BEFORE THE
SURFACE TRANSPORTATION BOARD

REVISIONS TO REGULATIONS FOR EXPEDITED RELIEF FOR SERVICE EMERGENCIES	)	Ex Parte No. 762

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, FREIGHT RAIL CUSTOMER ALLIANCE, NATIONAL COAL TRANSPORTATION ASSOCIATION, AND PORTLAND CEMENT ASSOCIATION

Bette Whalen
President, Western Coal Traffic League
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Ann Warner
Spokesperson, Freight Rail Customer Alliance
Ann Warner LLC
300 New Jersey Avenue, Suite #900
Washington, D.C. 20001

John Ward
Executive Director
National Coal Transportation Association
1616 17th St., Suite 266
Denver, CO 80202

Portland Cement Association
Katy Hartnett
Director, Government Affairs
200 Massachusetts Ave., N.W., Suite 200
Washington, D.C. 20001

William L. Slover
Robert D. Rosenberg
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
202.347.7170

Attorneys for the Western Coal Traffic League, Freight Rail Customer Alliance, National Coal Transportation Association, and Portland Cement Association

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The Western Coal Traffic League ("WCTL"), Freight Rail Customer Alliance ("FRCA"), National Coal Transportation Association ("NCTA"), and Portland Cement Association ("PCA") (collectively, "Shipper Groups") submit these reply comments in response to the Notice of Proposed Rulemaking ("Notice" or "Proposal") that the Surface Transportation Board ("Board" or "STB") served in the above-captioned proceeding on April 22, 2022.

Eighteen sets of comments were submitted in response to the Board's Notice. The only significant objections were from the three railroad commentators: the Association of American Railroads ("AAR"), CSX Transportation, Inc. ("CSX"), and Norfolk Southern Railway Company ("NS") (collectively, "Railroads"). The comments of the Railroads overlap substantially. Accordingly, Joint Shippers will focus on the comments of the Railroads as a group.

I. The basis for relief should be decided in individual adjudications, not the rulemaking.

All three railroad commentators devote substantial effort to seeking to induce the Board to decide prematurely where shippers and receivers should, and should not, be able to obtain emergency relief. Such matters should be decided on the basis of actual facts in individual adjudications, not on the basis of hypothetical facts as postulated by the Railroads at the rulemaking stage.

In particular, the AAR distinguishes between hypothetical rail deliveries to two shippers or receivers. The first is the Smallville Water District that receives chlorine for water sanitation, and the second is the Bugle Paper company that receives paper feedstock deliveries. The chlorine situation is reminiscent of *Hasa, Inc. v. Union Pacific R.R. Co.*, NOR 42165 (STB served Aug. 21, 2019), and serves as the AAR's strawman to show that the needs of Bugle, threatened with a shutdown at least for the weekend, are allegedly too limited to warrant relief. AAR at 2-5. Whether relief is appropriate should be determined based on a full set of facts, not a skimpy hypothetical.

The AAR further posits that Bugle's problems "can be remedied through other types of proceedings, including possible monetary damages." *Id.* at 5. But the AAR has it backwards. If other types of proceedings or remedies were available to address the harm, and had sufficient teeth, then Bugle would not need to seek emergency relief in the first place because the railroad would be deterred from curtailing service. The more likely reality is that the railroad will hotly contest and seek to avoid, or at least delay, all such remedies by hiding behind a combination of defenses such as the

vagueness of the common carrier obligation, one or more exemptions, a limitation on contractual remedies, a disclaimer of consequential damages, force majeure, and/or a challenge to any award of monetary damages or imposition of penalties. The AAR's later statement that "shutdowns or closures can often be remedied with monetary damages," *id.* at 7, is so fanciful and devoid of foundation as to be disingenuous.

