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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

SURFACE TRANSPORTATION BOARD

49 CFR Part 1146

[STB Ex Parte No. 628]

Expedited Relief for Service Inadequacies

AGENCY: Surface Transportation Board

ACTION: Supplemental Notice of Proposed Rulemaking

SUMMARY: In May 1998, the Board instituted a proceeding to solicit comments on proposed rules that would establish expedited procedures for shippers to obtain alternative rail service from another carrier when the incumbent carrier cannot properly serve shippers.¹ On September 25, 1998, the American Short Line and Regional Railroad Association (ASLRRA) asked for similar expedited procedures to be established for Class II and Class III railroads to obtain temporary access to an additional carrier under similar circumstances. By this notice, the Board sets dates for interested persons to respond to the ASLRRA request.

DATES: Supplemental comments on the ASLRRA request are due October 30, 1998.

Supplemental replies to such comments are due November 6, 1998.

ADDRESSES: An original plus 12 copies of all supplemental comments and replies, referring to STB Ex Parte No. 628, must be sent to the Office of the Secretary Case Control Unit, ATTN: STB Ex Parte No. 628, Surface Transportation Board, 1925 K Street, N.W.,

¹ Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served May 12, 1998), 63 FR 27253 (May 18, 1998) (May Notice).

Washington, DC 20423-0001. In addition, copies should be served upon all parties included in the service list issued by the Board in its notices served June 9 and 16, 1998, which are available on the Board's website (www.stb.dot.gov).

Copies of the supplemental comments will be available from the Board's contractor, D.C. News and Data, Inc., located in Room 210 in the Board's building. D.C. News can be reached at (202) 289-4357. The comments will also be available for viewing and self copying in the Board's Microfilm Unit, Room 755.

In addition to the original and 12 copies of all paper documents filed with the Board, the parties shall submit their pleadings, including any graphics, on a 3.5-inch diskette formatted for WordPerfect 7.0 (or in a format readily convertible into WordPerfect 7.0). All textual material, including cover letters, certificates of service, appendices and exhibits, shall be included in a single file on the diskette. Each diskette shall be clearly labeled with the filer's name, the docket number of this proceeding (STB Ex Parte No. 628), and the name of the electronic format used on the diskette for files other than those formatted in WordPerfect 7.0. All pleadings submitted on diskettes will be posted on the Board's website (www.stb.dot.gov). The electronic submission requirements set forth in this notice supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in the Board's regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB EX Parte No. 527, 61 FR 52710, 711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).²

² A copy of each diskette submitted to the Board should be provided to any other party upon request.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600.

[TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: As explained more fully in May Notice, the proposed rules are designed to enable the Board to remedy railroad service failures quickly and effectively.³ The proposed rules would provide expedite procedures for parties to seek alternative rail service under 49 U.S.C. 11102, 10705 or 11123 when, over an identified time period, there has been a substantial, measurable deterioration in the rail service provided by an incumbent carrier. We did not list particular factors to be used in making that assessment, or propose a specific test period, but rather proposed a flexible standard of relief to permit the Board to address varying circumstances. However, we cautioned that the proposed rules are not meant to redress minor service disruptions, but rather are directed only at substantial service problems that cannot readily be resolved by the incumbent railroad. Accordingly, we proposed to require petitioning shippers to: (1) first discuss and assess with their incumbent carrier whether adequate service can be restored within a reasonable time and, if not, to explain why not; and (2) obtain from another railroad the necessary commitment—should it be afforded access—to meet the shipper’s service needs, and describe the carrier’s plan to do so safely and without degrading service to its existing customers and without unreasonably interfering with the incumbent’s overall ability to provide service. Finally, the proposed rules would provide that, where relief has been granted and the incumbent carrier can demonstrate that it has restored, or is prepared to restore, adequate service, it may file a petition to terminate that relief (although the proposed

³ The proposed rules are designed only to respond to service problems, and not to provide permanent responses to perceived competitive issues. May Notice, at 6 n.6.

rules would discourage carriers from filing such a petition to terminate less than 90 days after relief was granted, absent special circumstances).

ASLRRRA Request

In its request, which it served on all parties to the Ex Parte No. 628 proceeding,⁴ ASLRRRA asserts that small (Class II and Class III) railroads⁵ and their shippers can be seriously affected by service disruptions of a connecting railroad and that they need expedited procedures comparable to the proposed Ex Parte No. 628 procedures for obtaining temporary access to a second carrier. ASLRRRA mentions three specific types of access:⁶

“(1) Relief from the terms of an existing [so-called paper] barrier [7] or other impediment to access, to permit direct access to the additional carrier;

“(2) Permitting the small railroad access over [the] incumbent carrier for a reasonable distance in order to reach the additional carrier; and

“(3) Permitting the additional carrier access over the incumbent to reach the small railroad.”

