

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 762

REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF FOR SERVICE EMERGENCIES

REPLY COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking served on April 22, 2022 (“Notice”), the Association of American Railroads, on behalf of its freight railroad members, files these reply comments regarding the proposal of the Surface Transportation Board to modify its emergency service regulations.¹ AAR continues to support the Board’s effort to appropriately structure expedited relief where necessary to resolve emergency situations and will not restate here its previously identified concerns with the Notice. Rather, AAR’s reply comments respond to several specific proposals suggested by other commenters.

1. Incumbent-Alternative Carrier Disputes. One commenter complains that the rule does not provide a mechanism for resolution of disputes between the alternative carrier and incumbent carrier regarding the commercial terms between them.² The statute specifically provides that the “[r]ail carriers may establish between themselves the terms of compensation

¹ See *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 (STB served Apr. 22, 2022).

² See Opening Comments of The Coalition Associations, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 6 (filed May 23, 2022) (“Coalition Assn. Comments”).

for operations, and use of facilities and equipment, required under this section.”³ Allowing the carriers to work out all the terms in the first instance makes sense as terms of service are necessarily tied to compensation. There is no reason to believe the carriers will be unable to do so. In any event, any unresolved disputes will be fact-specific and will require exercise of Board discretion to resolve. Limiting the Board’s hand—as the commenter proposes—to some sort of final offer arbitration approach is unnecessary and inappropriate, as the Board has the authority to resolve disputes in an expedited manner and individualized resolution will allow the Board to utilize its discretion to tailor a solution to the fact-specific nature of the dispute. Tying the Board’s hands with a final-offer process also threatens to unfairly penalize the alternative carrier, by requiring that it accept unacceptable commercial terms. Finally, it also bears noting that to the extent the accelerated timeframes of section 1146.2 make timely resolution of such hypothetical inter-carrier disputes difficult to imagine, it confirms that section 1146.2 really is only appropriate for granting incumbent-based relief.⁴

2. Punitive Measures. One commenter proposes that where the incumbent railroad is at fault “the incumbent rail carrier should be responsible for its own costs and the costs of an alternate carrier” and the “shipper should pay no more than it would have owed but for the service failure.”⁵ This punitive approach is nowhere authorized in the statute, which in contrast specifically provides for compensation to be paid to the incumbent carrier by the

³ 49 U.S.C. § 11123(b)(2).

⁴ See Comments of the Association of American Railroads, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 10-11 (filed May 23, 2022) (“AAR Comments”).

⁵ See Coalition Assn. Comments at 6-7. Ironically, this result could mean that a railroad that had been offering a lower rate would end up paying or subsidizing the payment of a higher rate to its competitor, and the shipper would receive that windfall.

alternative carrier for operations and the use of the incumbent's facilities and equipment.⁶ The statute was plainly intended to be remedial, not punitive. Indeed, the Board rejected these same arguments in adopting the current rule.⁷ Further, the Board also explained "[i]t is well established that an incumbent railroad is entitled to fair compensation for the use of its facilities pursuant to an emergency alternative service order."⁸ And as the Board previously noted, it "strongly prefer[s] that the parties resolve issues of compensation between themselves."⁹ The commenter admits, "[t]he answer may differ depending on fault" and "a determination of fault is fact specific" and can depend on the emergency event leading to the order itself.¹⁰ While shifting all costs to the incumbent may be facially attractive, penalizing the incumbent by imposing a rule that shifts all costs to the incumbent prejudices everything.

3. Single Board Member Authority. One commenter claims that the right to an appeal of a single Board member decision to the full Board in conjunction with the opportunity for a petition for reconsideration may drive shippers to use the ten-day section 1146.1 process

⁶ See 49 U.S. Code § 11123(b)(2). The statute also requires (in the rare case of cessation of service) that "compensation for the directed operations shall derive only from revenues generated by the directed operations." 49 U.S.C. § 11123(b)(3)(A).

⁷ See *Expedited Relief for Service Inadequacies*, EP 628 at 15 (STB served Dec. 21, 1998) ("Final Rule 1998") ("BHP and IPC argue that affected shippers should not have to pay more for receiving the alternative service than would be paid for the incumbent carrier's service.... We do not have the authority, however, to prescribe the rates that a carrier will charge to a shipper unless we first find that the carrier has market dominance over the traffic involved and that the rate selected by the carrier is unlawful.... We would note, however, that attempting to limit what the alternative railroad may charge to what the incumbent would have charged, even though the alternative carrier will incur different costs, could disserve the shippers' interests by discouraging carriers from offering to provide alternative service.").

