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SERVICE DATE – JANUARY 6, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 697

AMTRAK EMERGENCY ROUTING ORDERS

Digest:¹ The Board is proposing rules for the National Railroad Passenger Corporation (Amtrak) to follow when requesting Board orders that would permit Amtrak trains to detour over the lines of other railroads in emergency situations.

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rules.

SUMMARY: The Surface Transportation Board (Board or STB) proposes to establish regulations governing the issuance of emergency routing orders upon application of the National Railroad Passenger Corporation (Amtrak). Pursuant to 49 U.S.C. § 24308(b), the Board has statutory authority to require rail carriers to provide facilities immediately when necessary for the movement of Amtrak trains when Amtrak cannot operate its trains via normal routings due to rail line closures or other emergencies.

DATES: Comments are due by February 7, 2011. Reply comments are due by February 22, 2011.

ADDRESSES: Information or questions regarding this proposed rule should reference Docket No. EP 697 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Gabriel S. Meyer at 202-245-0389. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

SUPPLEMENTARY INFORMATION: The Board proposes to establish regulations governing the issuance of emergency routing orders upon application of the National Railroad Passenger Corporation (Amtrak). The rules will be codified at 49 C.F.R. parts 1011, 1034, 1102, 1104, and 1115.

Amtrak is a government-owned corporation that operates intercity passenger trains on an approximately 21,000-mile rail network, serving 46 states and 3 Canadian provinces. During its 2010 fiscal year, Amtrak carried more than 28 million passengers. With the exception of certain rail lines located primarily in the northeastern United States, Amtrak does not own the lines over which its trains operate. Most of the lines Amtrak uses are owned and operated by freight railroads, which are subject to the Board's jurisdiction.

Periodically, an established Amtrak route becomes blocked or closed as the result of a derailment, unscheduled maintenance, severe weather, or other emergency. In these circumstances, if an alternate rail routing exists, Amtrak may seek to detour its trains around the blockage using the alternate route. If no alternate route is available, Amtrak may be forced to suspend train operations.

In most emergency rerouting situations, Amtrak reaches a voluntary agreement governing the terms of its use with the rail carrier that owns the alternate route. Occasionally, however, Amtrak is unable to reach an agreement. In this event, Amtrak may seek relief from the Board as provided by the statute:

Operating During Emergencies.—To facilitate operation by Amtrak during an emergency, the Board, on application by Amtrak, shall require a rail carrier to provide facilities immediately during the emergency. The Board then shall promptly prescribe reasonable terms, including indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed. The rail carrier shall provide the facilities for the duration of the emergency.

49 U.S.C. § 24308(b).

Currently, there are no Board rules establishing procedures for Amtrak to obtain the relief authorized by the statute.² The Board therefore proposes revising its rules to remove uncertainty

² A Board order served on February 23, 1996 (Appointment of Agent to Require Emergency Routing of Amtrak Passenger Trains) (no docket number), named an agent of the Board, who was vested with authority to issue orders requiring railroads to make their facilities immediately available to Amtrak during emergencies. This continued a past practice of vesting, in named individuals, authority to issue such emergency orders. The agent named in the 1996 decision has since retired. As a result, the Board is revising its procedures for Amtrak emergency routing order requests. The Board has rarely had to issue Amtrak emergency routing orders. It last issued one in 1997. STB Passenger Train Operation No. 123, STB served Aug. 12, 1997 (no docket number).

regarding Amtrak emergency routing order applications. The proposed rules are set forth in this decision and are discussed below.

Delegations of Authority

Section 1011.4(a)(10): Under the proposed rules, authority to issue Amtrak emergency routing orders is delegated to the Chairman of the Surface Transportation Board (Chairman). The Board proposes adding this delegation of authority to others already contained in 49 C.F.R. § 1011.4(a). Additionally, in accordance with the existing rule at 49 C.F.R. § 1011.3(a)(3), in the Chairman's absence, authority for issuance of Amtrak emergency routing orders will be vested in the Vice Chairman, and in the event of the absence of both the Chairman and Vice Chairman, authority for issuance of Amtrak emergency routing orders will be vested in the remaining Board Member.

