



May 23, 2022

The Honorable Chairman Martin Oberman
Surface Transportation Board
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Washington, DC 20423

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Attn: Surface Transportation Board Docket No. EP 762, (Revisions to Regulations for Expedited Relief for Service Emergencies)

RE: Comments to the Surface Transportation Board from the National Mining Association

Dear Chairman Oberman,

The National Mining Association (NMA) appreciates the opportunity to provide comments on the Surface Transportation Board (STB) April 22, 2022, Notice of Proposed Rulemaking (NPRM) regarding expedited relief for rail service emergencies. The NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial, and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. The NMA's members conduct mining operations throughout the United States and rely on Class I rail carriers to transport mined products, including coal.

The NMA recently testified at the STB's hearing on April 26th and 27th regarding recent rail service problems and recovery efforts of several Class I carriers. NMA's testimony highlighted some of the severe implications of insufficient rail service including the backlogs at several mines and the inability to get coal to the consumer. The backlog projections are so dire that coal producers need more than 100 percent of shipments to not only cover for existing contracts, but to make up for what was not picked up by rail. The issue is not the number of cars on trains, it is that the trains often do not show up at all.

STB Proposed Rulemaking for Expedited Relief for Service Emergencies

The NMA appreciates the efforts of the STB to address some of the ongoing freight rail issues, including the promulgation of the current proposed rule for expedited relief during service emergencies. The STB proposes to revise its regulations in Title 49, Chapter X, Part 1146 of the Code of Federal Regulations. Specifically, in the

rulemaking the STB proposes to: (1) amend procedures for parties seeking a STB order directing an incumbent carrier to take action to remedy a service emergency; (2) indicate that the STB 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 STB decisions; and (5) establish an accelerated process for certain acute service emergencies. The NMA respectfully submits the following comments on the proposed rulemaking for consideration by the STB.

Revisions to Current Regulations on Expedited Relief for Service Emergencies

Proposed revisions to the existing expedited relief for service emergencies include adding language that would allow the STB to act on its own initiative and without a current petition. The STB intends for these amendments to address several concerns in Part 1146 that appear to diminish the ability of stakeholders to invoke the STB processes when they are most needed. The STB notes that ongoing uncertainty regarding whether the STB can simply direct incumbent carriers to take particular service actions without involving an alternative carrier was the impetus for these proposed changes, and they are intended to ease the burden on petitioners. The NMA supports these proposed improvements to existing Part 1146 but as noted below, has concerns that the rulemaking as a whole will not solve the existing rail service issues.

New Accelerated Process for Acute Emergencies

The STB proposes to add a new section called Accelerated Process that is intended to address acute emergencies after affected shippers or railroads have attempted the process set out in 49 CFR 1146.1. The proposed rule preamble states that the petitioner must demonstrate that the described emergency presents imminent harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. Notably, the proposed rule outlines that such emergencies exist 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.

The proposed Accelerated Process also establishes that the STB will assign a designated Board Member to evaluate each acute emergency petition, a position that will rotate on a quarterly basis throughout the STB board membership. After an expedited hearing process within 24-48 hours, the designated Board Member will issue an initial decision on the merits of the petition requesting accelerated relief. The NMA cautions the STB to use this new process, if codified, sparingly.

With the proposed easing of the process requirements under 49 CFR 1146.1, the STB will likely see more requests for emergency relief. As such, an increase in emergency requests will undoubtedly cause an increase in the new proposed acute emergency petition procedures, thus creating a new *de facto* regulatory mechanism for shippers to

try to navigate. While NMA believes it is not the intent of the STB to create a new program to regulate rail, this proposed rulemaking is a slippery slope that has the potential to be abused by bad actors.

The NMA is concerned that, while the proposed language and process was drafted with good intentions, this proposed standard process for acute emergencies may not produce the intended result the STB is anticipating. The question becomes, what is an acute emergency? An emergency to one entity may not be an emergency to another. The STB will have to make difficult decisions very quickly, including having to weigh one emergency over another.