⁸ *Pyco Indus. Inc.—Alternative Rail Service—South Plains Switching Ltd. Co.*, FD 34889, *et al.* at 6 (STB served Jan. 11, 2008) ("FD 34889").

⁹ See *id.* at 5.

¹⁰ Coalition Assn. Comments at 6-7.

even if they qualify for the section 1146.2 process.¹¹ In turn, the commenter suggests that the Board should get rid of the right to appeal.¹² The Board should reject this problematic suggestion. The desire for expediency must be balanced with the critical right to appeal, particularly in the section 1146.2 context. AAR has offered alternatives to the use of a single Board member, but if the Board elects to follow that path, the right to appeal that single Board Member's decision is fundamental and already required by the Board's own regulations.¹³ Parties are entitled to a decision issued by a majority of the full Board, and prohibiting appeal from the decision of a single Board member would be patently unfair and a denial of due process.

4. Defined Standard and Burden-Shifting. Several commenters suggest the Board establish a defined standard for making out a prima facie case of service deterioration, ultimately shifting the burden to the railroads to "encourage shippers to bring these types of cases."¹⁴ First, the Board should not be in the business of developing rules in order to encourage litigation. Rules should be adopted to provide narrowly tailored remedies to specifically identified problems. Second, as AAR explained on opening, the Board's authority

¹¹ Comments of the Western Coal Traffic League, Freight Rail Customer Alliance, National Coal Transportation Association, and Portland Cement Association, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 (filed May 23, 2022) at 10-11 ("Shipper Groups Comments").

¹² *Id.*

¹³ See 49 C.F.R. § 1115.2.

¹⁴ American Fuel & Petrochemical Manufacturers Comments, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 9-10 (filed May 23, 2022) ("AFPM Comments"); Private Railcar Food and Beverage Association Comments, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 10-11 (filed May 23, 2022) ("PRFBA Comments"); Industrial Minerals Association–North America Comments; *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 10-11 (filed May 23, 2022) ("IMA Comments").

under section 11123 is limited to addressing *emergency* situations, not generalized service complaints. A service metric or set of metrics, whether based on first-mile/last-mile data or trip plan compliance, are ill-suited to the identification of emergencies. Such metrics would not only require a certain amount of time over which the metric would be measured, but would not necessarily speak to the actual emergency situation. Finally, it would be fundamentally unfair and inappropriate to severely shorten the railroad's response time, while also shifting the burden to the railroad. Additionally, doing so is inconsistent with the basic premise that proponents of a Board order must make their case for the order, and there is no need to depart from that. The Board's rules should be a backstop to emergency situations in which privately developed solutions cannot be reached, not modeled to encourage litigation and Board intervention.¹⁵

5. Real Emergencies. Several commenters seek to loosen the proposal's requirements and expand it beyond true emergencies by allowing *any* type of plant shutdown to qualify for emergency relief under section 1146.2, not just "immediate and extended" shutdowns.¹⁶ Another commenter would like to include plant *slowdowns* in the list of eligible emergencies.¹⁷ As explained in its opening comments, the Board's emergency authority is limited to genuine emergencies. A slowdown, shutdown, or even a closure may not always rise

¹⁵ See *Pyco Indus. Inc.—Alternative Rail Service—South Plains Switching Ltd. Co.*, FD 34802, at 5 (STB served Jan. 26, 2006) ("The purpose of requiring pre-filing discussions is to ensure that the shipper and the carrier have done all that they can do to resolve the service issues before coming to the Board for relief.") (citing *American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad*, FD 33795, at 2-3 (STB served Dec. 7, 1999)).

¹⁶ See AFPM Comments at 12; PRFBA Comments at 14-15; IMA Comments 14-15.

¹⁷ See Comments of the National Grain and Feed Association, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at appx. A (filed May 23, 2022) ("NGFA Comments").

to that level, and therefore the Board should not simply presume that these will justify relief. Further, AAR believes the Board should limit relief under section 1146.2 to situations where there is a real risk of immediate and irreparable harm.¹⁸

6. Shorter Timeframes. Another proposal that should be rejected is the idea that the proposal's shortened timelines are not short enough.¹⁹ As AAR explained previously, the timelines in the proposal are already so short as to strain feasibility.²⁰ The Board previously said as much. When adopting the current rule, it rejected claims to shorten the current rule's timeline, stating that "a shorter time frame is [in]feasible" and an adequate record was needed to ensure safety and address operational concerns.²¹ Furthermore, the information about a shipper's specific needs and the timing of those needs are known to the shipper, who controls its filing and can file to ensure relief can be provided in the correct amount of time. No reasonable justification is provided to change the Board's prior decision.

