

BEFORE THE
SURFACE TRANSPORTATION BOARD

304708

ENTERED
Office of Proceedings
June 6, 2022
Part of
Public Record

Docket No. EP 762

REVISIONS TO REGULATIONS FOR
EXPEDITED RELIEF FOR SERVICE EMERGENCIES

REPLY COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES

The National Industrial Transportation League (“NITL” or “League”) and the Institute of Scrap Recycling Industries (“ISRI”) hereby submit these Reply Comments in this rulemaking proceeding initiated for the purpose of amending the Board’s rules governing emergency service orders and published at 49 C.F.R. Part 1146. NITL and ISRI strongly support the Opening and Reply comments submitted by the Coalition Associations in this proceeding¹ and join in the broad support by rail customers for adoption of the proposed amendments to improve the utility and efficiency of emergency service orders.

Specifically, NITL and ISRI agree that the new accelerated process in Section 1146.2 to address service emergencies that threaten a shipper’s or its customers’ operations or the public at large, and the clarification that ESOs are not limited to authorizing service from an alternative rail carrier (but may include service directives to the incumbent carrier) are critical changes that

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

will enhance the usefulness of the rules. Additionally, where alternative service is an appropriate remedy for a service emergency, the proposed change that shippers need only identify an alternative carrier rather than secure an advance service commitment from the alternative carrier is essential to enhancing the utility of the potential ESO remedy. This is because this change recognizes that securing an up-front commitment from the alternative carrier is too time consuming and alternative carriers may not be incentivized commercially to make such a commitment for a short-term service opportunity involving limited volumes. Indeed, NITL participated in prior *ex parte* meetings with Board members regarding options for enhancing the Board's emergency service rules and advocated for similar changes at that time.

NITL and ISRI also agree with the Coalition Associations' tempered enthusiasm based on the reality that the proposed amendments are not likely to serve as a panacea for all types of service challenges. This is especially the case where an award of trackage rights would offer the best solution but involve other operational complications, or when severe first mile-last mile problems occur but an alternative route or carrier is not available. The rules also do not address potential disagreements between incumbent and alternative carriers, as well as responsibility for additional costs that may be incurred to implement an ESO, which may hinder their efficient implementation.

Accordingly, NITL and ISRI whole-heartedly agree with the Coalition Associations that the strongest incentive for incumbent railroads to improve rail service would result from increasing rail-to-rail competition. Competition and the risk of losing traffic to an alternative carrier that can perform more reliably would drive incumbent carriers to become more customer-focused and to make investments that are lacking in today's highly concentrated rail environment. Thus, the Board should continue its efforts to complete and even expedite its

resolution of its EP No. 711 (Sub-No. 1) rulemaking on reciprocal switching which would help reduce the occurrence of service disruptions.

As noted above, NITL and ISRI endorse the Reply Comments of the Coalition Associations which thoroughly address the opening comments of the Association of American Railroads and CSX and Norfolk Southern Railway (“NS”). Specifically, NITL and ISRI oppose the railroads’ requests to jettison the accelerated process for addressing the most serious service problems with potentially dire consequences, and to retain the requirement for shippers to obtain an advance service commitment from an alternative carrier prior to filing a request for an ESO,² since these changes offer the greatest opportunity to improve the usefulness of the ESO rules. The League and ISRI also strongly agree with the Coalition Associations that the railroads’ contention that the Board may not exercise its Section 11123 authority over traffic that is covered by a contract are factually and legally incorrect and contrary to the intent of Congress. Moreover, NITL and ISRI share the concern that requiring the Board to define service emergencies in advance is too restrictive and agree that retaining the current case-by-case evaluation of service emergencies provides the Board with the flexibility necessary to apply its rules to different and potentially unpredictable circumstances.

However, one issue not addressed by the Coalition Associations in their Reply is the AAR’s claim that the Board may not apply the ESO rules to exempt traffic, and NITL and ISRI will address that issue in this Reply. Specifically, AAR asserted that “[c]ertain traffic is not eligible for relief under the proposal, specifically exempt or contract traffic....In general, the Board lacks authority to provide any relief for transportation that has been exempted from

² See AAR Op. at 7-10, CSXT Op. at 3-8.

regulation pursuant to 49 U.S.C. § 10502 without appropriate revocation...”³ While AAR technically is correct that the Board must first revoke an exemption to permit a shipper to access a Board remedy that is not otherwise excepted from the exemption,⁴ AAR ignores recent precedent in which the Board granted a partial revocation of the agricultural commodities exemption codified at 49 C.F.R. § 1039.10 in order to apply demurrage regulation under circumstances substantially similar to those involved with emergency service.⁵

Specifically, in its EP 760 proceeding, the Board partially revoked the agricultural commodities exemption after determining that:

- Numerous parties, including agricultural shippers, had expressed serious concerns regarding demurrage rules and charges;⁶
- The Board’s general principles and statutory goals involving demurrage would be undermined to the extent that demurrage was not widely subject to the Board’s “reasonableness” jurisdiction;⁷
- Agricultural commodity shippers should be treated similarly to other shippers who were facing demurrage challenges;⁸
- The revocation statute is broad and *only* requires the Board to find that regulation is necessary to carry out the transportation policy, thus, the Board is not obligated

³ See AAR Op. at 18-20.

⁴ 49 U.S.C. § 10502(d).

⁵ See Docket No. Ex Parte 760, *Exclusion of Demurrage Regulation from Certain Class Exemptions*, Feb. 28, 2020 (“EP 760”).

⁶ EP 760, slip op. at 5.

