

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 762

REVISIONS TO REGULATIONS FOR
EXPEDITED RELIEF FOR SERVICE EMERGENCIES

REPLY COMMENTS

submitted by

THE COALITION ASSOCIATIONS

The Coalition Associations¹ hereby submit these Reply Comments in response to the Notice of Proposed Rulemaking that the Surface Transportation Board (“STB” or “Board”) served in this docket on April 22, 2022 (“NPRM”). The Board has proposed to amend its rules, published at 49 C.F.R. Part 1146, for requesting emergency service orders under 49 U.S.C. 11123(a). In their Opening Comments, the Coalition Associations expressed strong support for the proposed amendments, while cautioning the Board not to consider the proposed amendments to be a solution for all, or even most, service problems. They explained that the benefits would extend only to select situations; the proposed rules would be ineffective when the available remedies are infeasible or cannot be implemented safely or without impairing the affected

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

carriers' ability to serve other customers; and the rules would still contain gaps that could discourage their use even when those other impediments can be surmounted.

The Association of American Railroads ("AAR"), CSX Transportation, Inc. ("CSXT"), and Norfolk Southern Railway Company ("NS") submitted opening comments that ranged from conditional support for some proposals to outright opposition to others and proposed additional modifications.² There were slight differences between the comments of CSXT and NS and those of the AAR. No other Class I railroad filed separate comments. These Reply Comments focus upon the opening comments submitted by those three Class I railroad parties.

In these Reply Comments, the Coalition Associations respond to the railroad comments in six general areas.

- First, they disagree with all three rail commenters' claims that the Board may not exercise its Section 11123 authority over traffic that is covered by a contract. Those claims are factually and legally incorrect and would produce absurd results that Congress could not have intended.
- Second, the Coalition Associations oppose the railroad requests for the Board to retain the existing requirement that petitioners include a front-end commitment from alternative carriers in their emergency service petitions because elimination of that requirement is essential to the effectiveness of the emergency service rules. The Associations nevertheless acquiesce to certain other modifications that could mitigate the railroad concerns without impairing the effectiveness of the rules.

² Those three sets of opening comments are hereafter cited as "AAR Op.," "CSXT Op.," and "NS Op.," respectively.

- Third, the Associations oppose railroad requests to discard the accelerated process in section 1146.2. That is the single most important of all the Board's proposals. Again, however, there are minor modifications pertaining to relief involving alternative carriers that would moot the railroad concerns.
- Fourth, AAR's attempt to establish objective standards for defining service emergencies is unnecessary and too constraining.
- Fifth, the Board should reject requests by AAR and NS to require petitioners to satisfy the Board's injunction standards in emergency service petitions. Those standards require irreparable harm to the petitioner; however, many conceivable scenarios would not constitute irreparable harm to the petitioner but still could have devastating consequences for the broader public interest. Similarly, the Board should reject any attempt to impose a market dominance standard upon emergency relief.
- Finally, the Coalition Associations comment on other issues raised by the railroads concerning the quarterly rotation of Board members, notice and service requirement, and compensation. The Associations generally support railroad proposals regarding the first two issues and make some additional suggestions to advance the same objectives, but they oppose the AAR's compensation points when the service emergency is due to the fault of the railroad.

I. THE BOARD MAY EXERCISE ITS SECTION 11123 AUTHORITY FOR TRAFFIC THAT IS COVERED BY A CONTRACT.

All three Class I rail commenters contend that the Board may not exercise its Section 11123 emergency service authority over traffic that is covered by a contract because 49 U.S.C. § 10709(c)(1) provides that "transportation under such contract[] shall not be subject to this

part....”³ AAR and CSXT make only conclusory assertions with little or no discussion to support this contention. NS provides a more thorough discussion but mischaracterizes the Board’s precedent as creating an ambiguity that requires clarification when, in fact, there is no such ambiguity.

To adopt the position espoused by these rail interests would preclude the Board from exercising its Section 11123 authority for any transportation covered by a contract even when the exercise of such authority is manifestly in the broader public interest, such as “a clear and present threat to public health, safety, or food security” as provided in the proposed section 1146.2(a). It is nonsense to claim that Congress granted the Board broad emergency authority in Section 11123 to address such emergencies only to take it away in Section 10709 for the substantial volume of rail traffic that is covered by a contract, or that Congress would subordinate the public interest to a private contract.