Filing Procedures

The proposed rules establish procedures that Amtrak shall use when submitting emergency routing order applications. The procedures are found at 49 C.F.R. parts 1034 and 1104.

Section 1034.2(a). This proposed rule requires Amtrak to file emergency routing order applications in accordance with the Board's rules of practice at 49 C.F.R. part 1104, except as otherwise provided in part 1034. The rule further requires that due to the time-sensitive nature of such applications, Amtrak shall file them with the Board in person or using the Board's e-filing option (as set forth at 49 C.F.R. part 1104.1(e)). Simultaneously, Amtrak shall send facsimile copies of applications to the Office of the Chairman at 202-245-0452 and to the Director of the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) at 202-245-0461.³

Section 1034.2(b). This proposed rule describes the required contents of Amtrak emergency routing order applications. Applications shall: 1) describe the nature of the emergency necessitating the routing order and its expected duration; 2) identify the Amtrak operations or trains that are or will be affected by the emergency; 3) provide an exact description of the facilities required for Amtrak's use, including, if available, mileposts of the detour line(s) it intends to use; 4) describe Amtrak's efforts to reach a consensual agreement with the carrier(s) whose facilities it seeks to use, including the name(s) of the representative(s) contacted; 5) include proposed terms of the detour agreement, including indemnification of the carrier(s) by Amtrak; and 6) specify the date on which Amtrak intends to begin using the facilities.

³ The Board understands that, given Amtrak's service schedule, emergencies necessitating Board intervention under these proposed regulations may arise outside of normal business hours. As indicated by the very short response times in the proposed regulations, the Board is prepared to handle all requests quickly. If necessary, Amtrak may, during non-business hours, alert the Board via email to an imminent filing by Amtrak to be made on the next business day. The Board will establish a designated email address for this purpose at a later date.

Section 1034.2(c). This proposed rule requires Amtrak, when filing an emergency routing order application, to make best efforts to simultaneously serve a copy of its application upon any affected rail carrier(s) via facsimile, email, or in person, to confirm receipt of the application, and to certify to the Board that it has done so. Because of the emergency nature of such applications, no other means of service is sufficient to provide timely notice to affected parties. This proposed rule also requires Amtrak to comply with the general service requirements of 49 C.F.R. § 1104.12, to the extent they do not conflict with this rule. For purposes of fulfilling the requirement under this rule that Amtrak simultaneously serve affected carriers, Amtrak must serve its application upon the representative(s) of the carrier(s) contacted in its efforts to reach a consensual agreement governing Amtrak emergency routing, and upon the registered agent(s) of the carrier(s).

Section 1034.2(d). This proposed rule establishes that any carrier potentially affected by an Amtrak emergency routing order application must file a reply with the Board within 1 business day following Amtrak's service of its application upon the carrier. However, because the language of the authorizing statute requires that the Board "promptly prescribe" emergency routing agreement terms, it may be impractical in some instances for the Board to await replies from affected carriers before acting on Amtrak's request. The Board will therefore consider replies as time permits and, if necessary, the Board may contact Amtrak or affected carriers to seek their input. (See the proposed rule at 49 C.F.R. § 1102.2(b)(4) governing ex parte communications.) When filing a reply, an affected carrier shall be governed by the same filing and service rules as those governing Amtrak's filing.

Section 1034.2(e). This proposed rule requires the Chairman, or in the Chairman's absence, the Vice Chairman or remaining Board Member, to issue an initial decision granting or denying Amtrak's application for an emergency routing order no later than 1 business day after Amtrak files it with the Board.

Section 1104.12(b). This rule provides for certain exceptions to the Board's rules governing service of pleadings. As modified, the rule incorporates by reference the special filing and service requirements for Amtrak emergency routing order applications and replies thereto contained in 49 C.F.R. § 1034.2(a) and (c). The rule also provides that appeals and replies thereto are subject to the requirements of 49 C.F.R. § 1034.2(a) and (c).