⁷ *Id.*

⁸ EP 760, slip op. at 5.

to find that a railroad has abused or could abuse its market power to partially revoke an exemption;⁹

- Although the Board was not obligated to determine that market power abuses did or could occur, it nevertheless found that Class I railroads had the potential to exercise market power over exempt agricultural commodity shippers based on prior decisions related to the exemption and the extensive record demonstrating serious concerns involving the reasonableness of the railroads' demurrage practices;¹⁰
- Applying demurrage regulation to exempt agricultural commodities would promote several provisions of the Rail Transportation Policy codified at 49 U.S.C. § 10101;¹¹ and
- Requiring case-by-case revocations "would unduly 'add to the complexity, length, and cost of such proceedings to the parties and the Board.'"

There are substantial similarities between the Board's EP 760 partial revocation of the exemption for agricultural commodities and the circumstances involving exempt traffic and emergency service orders that should cause the Board to partially revoke existing exemptions to provide shippers of exempt commodities with direct access the Board's ESO rules. As with demurrage, serious rail service concerns have been expressed by numerous shippers currently

⁹ See 49 U.S.C. § 10502(d) (the Board may revoke an exemption in whole or in part when it finds that regulation is necessary to carry out the transportation policy of 49 U.S.C. § 10101); EP 760, slip op at 8-9.

¹⁰ EP 760, slip op. at 6-9.

¹¹ EP 760, slip op. at 9-10.

and in recent years, including shippers of exempt commodities.¹² Based on the substantial volumes of exempt traffic, a failure by the Board to apply its ESO rules to such traffic would undermine the intent of Congress when it adopted 49 U.S.C. § 11123, as well as the principles and goals of the Board in seeking to revise its ESO rules. As noted by the Board in its Notice of this proceeding,

Emergency service orders are designed to preserve rail service where there has been a substantial rail service issue or failure that requires immediate relief. Under 49 U.S.C. § 11123(a), the Board may issue an emergency service order where there exists “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public[.]”¹³

As evidenced by the recent testimony of shippers of exempt traffic in the Board’s very recent EP 770 hearing, as well as testimony in the Board’s prior EP 742 hearing in 2017, exempt commodity shippers face the very same rail service challenges as non-exempt traffic and should have fair and reasonable access to the Board when they face severe rail service failures, including potential facility shutdowns.¹⁴ In other words, exempt shippers should be “on par”

¹² See generally, shipper testimony submitted in STB Ex Parte 770, *Urgent Issues in Freight Rail Service* (April 2022) (“EP 770”) and Ex Parte 742, *Public Listening Session Regarding CSX Transportation Inc.’s Rail Service Issues* (Oct. 2017) (“EP 742”).

¹³ EP 762, slip op. at 3 (April 22, 2022).

¹⁴ See e.g. EP 770 April 2022 testimony from Packaging Corporation of America, the Institute of Scrap Recycling Industries, and American Forest & Paper Association; and see e.g. EP 742 October 2017 testimony from Alliance of Automobile Manufacturers, Sand Rock Transit, Packaging Corporation of America, and American Forest & Paper Association.

with regulated traffic given the potential dire conditions and consequences addressed by the Board's section 1146 rules.

As the Board has recognized (and contrary to the claims of AAR), the revocation statute does not mandate an extensive market analysis before a partial revocation of exemptions may be granted.¹⁵ Rather, the exemption revocation statute only requires the Board to determine that applying the ESO regulations to exempt traffic would promote the national RTP. Here, that is clearly the case since the following policies would be fulfilled by a partial revocation of exemptions:

- (2) to require fair and expeditious regulatory decisions when regulation is required;
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (8) to operate transportation facilities and equipment without detriment to the public health and safety;
- (9) to encourage honest and efficient management of railroads;
- (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.¹⁶

Moreover, just as the Board decided in its EP 760 decision that requiring exempt agricultural commodities to access demurrage regulation on a case-by-case basis would “unduly ‘add to the complexity, length, and cost of such proceedings to the parties and the Board.’” (NPRM, EP 760, slip op. at 6), such would be precisely the case here. In fact, given the timing sensitivities associated with emergency service remedies, requiring exempt commodity shippers

¹⁵ Indeed, as the Board stated in its EP 760 Decision, “Notably, the exemption-revocation provision does not say anything about market power, in contrast to the exemption-granting provision, which, as pertinent here, requires a finding that regulation is not needed to advance the RTP or to protect shippers from the abuse of market power. Compare 49 U.S.C. § 10502(d) with id. § 10502(a).” EP 760, slip op. at 6.

¹⁶ 49 U.S.C. § 10101(2), (4), (5), (8), (9), and (15).

to first litigate revocation on a case-by-case basis would likely render the potential remedy moot or meaningless. It is hard to imagine that this was intended by Congress or desired by the Board.

Finally, AAR asserts that exempt traffic cannot be addressed by section 1146.2 because a single Board member would act to resolve the emergency but “only the full Board can revoke an exemption, not a single Board Member.”¹⁷ However, to the extent that the Board as a whole determines that partially revoking exemptions to apply part its 1146 rules is warranted and justified as part of this proceeding (and prior to a the filing of a petition seeking an ESO remedy), then the issue raised by AAR would be moot.

For the foregoing reasons, NITL and ISRI respectfully request the Board to partially revoke existing commodity exemptions for the purpose of applying its ESO rules to exempt traffic.

Respectfully submitted,

/s/ Karyn A. Booth

Karyn A. Booth
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4107

On Behalf of:
The National Industrial Transportation
League and the Institute of Scrap Recycling
Industries

June 6, 2022

¹⁷ AAR Op. Comments at 19-20.