Precedent also belies this railroad argument. When the Board adopted the existing emergency service rules, it plainly stated that “where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts.”⁴ The Board also identified a prior instance in which it had exercised its Section 11123 authority over contract traffic.⁵ Ultimately, the Board held that

³ AAR Op. at 18, CSXT Op. at 12, NS Op. at 7-10.

⁴ *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628, slip op. at 10 (served Dec. 21, 1998) (“EP 628”).

⁵ *Id.*, citing *Joint Pet. for Service Order*, STB Service Order No. 1518 (Oct. 31, 1997), *modified and extended* (Dec. 4, 1997), *further modified and extended* (Feb. 17 and 25, 1998), *terminated with wind-down period* (July 31, 1998) (“UP/SP Service Order”).

“[s]uch jurisdictional issues are best left to a case-by-case examination....”⁶ NS inexplicably characterizes this language as ambiguous and asks the Board to eliminate that ambiguity. But there is nothing ambiguous in the Board’s decision to address jurisdictional issues case-by-case. The railroad parties have offered no justification for altering that position.

Finally, it is factually incorrect to claim that an emergency service order subjects transportation under a contract to the Board’s jurisdiction. The transportation that occurs pursuant to an emergency service order is not occurring under a contract. Just because transportation of certain traffic can be performed under a contract does not mean that alternative service pursuant to Section 11123 is contractual. Furthermore, most rail contracts do not require a shipper to commit 100% of its traffic volume to move pursuant to the contract, which leaves the shipper free to move a portion of its traffic under alternative arrangements, including an emergency service order. But even if a shipper would be in violation of its contract by using alternative arrangements, the rail carrier can pursue its remedies under that contract. Indeed, that is what the Board contemplated in *EP 628* when describing its Section 11123 authority as allowing traffic to move “while any contract-related issues are being litigated in the courts.”⁷ In sum, by issuing an emergency service order, the Board provides the shipper with an alternative to any rail contract service that may exist, but does not absolve either the carrier or the shipper of any rights or obligations they have under such contract; nor does the Board resolve any contract-related disputes between the parties.

⁶ *Id.*

⁷ *Id.*

II. THE BOARD IS CORRECT TO ELIMINATE THE REQUIREMENT THAT PETITIONERS HAVE A COMMITMENT FROM AN ALTERNATIVE CARRIER.

AAR and CSXT contend that the Board should retain the requirement in the existing rule that a complaining shipper have a commitment from another carrier to provide alternative service when the shipper files its petition.⁸ It is not clear, however, whether they are referring solely to emergency service orders that establish trackage rights for an alternative carrier or also would encompass their participation in alternative through routes. As the Coalition Associations explained in their opening comments, elimination of this requirement is essential to the effectiveness of the emergency service rules because, otherwise, an alternative carrier seldom will have any incentive to provide such a commitment.⁹

The Coalition Associations appreciate some of the concerns expressed over eliminating this requirement, but there are ways for the Board to address those concerns short of abandoning this critical element of its proposal. The Board already has taken a partial step in that direction by proposing to require a shipper to identify at least one alternative carrier when service from an alternative carrier is requested. The logical next steps are to require the shipper to serve its petition on the identified alternative carrier(s) and to mandate that the carrier(s) participate throughout the process. These additional steps will ensure that alternative carriers are informed and engaged at the front-end of the process without requiring a “commitment” to provide service.

The Coalition Associations also are amenable to certain other modifications to address these concerns. First, because the Board has proposed an accelerated process in new section

⁸ AAR Op. at 7-10, CSXT Op. at 3-8.

⁹ Coalition Op. at 4.

1146.2, there is less need to reduce the time frames for relief under section 1146.1. If those time frames are not reduced, there will be more time to resolve alternative service matters under section 1146.1. Second, the Coalition Associations are receptive to proposals from AAR and NS to limit relief under the accelerated process to so-called “incumbent-based” relief, *i.e.*, a remedy that does not require granting trackage rights to an alternative carrier.¹⁰ To be clear, shippers still could use the accelerated process to obtain an alternative through route involving an alternative carrier. That modification would moot concerns over alternative service via trackage rights in accelerated proceedings.

All the foregoing modifications are consistent with a proposal that ACC, TFI, and The National Industrial Transportation League shared in *ex parte* meetings with Board members in 2018. First, they proposed to require service of petitions on both the incumbent and alternate carriers (if any). Second, they proposed an accelerated process that, due to its expedited and abbreviated nature that limits presentation of the detailed information implicated by more complex operating solutions, trackage rights would not be an available remedy.¹¹ Third, they did not propose to shorten the process under section 1146.1. With the adoption of these modifications, railroad objections to eliminating the existing requirement that shippers have a commitment from an alternative carrier are significantly reduced for section 1146.1 and eliminated for section 1146.2.