7. Service Guarantees. One commenter proposes that the Board require service guarantees in tariffs.²² Broad new requirements regarding common carrier tariffs obviously are outside the scope of this rulemaking. Suffice it to note that requiring a service guarantee in

¹⁸ See AAR Comments at 5-7.

¹⁹ See Comments of Renewal Fuels Association, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 2 (filed May 23, 2022) ("RFA Comments") at 2; Comments of Agricultural Retailers Association, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 1 (filed May 23, 2022) ("ARA Comments").

²⁰ See AAR Comments at 12-14.

²¹ Final Rule 1998 at 16.

²² See Comments of the National Mining Association, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 4 (filed May 23, 2022) ("NMA Comments").

every tariff could well have unintended negative consequences including limiting the availability of premium service.

8. Alternative Carriers. Expressing concern similar to AAR's that the Board must be able to "weigh all the relevant factors to determine what is in the public interest and do so in a short period of time," one commenter suggests the Board "make it mandatory for an identified alternative carrier to reply to the petition, instead of making it optional."²³ As the Board previously explained, the participation of the alternative carrier is *essential* given the operational, safety and financial implications of requiring a second carrier to unwillingly provide service.²⁴ The far more logical and practical solution is the current requirement that the complaining shipper—the party with full knowledge of the problem and in the best position to identify possible solutions—contact the alternative carrier in advance of the filing to secure a commitment to provide alternative service.

9. National Defense. The Military Surface Deployment and Distribution Command ("SDDC"), after noting that railroads "collaborate well to solve unique military issues that arise", recommends adding "national defense" to the list of situations in which the super-accelerated process would be applicable.²⁵ If the super-accelerated process is retained, AAR does not oppose that change.

10. Access to Incumbent Track and Facilities. AAR agrees with several commenters that express reservations about an alternative carrier being provided access to an incumbent

²³ NGFA Comments at 5-6..

²⁴ See Final Rule 1998 at 11; see also AAR Comments at 7-10.

²⁵ Comments of the SDDC, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 1 (filed May 12, 2022).

carrier's track and facilities.²⁶ These concerns are further support for limiting section 1146.2's super-accelerated process, if retained, to incumbent-based relief only.²⁷ This would address BLET's concern about undermining collective bargaining, while also addressing the Coalition Association's concerns about trackage rights. As to proceedings under section 1146.1, these same concerns support retaining the requirement for an alternative carrier commitment on the frontend. Again, it is important to appreciate that while removing the alternative carrier commitment may make it "easier" for the shipper to file a petition seeking relief, it will actually complicate, not expedite, the overall proceeding.²⁸

10. Real Emergencies, Redux. Finally, AAR shares the concern expressed by NMA that "this proposed rulemaking [section 1146.2] is a slippery slope that has the potential to be abused by bad actors.... 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

²⁶ See Comments from Brotherhood of Locomotive Engineers and Trainmen, *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 5 (filed May 23, 2022) ("BLET Comments") (explaining it harbored concerns about alternative carriers being ordered to provide service on territories covered by existing collective bargaining agreements); Coalition Assn. Comments at 9-10 (explaining the Board must be "realistic about the practicality and efficacy of [trackage rights] in most situations" given concerns about an alternative carriers' crews not being familiar with the territory, alternative carriers lacking economies of scale to provide the service, and alternative carriers experiencing the same congestion the incumbent is experiencing, especially in first-mile/last-mile situations).

²⁷ See AAR Comments at 10-11.

²⁸ See *id.* at 7-10; Comments of CSX Transportation, Inc., *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762 at 3-8 (filed May 23, 2022) ("CSX Comments").

resources.”²⁹ Echoing AAR’s opening comments, NMA noted “[t]he 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.”³⁰ If adopted, the Board should ensure the process is amended as outlined in the AAR’s opening comments and, as NMA requests, “use this new process, if codified, sparingly.”³¹

Conclusion

AAR reiterates its support for the Board’s efforts to provide clarity for emergency relief proceedings. As explained in its opening comments and above, the Board should make certain refinements and reject others to ensure the rules will be workable, fair, and comply with congressional intent.

Respectfully submitted,



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²⁹ NMA Comments at 3.

³⁰ *Id.*; see AAR Comments at 2-7.

³¹ NMA Comments at 2.