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SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 762
REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF
FOR SERVICE EMERGENCIES

COMMENTS FROM
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

The following comments are filed on behalf of the Brotherhood of Locomotive Engineers and Trainmen (“BLET”). The BLET is the oldest trade union in North America, was founded in 1863 and represents nearly 33,000 active engineers and trainmen members. BLET is also a Division and the founding member of the Teamsters Rail Conference.

The Surface Transportation Board published a Notice of Proposed Rulemaking (“NPRM”) on April 22, 2022, that proposes to amend its emergency service regulations in response to service challenges in recent years.

According to the Board’s Summary in the NPRM, it proposes to do the following:

- (1) amend procedures for parties seeking a Board order directing an incumbent carrier to take action to remedy a service emergency;
- (2) indicate that the Board 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 Board decisions; and
- (5) establish an accelerated process for certain acute service emergencies.

Some of the shippers have had the following problems According to the NPRM, shippers have had various service problems and problems with obtaining emergency service relief. First, the Board’s regulations at 49 C.F.R. part 1146 governing expedited relief for service emergencies are rarely invoked, even in times of serious rail service challenges.

As a result, the STB announced meetings with STB Staff in March 2018 to gather information regarding emergency service and service inadequacies and, “whether and how the current regulations should be modified to offer a more meaningful path to relief.”

Another recurring concern by shippers identified in the NPRM is the amount of time it takes to get relief when a service failure occurs under the current process and satisfying the informational burdens. According to the NPRM, railroads acknowledged very few emergency petitions had been filed, and they believed existing procedures were sufficient and that informal Rail Customer

Assistance Program (“RCPA”) was helpful. Rail crews have not been informed about this program. If rail crews are not integral to customer service, there can be no way to expedite service from an operational perspective. Rail employees take pride in their work and want to satisfy customers demand for quality, safe and prompt service.

April 26 and 27, 2022 Hearing

The Board notes that it has heard informally from a broad range of stakeholders about inconsistent and unreliable rail service throughout the network and across service groups. The Board has identified the challenges of a tight car supply and unfilled car orders, delays in transportation for carload and bulk traffic, increased origin dwell time for released unit trains, missed switches, and ineffective customer assistance.

The BLET’s submission to the Board at this hearing is discussed in more detail below.

Background

The NPRM explains when an emergency service order can be invoked. 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.*”

Also, the NPRM notes remedies available the Board to impose include the ability to:

- (1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines;
- (2) require joint or common use of railroad facilities;
- (3) prescribe temporary through routes; and
- (4) give directions for—(A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits;” or, when the service failure is caused by a cessation of service by Amtrak, direct the continuation of operations and related functions.

Notably, the Board may act on its own initiative or pursuant to a petition and emergency service may be ordered summarily, without regard to Administrative Procedures Act. The current regulations at 49 C.F.R. § 1146.1(a) also provide, in relevant part, that a petitioner seeking relief must show a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period by the incumbent carrier.

Any petition for relief must demonstrate that the standard contained in 49 C.F.R. § 1146.1(a) is met, provide a summary of discussions the petitioner has had with the incumbent carrier regarding the service problems and the reasons why the incumbent is unlikely to restore adequate rail service

within a reasonable period, and include a commitment from an alternative carrier to provide service that can be performed safely without degrading service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service.

One of the problems BLET sees with current practice is the ability of an incumbent carrier to make a claim that almost any petition could be dismissed for failing the "degrading service to existing customers" test. With a high burden of proof on the petitioner who may not have access to the required data, this presents problems for access to the Board and for emergency service relief.

Modification of Petition Requirements (onerous parts of petition requirement)

Currently, under 49 C.F.R. § 1146.1(b)(1)(iii), a petitioner must have a commitment from another available railroad to provide alternative service and explain how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service.