Ex Parte Communications

Section 1102.2(b)(4). The Board proposes to add this rule to the list of instances in which ex parte communications are not prohibited. This rule is necessary to allow the Board, or designated Board staff, to obtain information in situations in which it may be impractical to await formal written submissions from Amtrak or affected carriers. This rule also permits ex parte communications with Amtrak, or carrier(s) over whose lines Amtrak seeks emergency routing authority, in connection with an appeal of the Board's initial decision on an Amtrak emergency routing order application.

Appeals

Section 1115.2(h)(1). This proposed rule provides that parties may appeal initial Amtrak emergency routing order decisions. Under the proposed rule, any appeal must be filed within 1 business day following service of the decision.

Section 1115.2(h)(2). Under this proposed rule, a reply to an appeal is optional. Any reply must be filed within 1 business day following the filing of the appeal, and the Board will consider replies only if time permits. If necessary, the Board may contact Amtrak or an affected carrier to seek its input regarding an appeal. (See proposed rule at 49 C.F.R. § 1102.2(b)(4) governing ex parte communications.)

Section 1115.2(h)(3). This proposed rule requires the entire Board to issue a decision granting or denying an appeal of an initial Amtrak emergency routing order decision within 1 business day following the filing of an appeal.

Section 1115.2(h)(4). This proposed rule provides that the filing of an appeal will not stay the effectiveness of an Amtrak emergency routing order that has already taken effect, or otherwise stay the effectiveness of an initial decision regarding Amtrak's application for an emergency routing order.

Section 1115.2(i). This proposed rule provides that when filing appeals of initial decisions on Amtrak emergency routing applications, or replies to such appeals, parties are governed by the special service rules contained at 49 C.F.R. § 1034.2(a) and (c).

The Board further proposes modifying, as necessary, section 1115.2(e) (time to file appeals and replies to appeals) and section 1115.2(f) (appeal staying effectiveness of decision) to reflect the addition of section 1115.2(h). Section 1115.2(e) currently permits parties to appeal decisions of an individual Board Member (including the Chairman) within 20 days following issuance, and permits parties to file replies to appeals within 20 days following the filing of an appeal. Under the proposed rules, section 1115.2(e) will establish that the 20-day appeal and reply deadlines will not apply to appeals of initial decisions on Amtrak emergency routing order applications. Section 1115.2(f) currently provides that a timely filed appeal will stay the effectiveness of a decision pending a determination of the appeal. Under the proposed rules, section 1115.2(f) will provide that the filing of an appeal will not stay the effectiveness of an initial decision on an Amtrak emergency routing order application.

CONCLUSION

With regard to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, this action directly impacts Amtrak and does not directly impact small entities as defined in the Regulatory Flexibility Act. Accordingly, pursuant to 5 U.S.C. § 605(b), the Board certifies that these proposed regulations will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision is being provided to the Chief Counsel for Advocacy, Small Business Administration.

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

This rulemaking will affect the following subjects:

49 C.F.R. Part 1011

Administrative practice and procedure, authority delegations (Government agencies), organization and functions (Government agencies).

49 C.F.R. Part 1034

Railroads.

49 C.F.R. Part 1102

Communications.

49 C.F.R. Part 1104

Administrative practice and procedure.

49 C.F.R. Part 1115

Appellate procedures.

It is ordered:

1. The Board proposes rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.

2. Comments regarding the proposed rules are due by February 7, 2011. Reply comments are due by February 22, 2011.

Decided: December 22, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

Appendix

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1011, 1034, 1102, 1104, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011 – BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 is revised to read as follows:

Authority: 5 U.S.C. § 553; 31 U.S.C. § 9701; and 49 U.S.C. §§ 701, 721, 11123, 11124, 11144, 14122, 15722, and 24308(b).

2. Amend § 1011.4 by adding paragraph (a)(10), to read as follows:

§ 1011.4 Delegations to Individual Board Members.

(a) * * *

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(10) Issuance of decisions on Amtrak applications for emergency routing orders, filed pursuant to 49 U.S.C. § 24308(b) (Operating during emergencies).

PART 1034 – ROUTING OF TRAFFIC

3. The authority citation for part 1034 is revised to read as follows:

Authority: 49 U.S.C. §§ 721, 11123, and 24308(b).

4. Add § 1034.2 to read as follows:

§ 1034.2 Amtrak emergency routing orders.