¹⁰ AAR Op. at 10-11, NS Op. at 5-6.

¹¹ See Coalition Op. at 6 n. 3.

III. **THE BOARD SHOULD REJECT REQUESTS TO DISCARD THE ACCELERATED PROCESS.**

AAR, CSXT, and NS urge the Board to discard the proposed accelerated process in section 1146.2.¹² AAR contends that the procedural process is too abbreviated to allow the Board sufficient information to determine whether its order would impair substantially the ability of the rail carriers to serve other customers, or to fulfill their common carrier obligations. CSXT offers two separate justifications. First, CSXT claims there is no need for the accelerated process in section 1146.2 where the Board also is proposing to accelerate the existing process in section 1146.1. Second, like AAR, CSXT claims that the accelerated process is so compressed that it undermines basic principles of fairness and the Board's ability to gather information. NS offers modifications if the Board proceeds to adopt the accelerated process. The Coalition Associations believe that there is an acute need for a separate accelerated process, but certain modifications can be made to address the concerns raised by AAR, CSXT, and NS.

As discussed in Part II above, the Coalition Associations do not believe there is a compelling need to further compress the timelines for petitions brought under section 1146.1 if the Board adopts the accelerated process in section 1146.2. The latter process is sufficient to address shipper concerns that the former is too slow and cumbersome for the most time-sensitive emergencies. Indeed, proposed section 1146.2(a) makes clear that a shipper may invoke the accelerated process only when "[t]he timing of such potential harm and consequences must render potential relief under 49 C.F.R. § 1146.1 ineffective." Also, in Part II above, the Coalition Associations do not object to limiting relief available under the accelerated process to so-called "incumbent-based" remedies due to its compressed timelines, which is a modification

¹² AAR Op. at 13-14, CSXT Op. at 8-11. *See also*, NS Op. at 4-7 (proposing limits upon the accelerated process if the Board is intent upon adopting it).

that both AAR and NS have proposed. If the Board opts not to compress the existing timelines for the section 1146.1 process and restricts relief under section 1146.2 to incumbent-based remedies, there is a clear distinction that vitiates the concerns raised by AAR, CSXT, and NS, and strengthens the Board’s justification for adopting the accelerated process.

IV. AAR’S ATTEMPT TO DEFINE ELIGIBLE SERVICE EMERGENCIES IS UNNECESSARY AND TOO CONSTRAINING.

AAR asks the Board to clearly define what constitutes an emergency justifying relief under sections 1146.1 and 1146.2.¹³ The Coalition Associations, however, believe that AAR’s proposals are unnecessary and too constraining.

AAR claims that “it is essential that the rule articulate clear and objective standards for when it is the correct vehicle, as opposed to when other Board authorities for addressing service issues would be more appropriate.”¹⁴ AAR, however, fails to explain why it is necessary to do this now, when the existing process in section 1146.1 has been in place for nearly 25 years without the objective standards that AAR deems “essential.” Indeed, in past decisions where the petitioner has invoked section 1146.1 improperly, the Board has denied emergency relief on those grounds and, where appropriate, directed petitioners to the proper procedures.¹⁵

Identifying objective standards for invoking emergency service relief simply is not practical. The Board cannot fully anticipate every scenario that may arise, which is why a case-

¹³ AAR Op at 2-7.

¹⁴ AAR Op. at 3.

¹⁵ *E.g., Granite State Concrete Co., Inc. et al. v. B&M Corp., et al.*, Docket No. 42083 (served Sept. 15, 2003) (denying an emergency service order, but commencing a proceeding under 49 U.S.C. § 11701(c)); *Keokuk Junction Ry. Co. – Alternative Rail Service – Line of Teodo, Peoria and W. Ry. Corp.*, FD No. 34397 (served Oct. 31, 2003) (denying an emergency service order because alleged service inadequacy is based primarily upon rate levels); *Ohio Valley R.R. Co. – Pet to Restore Switch Connection and Other Relief*, FD No. 34608 (served Feb. 23, 2005) (denying an emergency service order, but granting relief under 49 U.S.C. § 10742).

by-case approach is superior. The Board can and should continue to employ the same case-by-case approach it has used since it adopted the current emergency service rules. The most that the Board should do in this proceeding is to illustrate the types of situations that clearly would merit relief.