The economic loss associated with failures to provide needed service, which the Railroads seek to dismiss as a basis for obtaining any emergency relief, can be massive. For example, the delivered cost of a trainload of Western PRB (Powder River Basin) coal to a power plant can easily approximate $500,000. (125 cars/train times 120 tons per car times $33/ton ($16/ton for 8,800 Btu coal and $17/ton for transportation) equals $495,000.) The delivered cost of that trainload equates to $1.88 per million Btu ($33/ton times ton/2,000 pounds times pound/8,800 btu). According to Platts Coal Trader (June 1, 2022) at page 2, physical natural gas prices in the West per million Btu included $7.965 at NGPL, Midcontinent (Oklahoma), $8.200 at Chicago City-Gates, and $8.420 at Henry Hub (excluding additional delivery charges). Assuming equivalent heat rates (for a gas steam unit), the cost of replacing an undelivered trainload of coal with an equivalent amount of natural gas would range from $1.6-$1.72 million. The economic impacts on shippers and receivers of other commodities, and their ultimate consumers and end-users, resulting from of a railroad's failure of service is similar, and in many instances, much greater.

Shippers thus face economic losses of tens of million dollars due to the railroads' inability to deliver needed volumes of commodities at rates that the railroads

consider profitable and desirable, yet these shippers and their customers would be categorically precluded at the outset from receiving emergency service under the Railroads' approach. Relief would be unavailable no matter how easy it would be for the incumbent (or an alternative carrier) to provide service and how flimsy its excuse for not doing so. There is no reason to reach such a draconian result at this time, especially on the basis of no actual facts.

The AAR itself invokes the injunction standard for obtaining relief and focuses on irreparable injury. AAR at 6, citing *Sampson v. Murray*, 415 U.S. 61, 90 (1964). However, the test involves a balancing of interests, an exercise which is inherently fact-specific. In some cases, such as *Hasa*, there may be no bar to providing service, only a carrier's callous disregard for what level of service is truly needed. Emergency relief should not be precluded at the outset in the manner proposed by the Railroads.

II. Contract and exempt traffic should remain eligible for emergency relief.

The Railroads all seek to reverse the Board's ability to grant relief to movements that involve contract and exempt traffic. AAR at 18-20; CSX at 12 (§ 10709 traffic); NS at 7-10. The STB recognized that it had this authority over twenty years ago in EP 628, and the Railroads have not advanced any basis for the Board to alter its view. If anything, the breadth of the harm currently inflicted upon shippers, receivers, and the public by the massive service failures under so-called Precision Scheduled Railroading buttresses the need for the Board to be able to act broadly.

In any event, this aspect of the Board's authority was not encompassed within the Board's notice, and the Railroads' suggestions cannot be acted upon in any event.[1]

III. Increased availability of emergency relief will facilitate, not undermine, the Rail Customer and Public Assistance process.

The Railroads also express concern that the availability of emergency relief may interfere with the efforts of the Rail Customer and Public Assistance ("RCPA") process. *E.g.,* NS at 1. The reality is that the availability of emergency relief is apt to make the RCPA more effective as the shipper/receiver will have some other ability to obtain relief when confronting difficult circumstances. The availability of emergency relief may make it possible for the shipper and the railroad to resolve service issues without resort to RCPA in the first place, which will then free up RCPA resources to address other situations.

Joint Shippers are deeply appreciative of the expertise efforts of the RCPA staff. However, the unavoidable reality is that RCPA has no authority to order any action, and its effectiveness depends entirely on the voluntary efforts of shippers and

[1] The AAR also seeks to concoct a "chicken or the egg" argument that no relief can be granted for exempt traffic unless the exemption is first revoked. AAR at 18-20. If the situation is sufficiently dire to warrant emergency relief, then it surely warrants prospective revocation of any exemptions to the extent needed to permit the relief. It should be clear that application of some components of the national transportation policy and the legislation are needed to protect shippers from the abuse of market power. Furthermore, to the extent a railroad objects to limited, prospective revocation of an exemption by a single Board member, the issue can be addressed upon appeal to the full Board.

railroads. Undoubtedly, the railroads prefer to avoid any change that increases their exposure to coercive action. But the reoccurrence of widespread service failures demonstrate that additional measures are essential. The railroads' real concern is not that RCPA will be undermined, but that the playing field will be made more level.

IV. The agreement of an alternative carrier to participate is not needed in advance, and accelerated relief should not exclude the participation of an alternative carrier.

The Railroads would require that the shipper/receiver have secured the agreement of the alternative carrier before filing a petition for emergency relief and would make the accelerated procedures unavailable when an alternative carrier is involved. The Railroads again seek to make it more difficult, if not impossible, for the shipper or receiver to secure relief in the first place.

