



**National Grain
and Feed Association**

www.ngfa.org

1400 Crystal Drive, Suite 260

Arlington, VA 22202

304696

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record

Docket No. EP 762

**REVISIONS TO REGULATIONS FOR EXPEDITED
RELIEF FOR SERVICE EMERGENCIES**

**REPLY COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

The National Grain and Feed Association (“NGFA”) hereby submits these brief Reply Comments on the Notice of Proposed Rulemaking (“NPRM”) served in this Docket on April 22, 2022. As with its opening Comments, the NGFA has been authorized to convey that these Reply Comments are supported by the North American Millers’ Association (“NAMA”) on behalf of its members.

The NGFA reiterates its approval of the Surface Transportation Board’s (“Board” or “STB”) issuance of the NPRM and asks the Board to carefully consider the comments and suggestions of the NGFA and other parties when fashioning the final rules. These Reply Comments briefly address several issues raised in the opening comments of other parties. First, the Association of American Railroads (“AAR”) asserts that exempt and contract traffic are “not

eligible for relief” under §11123.¹ This statement is not correct, and AAR is merely repeating an argument it previously made that the STB firmly rejected in 1998.² There, the Board stated that “AAR is clearly wrong as to exempt traffic. We retain full jurisdiction to deal with exempted transportation, as we can revoke the exemption at any time, in whole or in part, under section 10502(d).”³ The Board also clearly established that it has jurisdiction to issue an order under §11123 for movements subject to a transportation contract if the facts and circumstances require it, holding “the mere existence of a contract” does not preclude the Board from directing emergency service “where no transportation is being provided” or “other instances where it is possible and appropriate to exercise our broad regulatory authority to ensure transportation can move.”⁴ The Board also clarified that its authority to issue emergency service orders for transportation subject to a contract was subject to the restriction that it “cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract.”⁵ The Board concluded it “was not inclined to disavow in advance any possible exercise of jurisdiction. Such jurisdictional issues are best left to a case-by-case examination and, again, our assertion of jurisdiction in any specific case will be subject to judicial review.”⁶ AAR’s attempt to reargue these jurisdictional claims should be again rejected.

¹ Comments of AAR at 15.

² See EP 628, *Expedited Relief for Service Inadequacies* (served December 19, 1998) at 9 (“AAR argues that we lack authority to provide any relief for transportation that has been exempted from our regulation pursuant to 49 U.S.C. 10502 or that is the subject of a rail transportation contract under 49 U.S.C. 10709”).

³ *Id.*

⁴ *Id.* at 10.

⁵ *Id.* In its Comments CSX Transportation Inc. vaguely attempts to claim that this restriction extends to the Board’s general authority to act under §11123, which is clearly incorrect.

⁶ *Id.*

Similarly, Norfolk Southern Railway (“NS”) makes the “suggestion” that this Board should disavow the foregoing determination in EP 628 and “clarify that its emergency service authority does not apply to traffic that moves exclusively under private contract.”⁷ This suggestion should also be declined. To adopt the blanket, overreaching⁸ prohibition for which NS and AAR advocate, the Board would have to conclude it is powerless to take any action whatsoever when the failure or refusal of a railroad to perform its basic function of providing rail service causes significant harm to a business and the public at large solely because the service that is not being provided is subject to rail transportation contract. This would be very bad public policy and is not the law. To the extent that the Board’s holding in EP 628 should be clarified at all, the Board should reaffirm in any decision issuing final rules in this proceeding that it indeed has the authority under §11123 to act in the public interest to avert rail service emergencies, regardless of whether the service the railroad has failed to provide is governed by a tariff or a contract, subject to the restrictions set forth in that decision.

Second, the NGFA concurs with commenters who have suggested the Board should be more aggressive in imposing penalties on railroads in the context of proceedings under §11123

⁷ Opening Comments of NS at 1-2.

⁸ The overreaching nature of the blanket exclusion of all contract movements from §11123 relief is plainly obvious from the case NS cites as the reason “clarity” is supposedly needed. Specifically in *Hasa, Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42165 (STB served Aug. 21, 2019)(“*Hasa*”) *Hasa, Inc.* purchased its commodities on a delivered cost basis and was not a party to any rail transportation contract with Union Pacific Railroad Company (“UP”). Rebuttal of *Hasa, Inc.* (filed September 10, 2019) at 26-28. Yet, *Hasa* bore 100% of the brunt of UP’s actions cutting its service. Neither NS nor AAR address why such a shipper should be foreclosed from seeking relief under §11123. Moreover, in *Hasa* UP’s claims that the Board had no jurisdiction to even consider *Hasa*’s request for an order under §11123 because the movements at issue were allegedly contract movements were fully briefed and before the Board when it issued a decision holding the case in abeyance on October 3, 2019 rather than dismissing it. This is a strong indication that UP’s arguments were considered and rejected.

when they either do not comply with an order directing emergency service, or they have made business and operational decisions that have resulted in them being unable to provide emergency relief when the public interest requires it from them as a common carrier.⁹ Further, when assessing penalties for violations of orders or directions of the Board issued pursuant to §11123 the Board should interpret the term “each violation” in 49 U.S.C. §11901(d) broadly in order to assess penalties commensurate with the harm caused by the incumbent or an alternative railroad’s failure or inability to provide emergency service in the public interest, and to incentivize railroads to refrain from taking the actions which caused the service failure to occur in the first instance.¹⁰

In conclusion, the NGFA reaffirms its support for the Board’s timely issuance of the NPRM and the measures the Board has proposed to make its powers to act during rail service emergencies more accessible and efficient.

Respectfully submitted,



Michael C. Seyfert
President and Chief Executive Officer
National Grain and Feed Association
1400 Crystal Drive, Suite 260
Arlington, VA 22202
msefert@ngfa.org
202-289-0873



Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW Suite 300
Washington, D.C. 20006
tom@twilcoxlaw.com
202-508-1065

*Transportation Counsel for the
National Grain and Feed Association*

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⁹ See, e.g., Comments of “Shipper Groups” at 7-8.

¹⁰ For example, the term “each violation” should be interpreted to mean penalties can be applied on a per car basis rather than a per train basis, which would more accurately reflect the harm caused when the service emergency is due to the failure of a railroad to deliver 100-car unit trains of commodities or products.