely to restore adequate service on its own within a reasonable period of time. If alternative service is desired, the petitioner's burden should be deemed satisfied with the identification of at least one replacement, as the Proposal provides, rather than a requirement that the petitioner show that the replacement is able and willing to provide such service.

The Board's proposed modifications to the petition requirements are thus reasonable and should be adopted.

The Shipper Groups have some additional concerns about how a railroad may seek to defeat a request by claiming that the relief would result in "substantial impairment" of its ability to service its own customers adequately or fulfill its common carrier obligations. Notice at 6, 8-9. The unfortunate reality is that the railroads have effectively created a triage environment for many of their customers. The carriers have already impaired their general ability to meet their commitments and obligations by underinvesting in employees and other resources in order to pursue lower operating ratios. While some sort of balancing test is appropriate in the sense that the first rule should be to "do no harm," the railroads should be required to make a specific and documented showing as to "substantial impairment" in order to defeat a request for relief on a regular or accelerated basis. Conclusory assertions that other shippers may be adversely affected should not suffice. The Board should be very sensitive to the prospect that the railroads will seek to preserve service to others because that other traffic is more profitable or doing so enables the carriers to avoid or minimize liquidated damages or other contractual exposure.

There should also be some additional consequences, such as penalties or damages, when a railroad has deprived itself of the ability to meet its commitments and obligations, especially when emergency relief cannot be granted on that basis. Imposing consequences for the failure to maintain adequate service in the first place may serve to reduce the need for shippers and receivers to resort to requests for emergency service orders.

C. The proposals to shorten the regulatory timeframe are appropriate, although the Board should clarify that it retains the ability to act on an ex parte basis

The proposed shortening of the time periods for reducing the reply period for the carrier(s) from five business days to two, for reducing the rebuttal period from three business days to two, and for having the Board issue its decision within five days, are reasonable and appropriate. The consequences of service failures are painful and expensive for shippers, receivers, and end-users. Parties and the public need to know that an expedited process is available and that the Board is able and prepared to move quickly, as it did in *Hasa, supra*.

Making relief available within a short-time frame has the potential to reduce the need to invoke the process in the first place. If a carrier knows that emergency service is available, then the carrier may act more responsibly to avoid having an emergency situation emerge and/or may not need Board intervention to allow a second carrier to participate in the movement. The ready availability of a remedy has the potential to reduce the need to resort to that remedy.

In addition, the Board should clarify or confirm that it retains the ability to act on an *ex parte* basis where appropriate. The Board’s authority under 49 U.S.C. § 11323(b)(1), “permits us to act immediately, without observing normal due process procedures.” *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 972 (1998). Under the current standards, the reply and rebuttal filings called for by 49 C.F.R. § 1146.1(b)(2) and (3) are not necessary where service by a second carrier is not implicated. *E.g. Hasa* (directed service ordered on an *ex parte* basis, one day after the application for an emergency service order was filed).

Shipper Groups do not believe that the Board intended its Proposal to limit the Board’s authority to order *ex parte* relief in appropriate circumstances, particularly in light of the Proposal’s recognition that the Board can act on its own initiative and not require a petition, as in *Canexus*. To avoid any confusion, the Board should consider stating in its final rules that it retains the authority to provide for relief on an *ex parte* basis in appropriate circumstances as required, especially in instances such as *Hasa*, where the petitioner seeks to preserve the existing level of service (five days per week in that instance) until the Board rules further.

D. The proposed accelerated process to handle acute service emergencies is also appropriate, but some refinements should be considered

In addition to establishing what amounts to a “standard” emergency procedure that will take ten business days, the Proposal also contains an accelerated process to handle acute service emergencies. The accelerated procedure would apply where 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. The process is similarly to an ex parte request for a temporary restraining order, with a short filing (no more than three pages), a hearing for all parties before the designated Board member generally the day after the filing, and relief, where appropriate, within 24 hours of the filing, subject to potential appeals and requests for stay. Notice at 7-9. The process as described would take roughly 72 hours.

The Board has already shown that it can act even more expeditiously where public health and safety are involved, as in *Hasa*, where the service was ordered the day after the party's filing. As explained above, such one-day turnaround may continue to be appropriate in some instances, and the Board should preserve or restate its ability to act on its own initiative, or on an ex parte basis, where needed. The 72-hour procedure proposed in the Notice is otherwise useful and should be adopted, especially in view of the widespread service failures that currently prevail. While it would be better if the procedure did not need to be utilized, having the procedure available and go unused is far better than needing the procedure and not having it available.

Shipper Groups have some concerns with limiting application filings to three substantive pages. Notice at 8. The page limitation is well-intentioned, but it may contribute to downstream difficulties. Relatively skeletal filings may result in uncertainty, confusion, and longer hearings on applications. Formulating the limitation as a word count, rather than a page limit, might make it less subject to manipulation.

Also, the appeal process associated with the accelerated process may have some unintended consequences. Notwithstanding assurances that an appeal and petition

for stay will not normally stay the effectiveness of the initial decision, the potential for an immediate appeal to the full Board that could be followed with a second appeal through the possible petition for reconsideration of a full Board decision. The prospect of consecutive appeals could dissuade shippers from seeking relief under the accelerated procedures in the first place. The possibility of two appeals might cause the standard procedure, which takes only ten business days, to appear less burdensome and more attractive than recourse to the accelerated procedures. Shipper Groups can appreciate that the Board may desire to preserve a full appeal from the decisions of a single Board member. At a minimum, the potential for additional appeals and the associated burdens reinforces the need for the Board to clarify that it is preserving the ability to act on its own initiative, or on an *ex parte* bases, in appropriate circumstances.

With these clarifications, allowing an initial determination by a single Board member may prove very helpful, especially if the number of urgent applications is substantial. Ideally, the standards will become reasonably uniform after no more than a few such filings and hearings, and the appeal process should become less of a potential wild card thereafter.

IV. CONCLUSION

For the reasons stated, the Shipper Groups strongly support the Board's Proposal and urge its adoption, subject to the concerns stated and the modifications described above.

Respectfully submitted,

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