Proponents of a rule modification have expressed frustration with this requirement to secure an alternative carrier in advance (i.e., a commitment to be included in a petition) during a service emergency. These proponents report that potential alternative carriers are reluctant to participate in emergency alternative service:

(1) because taking on new business for a short and unknown period can be unattractive financially,

(2) for fear of retaliation by the incumbent carrier (particularly where the alternative carrier is a railroad that depends on an ongoing working relationship with the incumbent), and

(3) due to uncertainty in ensuring that alternative service can be provided safely and in accordance with applicable regulations and operating practices. In the 1998 decision adopting the part 1146 rules, the Board considered similar concerns but ultimately decided to require the advance commitment of a willing alternative carrier, on the basis that to do otherwise "could create safety concerns, impair service to [the alternative carrier's] customers or hurt its finances."

The Board's Proposed Changes

Requiring an advance commitment from an alternative carrier as a condition to filing an emergency service petition is not a needed burden on petitioners experiencing a service crisis and undermines the usefulness of this important statutory remedy. The Board therefore proposes changes that will ease this burden by requiring petitioners to submit only a list of possible alternative carriers, based on the petitioner's understanding of other rail carriers nearby operations. The Board also proposes to clarify that the explanation need only take the form of a "summary" to the extent that such information is available to the petitioner.

The Board proposes these changes because it agrees that the current regulations do not place the informational requirements on the parties most likely to have the information. BLET is mindful of the problems a customer may face trying to provide information up front because this information is likely under the railroads control and the petitioner will not have access to it.

Another problem identified in the NPRM is by requiring the petitioner to provide detailed information at the outset of a matter could limit access to the Board.

To remedy this, the Board also proposes letting an alternative carrier to provide a response to the petition because another railroad would be the most knowledgeable about whether safety implications exist or that the operation is not feasible or that the incumbent railroad would be unreasonably impaired from fulfilling its common carrier obligations. BLET believes that the employees and our members are great resources of information as to how operations are happening in the field. They help contextualize data that would be provided by help contextualize and fill in gaps that may exist in the raw data that may be furnished by the incumbent railroad, especially regarding manpower and operational difficulties where data points may be lagging in an emerging crisis.

Board proposes modifying the Regulatory Timeframe

The NPRM notes that to provide better access to relief while minding the concept that relief delayed is relief denied, the NPRM seeks to shorten the filing deadlines, establish a target deadlines or timeframes for decisions on the petitions and reduce the period to an incumbent carrier from 5 days to 3.

The Board would then issue decisions within 5 days of rebuttal. The BLET sees no problem with the expedited time frames except that if all the parties agree to extend the timelines, then, the Board should be amenable to a new mutually agreed upon time frame.

Establishing an Accelerated Process to Handle Acute Service Emergencies

In situations involving a clear and present danger to public health, safety, or food security or a high probability of business closures or immediate and extended plant shutdowns (e.g., pandemic) action by the Board under emergency service rules is critical.

The Board seeks comment on a separate accelerated process, set out in Appendix A in proposed new § 1146.2, whereby a petitioner seeking accelerated relief must indicate that the petitioner is seeking such relief pursuant to that process, include a description of specific and particularized actions that can be performed by the incumbent or an alternative carrier and ordered by the Board, and demonstrate that the described emergency presents an imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public.

BLET believes that a careful balance must be struck by the Board in the implementation of emergency requests. Unprecedented events like the outbreak of COVID-19 in America are fresh in our minds because the pandemic is still with us and likely has become endemic. However, there are not many analogues to COVID. It seems to be the worst pandemic anyone in the U.S. has

experienced and it is difficult to forecast ways to prevent the type of harm that it has caused and will cause. Other pandemics or dangers like war may be less widespread yet cause huge service disruptions due to infrastructure. Severe weather events, or military or terrorist attack could require swift action by the Board.