⁴ ASLRRRA also served its request on all parties in Ex Parte No. 575, the more general informational proceeding that spawned our proposal in Ex Parte No. 628. See Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served April 17, 1998) (Review), at 6; May Notice, at 2-3.

⁵ Railroads are classified by the amount of their annual operating revenues, measured in 1991 dollars. A Class III railroad’s revenues do not exceed \$20 million; a Class II railroad has revenues of more than \$20 million, but less than \$250 million; and a Class I railroad has revenues of at least \$250 million. 49 CFR 1201, General Instruction 1-1.

⁶ ASLRRRA Request, at 7-8.

⁷ “Paper barriers” refer to contractual restrictions that preclude some small carriers from interchanging traffic with carriers other than their primary connecting carrier. See Review, at 8.

ASLRRA further suggests that, for small railroads, severe service disruptions of 30 days should qualify for relief,⁸ and that the access granted should last for 270 days (the maximum time allowed under current law for emergency orders under 49 U.S.C. 11123). Finally, ASLRRA asserts that a railroad-petitioner should not need an advance commitment from the additional carrier, in view of the mandatory interchange requirements applicable to all railroads.

AAR Reply

AAR asserts that the ASLRRA proposal can and should be considered in the ongoing Ex Parte No. 628 proceeding,⁹ as it involves the same subject—expedited relief for service inadequacies.¹⁰ Moreover, AAR does not view the rules proposed in May as limited to shipper petitions for relief; rather, AAR takes the position that the expedited procedures, as proposed, would be available to railroads (of any size) and shippers alike.¹¹ Nevertheless, AAR supports clarifying the Ex Parte No. 628 rules to specify that railroads, like shippers, could petition for relief, and that the relief granted could include providing for a connection between the petitioning railroad and a second railroad.

⁸ ASLRRA would specifically include serious, continuing car supply problems as grounds for relief.

⁹ The AAR reply, like the ASLRRA request, was served on all parties of record in both the Ex Parte No. 575 and Ex Parte No. 628 proceedings.

¹⁰ Edison Electric Institute (EEI), in a letter dated October 5, 1998, asks that the record in Ex Parte No. 628 be considered in addressing the ASLRRA request, and that the Board provide for opening and reply comments in the matter. Our approach here is consistent with both of EEI's requests.

¹¹ Although the proposed rules do not specifically limit petitioners to shippers, the explanatory discussion in the May Notice focused on shipper-petitioners.

Although AAR agrees in principle with the ASLRRRA proposal, it does not concur in all aspects of that proposal. Rather, it argues against compelling an unwilling second railroad to participate in an emergency service arrangement,¹² establishing preset time frames as suggested by ASLRRRA,¹³ and using what it describes as “routine car supply issues” as a basis for emergency relief.¹⁴

Board Conclusion

We conclude that the ASLRRRA proposal should be considered in the Ex Parte No. 628 proceeding.¹⁵ Accordingly, to ensure that all issues relating to that proposal are fully aired, and that the inclusion of the ASLRRRA proposal does not unduly delay this proceeding, we are establishing an abbreviated schedule for the submission of comments on the proposal. Comments on the ASLRRRA request will be due October 30, 1998, and replies to such comments are due November 6, 1998.

¹² AAR asserts that “the principal if not only reason that a second railroad would decline to handle additional traffic via a new connection would be operating considerations.” AAR Reply at 4 n.3. Under the proposed rules, operating considerations are a significant factor in determining whether to grant relief. See Proposed Rule 1146.1(b)(1)(C) (requiring the petition to address whether the alternative service “would meet the . . . service needs” and “how that carrier would provide the service safely without degrading service to its existing customers or unreasonably interfering with the incumbent’s overall ability to provide service.”).

¹³ AAR Reply at 5 n.4, 7.

¹⁴ AAR argues that “application of the rules to car supply issues between small and large railroads would be particularly inappropriate in light of the fact that the [recent] AAR-ASLRRRA Rail Industry Agreement [a far-reaching agreement encompassing a variety of issues, negotiated in response to the Board’s Review decision] provides a structured mechanism for working together to improve the satisfaction of customers’ car supply needs.” AAR Reply at 6 n.6.

¹⁵ The Board otherwise takes no position at this time on either the ASLRRRA proposal or the AAR arguments relating to it.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1146

Expedited Relief for Service Inadequacies

Decided: October 15, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Secretary