As Joint Shippers explained on opening, an alternative carrier may be reluctant to commit publicly in advance to providing alternative service, especially if it is otherwise dependent on the incumbent carrier in some way, such as a short line that is beholden to the affected carrier for all or much of its business or otherwise subject to "paper barriers" established by the incumbent. Moreover, the need for the alternative carrier will not always be fully apparent. For example, confronted with the possibility that the service might be performed instead by an alternative carrier, the incumbent might conclude that it is able to perform the service itself after all.

The Railroads' insistence that the alternative carrier be formally committed before a petition is filed with the Board and that accelerated relief be unavailable if an alternative carrier is involved appears designed to hobble the relief process before it

begins, consistent with what appears to be the Railroads' overriding objective in their comments.

V. Other proposals of the Railroads appear unneeded or at least speculative at this time.

The Railroads present various other proposals that appear to be unneeded or at least speculative at this time. For example, the AAR states at p. 12 that the period of time for development of the record under § 1146.1 has been unduly shortened, and NS appears to concur at pp. 4-5. However, CSX says at p. 12 that decisions should be subject to a firm deadline. The more appropriate course would be for the Board to take the time that is needed in the individual situations, balanced against the extent to which immediate action is needed. Some situations will logically be more complex and take more time to resolve than others.

The AAR also posits at pp. 15-16 that the single Board member appointed for a given calendar quarter may be inadequate. The identified problem may or may not actually materialize, but it makes more sense to address it at such time as it actually materializes, and deal with actual circumstances and actual problems, rather than adopt complicated procedures based on hypothetical concerns that may never materialize. The same is true of the AAR's contentions that the § 1146.2 process should be more narrowly tailored (pp. 5-7), that "food security" needs to be defined more narrowly (p. 7), and that more time is needed (pp. 12-13). These matters should be addressed as they arise, and not decided in advance based on speculative concerns.

The AAR's subsequent claim that absent the opportunity under § 1146.2 for the carriers to make a written presentation, "[i]t is inconceivable how the Board will make a responsible decision," *id.* at 13-14, more than borders on the specious. There is no basis to conclude at this stage that any railroad will be deprived of a fair hearing without the opportunity to make a written presentation. Railroad counsel has shown an impressive ability to put together lengthy filings on short notice, when doing so suits the railroads' interests. The greater risk is that the railroad will use the opportunity to bury the shipper/petitioner and the Board itself in an avalanche of paper.

Similarly, there is no basis to conclude that the railroad will be deprived of notice. *Id.* at 16-17. The AAR's concern with the need for an affirmation that there are no other "modal options" is also contrived. That issue, to the extent applicable, can be pursued as needed in an individual situation. In general, one would expect that a shipper that had a viable, economic option to pursue would choose that option before seeking emergency relief. What the railroads more likely have in mind is the opportunity to present a mini-market dominance case that will impose additional burdens on shippers. In that regard, the AAR claims that the Board has no authority to fix rate unless it first finds market dominance. *Id.* at 18. For a railroad to be able to inflict harm by withholding service in the first place, and then claim that there is effective competition that excuses or somehow prevents relief for the harm causes by its service failure, is spurious and constitutes a contradiction in terms.

VI. CONCLUSION

For the reasons stated above and in their opening comments, the Shipper Groups strongly support the Board's Proposal and urge its adoption.

Respectfully submitted,

Bette Whalen
President, Western Coal Traffic League
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Ann Warner
Spokesperson, Freight Rail Customer Alliance
Ann Warner LLC
300 New Jersey Avenue, Suite #900
Washington, D.C. 20001

John Ward
Executive Director
National Coal Transportation Association
1616 17th St., Suite 266
Denver, CO 80202

Portland Cement Association
Katy Hartnett
Director, Government Affairs
200 Massachusetts Ave., N.W., Suite 200
Washington, D.C. 20001

William L. Slover
/s/ Robert D. Rosenberg
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
202.347.7170

Attorneys for the Western Coal Traffic League, Freight Rail Customer Alliance, National Coal Transportation Association, and Portland Cement Association

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