BLET's members have been at the forefront of providing safe rail service every time they arrive for duty. They are the perennial essential worker and have always been eager to move America's freight and provide customer service with pride. They need to be given an opportunity to have a voice in how best to achieve the goals when the process is expedited. Although this balance must be taken, the BLET agrees with the concept that if the process moves forward and the Board orders action, the 20-day time limit is a back-stop to causing most major harms.

Ways a Petitioner Can Satisfy the New Standard of the NPRM

According to the NPRM, to satisfy the new standard, the petitioner must demonstrate that the alleged harm will occur before any relief could be ordered under § 1146.1 and that any relief ordered by the Board pursuant to § 1146.1 would be rendered ineffective.

Again, such unfavorable circumstances 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. BLET believes this standard would be a fair way to define the standards.

Also, according to the NPRM, "the petition must also include a description of any efforts taken to resolve the issue through others means, such as utilizing the Board's rail customer and public assistance program (RCPA) or direct discussions with the incumbent railroad." Although this has the potential to work, BLET believes operating employees, such as locomotive engineers, should have a voice in this process. There is not a better group to help STB gather information about the state of rail operations, emergency or otherwise

As a general matter, BLET's position is that we are supportive of a concept easing the burden to petitioners in cases of acute service emergencies. However, we also harbor some reservation and concerns about the remedies provided when an alternate carrier is ordered to provide service on territories covered by existing collective bargaining agreements. We are also concerned about how the intended consequence of providing emergency service does not come with an attendant unintended consequence of undermining collective bargaining agreements between railroads and their employees.

However, BLET is careful to point out and refers the Board to our testimony in April 2022 when BLET identified the major problem plaguing good service is the Class I Railroads' adoption of the Precision Scheduled Railroading ("PSR") business model. Cuts to operating employees' jobs have undermined any ability the carriers have had to stave off supply chain problems and provide reliable service before and after the onset of COVID. This makes expedited, emergency service even harder than normal service to meet. As BLET noted before the Board in its testimony, the elimination of 35% of Class I Railroad operating employees since January 2015 has left no room for curing service problems.

The railroads need to hire, train, and retain their workforce at a time when their business model instead encourages layoffs, keeping employees in the dark and drafting draconian attendance policies to curtail the railroad's self-inflicted manpower shortage. These policies make most workers who manage to hang on, either hate their employer outright or simply quit their jobs fed up with railroads who refuse to recognize their workforce is overworked burned out and over the excuses. *See* "Urgent Issues in Freight Rail Service," April 26 and 27, 2022, STB Docket No. EP 770.

The safety implications also must be handled and employees, in addition to alternate rail carriers, need to be given an opportunity to comment on possible implications of providing expedited relief to a shipper where employees are not provided adequate notice to the relief or the period in which it will occur. Thus, although the relief may be limited in some cases only to 20 days, it is important, if not critical, to notify operating employees as to when the 20-day period of relief would commence and when it would conclude.

The BLET is supportive of the need of the Board to be responsive to the shipping needs of America and to ensure that rail carriers meet their common carrier obligations under the law. Emergency situations like we are experiencing with the COVID-19 Pandemic need to have a process that can allow the Board to quickly address the needs of the Country's supply chain. BLET members are dedicated and have been part of the solution of moving America's freight by rail.

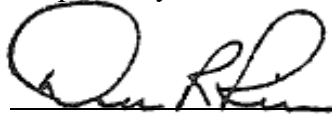
We are also careful to point out that proposed cures of "reciprocal switching," although not called out specifically in the NPRM, will not, in most cases, be a feasible solution to the problems being experienced by shippers or other rail customers.

The Class I Rail Carriers use of a new business model called PSR has created shipping problems that can masquerade as a crisis or emergency to the supply chain. However, the manpower problems created by PSR is not an unforeseeable emergency, rather it is a logical consequence of cutting jobs and running rail operations with skeleton crews and slashed budgets.

Thank you for the opportunity to comment.

Date: May 23, 2022

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Dennis R. Pierce", written over a horizontal line.

Dennis R. Pierce
National President