It is noteworthy that AAR does not offer any objective criteria for the Board to adopt. AAR, however, does ask the Board to clarify that the imminent threat of a plant shutdown, unaccompanied by a public health, safety, or food security emergency, should not be considered an emergency that merits emergency service relief.¹⁶ But Section 11123 of the statute plainly applies to any “failure of traffic movement...which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers....” This statutory language is consistent with language in the proposed rule that applies the accelerated process when there is “a high probability of business closures or immediate and extended plant shutdowns.” If that is not “an emergency situation of such magnitude as to have substantial adverse effects on shippers,” it is difficult to envision what else Congress could have meant.

AAR justifies its request by claiming that the harm to shippers for most plant shutdowns can be remedied with monetary damages.¹⁷ But this in no way reflects reality. Nearly all rail tariffs and contracts foreclose the most significant types of monetary damages that shippers sustain from plant closures (*e.g.*, consequential). Railroads will only pay direct damages, which primarily would be the additional cost of alternative transportation. However, the most captive shippers, which are the shippers with the greatest need for emergency service, have the least

¹⁶ AAR Op. at 6.

¹⁷ *Id.*

ability to use alternative transportation. Thus, telling those shippers that their injuries from service emergencies can be remedied through monetary damages is not helpful.

Finally, AAR seeks clarification of the term “food security.” AAR posits absurd hypotheticals involving shortages in pet food, livestock feed, bread, potato chips and soda to illustrate its alleged need for greater clarity.¹⁸ None of these hypotheticals can reasonably be conflated with food security to suggest a need for greater clarity. Food security is traced back to the ultimate food sources, not the manufactured products in the AAR’s hypotheticals. For example, shortages of grain or potatoes used to produce bread and potato chips implicate food security, not a shortage of bread and potato chips as finished food products. In addition, shortages of fertilizer, which is essential to maximize crop yields would implicate food security. “Food security” is not a term the Board should feel compelled to define more clearly or objectively. Common sense is all that is required for the Board to understand and apply these concepts.

V. THE BOARD SHOULD REJECT ATTEMPTS TO IMPOSE MARKET DOMINANCE AND INJUNCTION STANDARDS UPON EMERGENCY SERVICE REQUESTS.

Rail commenter attempts to append additional standards onto the proposed rules are unwarranted. Both AAR and NS urge the Board to apply its standards for granting injunctions under 49 U.S.C. § 1321(b)(4).¹⁹ Similarly, CSXT asserts that the Board does not need the accelerated process in section 1146.2 because it already can provide such relief through its injunction authority.²⁰ In addition, AAR advocates for a requirement that “there are no

¹⁸ AAR Op. at 7.

¹⁹ AAR Op. at 6, NS Op. at 6-7.

²⁰ CSXT Op. at 9.

alternative modes available or feasible for the petitioner.”²¹ These concepts are not appropriate for emergency service orders.

The Board’s injunction authority derives from 49 U.S.C. § 1321(b)(4) which states that “The Board may...when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.” [emphasis added] In exercising this authority, the Board has applied the four *Holiday Tours*²² criteria and will grant an injunction where the requesting party shows that: (1) it is likely to prevail on the merits; (2) it will be irreparably harmed absent an injunction; (3) issuance of the injunction will not substantially harm other interested parties; and (4) granting the injunction is in the public interest.²³ These factors are considered on a "sliding scale" such that they are "balanced against each other."

Davenport v. Int’l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999).

However, at least some showing of irreparable harm is necessary, even if the other three factors militate in favor of granting relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

The fundamental problem with injecting this standard into an emergency service order is the *sine qua non* requirement of irreparable harm in both the statute and the *Holiday Tours* criteria. Irreparable harm means that monetary relief for the petitioner will be insufficient to

²¹ AAR Op. at 17.

²² *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977) (citing *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

²³ *E.g.*, *CVAG; N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148 (STB served Oct. 21, 2016), at 3; *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42149 (STB served May 4, 2012), at 4; *Stagecoach Grp. PLC—Acquis. of Control—Twin Am., LLC*, MC-F-21035 (STB served Mar. 9, 2011), at 2; *R.R. Salvage & Restoration, Inc.—Pet. for Investigation & for Emergency Relief Under 49 U.S.C. 1321(b)(4)—Sec. Deposit for Demurrage Charges, Mo. & N. Ark. R.R.*, NOR 42107 (STB served June 30, 2008).

make the petitioner whole. The Board also exercises its emergency service authority, however, for the broad public interest, not just a petitioner. It is entirely conceivable that the petitioner could be made whole with monetary damages, but the broader public interest could not.