The NMA is also concerned that there may be multiple emergencies at any given moment and on one carrier line where the STB Board Member must exercise their discretion in determining what emergency is more important than the other. Because of the broad overlay of emergencies that may be encompassed in this proposed rule, certain shippers may attempt to utilize this provision generously, while other shippers who would use it sparingly may not get the immediate relief desired. This provision is ripe for abuse and could overwhelm the STB and its already limited resources, especially with the proposed easing of the requirements in 49 CFR 1146.1.

The Rulemaking Does Not Resolve the Underlying Problem

Importantly, while this rule is intended to relieve shippers during emergencies, the NMA believes the proposed rule, as written, will not fix the overarching issue with inconsistent rail service. The issue is not emergency relief, it is the consistent, regular service that is needed – but it is needed all the time. Currently, trains are not even picking up their scheduled loads. Part of the issue is due to dangerously low staffing levels for Class I carriers, which contributes to the inability to meet even basic service agreements. This results in rail companies diverting personnel from one site to increase service at another, where the commodities are not even comparable to the market conditions. In other words, to increase service elsewhere, service is taken away from coal producers.

Any STB rulemaking covering only emergencies and use of alternate railroads would not have any impact on coal in the west, which is served by two railroads, BNSF and UP. Nearly all electric generating units are captive to one railroad or another. Usually, both BNSF and UP experience service emergencies at the same time, due to weather or track failures (for instance in early 2000's there was a flood in the Midwest where most tracks were under water, and in around 2005, there was a rain event that saturated the rail beds in the Powder River Basin and the joint line was down for days while repairing tracks and recovering from derailments caused by the track failure). The proposed rulemaking for acute emergencies would largely have no effect in situations like the one described above.

The current labor crisis is different and affects all industries. As the STB has noted¹, many of the Class I railroads have placed a priority on lowering their operating ratios and satisfying shareholders at the cost of the customers. The strategy included cutting workforce to the bare bones minimum, with up to 29 percent or 45,000 employees being let go. This labor shortage has greatly exacerbated the problem.

Possible Solutions

The NMA suggests that rather than addressing only emergency situations, the STB should address current tariffs. Tariffs should include service guarantees, since the railroads refuse to provide service guarantees in their contracts. Mining companies are not included in shipper's contracts, but are negatively impacted when the rail service is inadequate to meet the shipper's contractual obligations. Mining companies are unable to recover any losses experienced when a shipper faces embargoes or restricted movements and are forced to carryover volumes into future years. The shippers provide contractually binding volume nominations well in advance of each calendar year, which the railroads then use for equipment and personnel planning. If the railroads were required to provide a service guarantee showing the monthly shipments, it would be a step in the right direction for shippers to plan equipment needs, railroads to plan personnel and locomotive needs and mining companies to have some assurances that the volumes under contract will be shipped.

In essence, the tariffs allow railroads to recover expenses due to any delay caused by shippers, but do not provide any relief for any expenses or losses incurred by shippers or producers when there are rail related delays. Tariffs are just one approach that NMA would suggest overhauling, but there are others that may help to alleviate the current situation. The NMA would welcome the opportunity to work with the STB more closely to propose additional regulatory revisions to mitigate the continued inconsistency in rail service. In working cooperatively to develop solutions, the NMA suggests that the STB host roundtable discussions with various industry groups to hear from them on specific proposed changes that they would like to see the STB implement. A more intimate setting such as a roundtable would likely provide more candid responses and recommendations by industry without fear of retaliation by the railroads.

Conclusion

The NMA appreciates the opportunity to provide comments on the current proposed rulemaking for expedited relief for service emergencies. We look forward to working with the STB to come up with solutions to the ongoing inconsistent rail service that is plaguing so many mining companies. The NMA feels like this current rulemaking, as written, does not get to the heart of the problem, and in fact could cause even more confusion and worsen an already grave situation. The NMA welcomes the opportunity to work closely with the STB to propose other regulatory mechanisms, or accountability

¹ See <https://www.stb.gov/news-communications/latest-news/pr-22-21/> (last accessed May 23, 2022).

measures that would create a meaningful change in the current operating standards Class I railroads.

If there are any questions, please reach out to me at kmills@nma.org or (202) 463-2643.

Sincerely,

Katie Mills

Katie Mills
Associate General Counsel