A recent example of this is fertilizer transportation and the restrictions that Union Pacific Railroad (“UP”) placed upon fertilizer shipments (and many other commodities) to alleviate congestion on its network. TFI was prepared to file an emergency service order petition to repeal UP’s restrictions on fertilizer shipments before TFI’s affected members reached a negotiated accommodation with UP. That petition was necessitated by the fact that UP had imposed its restrictions at the onset of the planting season for which there is a narrow window to apply fertilizer after which the opportunity is lost for the current season. Consequently, if UP did not transport the fertilizer, that fertilizer could not be applied and crop yields for the Fall harvest would be reduced. These consequences were exacerbated by the Russian invasion of Ukraine, which has curtailed supplies of both fertilizer and grain worldwide. This was a textbook example of a food security concern. Theoretically, however, the TFI members – if their contracts allowed them — might have been made whole through monetary damages and thus would not sustain irreparable harm. But that would not have alleviated the impacts upon food security for the broader public. If the Board were to require irreparable harm as the rail commenters urge, an emergency service order could not be granted in that situation. Yet that is precisely the type of situation that even AAR appears to concede would warrant an emergency service order.²⁴

²⁴ *E.g.*, AAR Op. at 4 (presents a scenario where chlorine needed for water treatment could justify an emergency service order even though the petitioner could be made whole by monetary damages).

In addition to applying an injunction standard to emergency service petitions, AAR asks the Board to “require petitioners under both sections 1146.1 and 1146.2 to affirm that there are no alternative modes available or feasible for the petitioner.”²⁵ It is unclear whether AAR merely wants the petitioner to make a sworn statement to that affect or if AAR contemplates some form of market dominance showing. The latter clearly is impractical for an emergency petition. The Coalition Associations agree with AAR that “[t]he mere preference for rail traffic movement over another mode does not, in and of itself, constitute an emergency.” But the inference that shippers would litigate an emergency service order when they have other alternatives to mitigate the consequences of rail service failures is unrealistic and cynical. The time, cost, and uncertainty of pursuing emergency service relief will always outweigh the additional cost of a non-rail transportation alternative to avoid the emergency.

VI. OTHER ISSUES.

A. Quarterly Rotation of Board Members.

AAR has proposed various modifications to the quarterly rotation of the Board member designated to resolve accelerated requests under section 1146.2.²⁶ The Coalition Associations have no objections to those proposals for the purpose of mitigating the burdens that could fall unduly upon a single member. Nevertheless, the Coalition Associations stridently object to AAR’s contention that such modifications are needed to prevent “judge shopping.” Section 1146.2 is designed for the most urgent requests that cannot be addressed in a timely manner by the section 1146.1 process. Thus, any circumstance in which a shipper can afford to wait until

²⁵ AAR Op. at 17.

²⁶ AAR Op. at 15-16.

the following calendar quarter to have its petition decided by a different Board member would not qualify for the section 1146.2 process.

B. Notice and Service to Carriers.

AAR, CSXT, and NS seek clarification of the proposed requirements for serving emergency service petitions.²⁷ The Coalition Associations agree that the requested clarifications are needed. Furthermore, as discussed in Part II above, service should be made upon both the incumbent and any alternate carriers identified in the petition. The Board also should consider requiring all Class I carriers to file with the Board the name and electronic address for service of all such petitions. This will ensure even faster delivery to those carriers to maximize their response time.

C. Compensation of Carriers.

AAR asks the Board to clarify that compensation for an alternative carrier's service is a matter between the shipper and that carrier.²⁸ In their opening comments, the Coalition Associations also asked the Board to clarify responsibility for compensating alternative carriers.²⁹ The key difference in positions, however, is that AAR would place responsibility for such costs solely upon the shipper in all circumstances, whereas the Coalition Associations would apply a more equitable fault-based standard to determine responsibility.

VII. CONCLUSION.

The Coalition Associations continue to strongly support the Board's proposals to modify the emergency service rules in 49 C.F.R. Part 1146 to provide more effective and accessible remedies for a larger number of emergency situations. They oppose most of the rail industry

²⁷ AAR Op. at 16-17, CSXT Op. at 12, NS Op. at 10-11.

²⁸ AAR Op. at 18.

²⁹ Coalition Op. at 6-7.

comments except to the limited extent expressed herein. They also urge the Board to proceed expeditiously to adopt new reciprocal switching rules in EP 711 (Sub-No. 1) to complement the proposals in this proceeding.

Respectfully submitted,

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