(a) *Filing.* All Amtrak applications for emergency routing orders shall be made in accordance with the Board’s rules of practice at 49 C.F.R. part 1104, except to the extent otherwise provided in this paragraph (a) and paragraph (c) of this section.

(1) Amtrak shall file any application for an emergency routing order with the Board in person or using the Board’s e-filing option (as described at 49 C.F.R. § 1104.1(e)).

(2) Simultaneously with its filing of an emergency routing order application, Amtrak shall send facsimile copies of its application to the Office of the Chairman at 202-245-0452 and

to the Director of the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) at 202-245-0461.

(b) *Contents of application.* Amtrak applications for emergency routing orders shall contain the following information:

(1) A description of the nature of the emergency necessitating the routing order and its expected duration.

(2) A description of Amtrak trains or operations that are or will be affected by the emergency.

(3) An exact description of the facilities required for Amtrak's use, including mileposts of the detour line(s), if available.

(4) An explanation of Amtrak's efforts to reach a consensual agreement with the carrier(s) whose facilities Amtrak seeks to use, including the name(s) of the representative(s) contacted.

(5) Proposed terms of the detour agreement, including indemnification of the carrier(s) by Amtrak.

(6) The date on which Amtrak intends to begin using the facilities.

(c) *Service.* When filing an emergency routing order application with the Board, Amtrak shall certify to the Board that it simultaneously served, or made best efforts to serve, its application upon the affected rail carrier(s) via facsimile, email, or in person, and that its application was received by the affected rail carrier(s). In serving affected rail carrier(s), Amtrak shall serve its application upon the representative(s) of the carrier(s) contacted in its efforts to reach a consensual agreement governing Amtrak emergency routing, and shall serve the registered agent(s) of the carrier(s). Amtrak shall also comply with the general service requirements of 49 C.F.R. § 1104.12 to the extent they do not conflict with this paragraph (c).

(d) *Replies.* Any carrier potentially affected by an Amtrak application for an emergency routing order shall file a reply with the Board within 1 business day of the time Amtrak serves a copy of its application upon the carrier. The Board will consider replies as time permits. When filing a reply, a carrier shall comply with the filing and service requirements contained in paragraphs (a) and (c) of this section, and 49 C.F.R. § 1104.12 to the extent they do not conflict with paragraphs (a) and (c) of this section.

(e) *Decisions.* An initial decision granting or denying Amtrak's application for an emergency routing order shall be issued no later than 1 business day after Amtrak files its application for an emergency routing order with the Board.

PART 1102 – COMMUNICATIONS

5. The authority citation for part 1102 is revised to read as follows:

Authority: 49 U.S.C. §§ 721 and 24308(b).

6. Amend § 1102.2 by adding paragraph § 1102.2(b)(4) to read as follows:

§ 1102.2 Ex parte communications prohibited; penalties provided.

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(b) * * *

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(3) * * *

(4) Any communication made by the Board, any Board Member, or designated staff member, to obtain information from Amtrak or from a carrier(s) over whose lines Amtrak seeks emergency routing authority, regarding an emergency routing order application or an appeal thereof, pursuant to the Board’s authority under 49 U.S.C. § 24308(b).

PART 1104 – FILING WITH THE BOARD-COPIES-VERIFICATION-SERVICE- PLEADINGS, GENERALLY

7. The authority citation for part 1104 is revised to read as follows:

Authority: 5 U.S.C. §§ 553 and 559; 18 U.S.C. § 1621; 21 U.S.C. § 862; and 49 U.S.C. §§ 721 and 24308(b).

8. Amend § 1104.12 by revising paragraph (b) to read as follows:

§ 1104.12 Service of pleadings and papers.

* * * * *

(b) Exceptions.

(1) Copies of letters to the Board relating to oral argument under part 1116, and subpoenas under § 1113.2, need not be served on other parties of the proceeding. Service of comments in rulemaking proceedings is not required, unless specifically directed by the Board.

(2) When filing an emergency routing order application, or reply to such application, with the Board, Amtrak and affected carriers shall comply with the special filing and service requirements contained in 49 C.F.R. § 1034.2(a) and (c). These requirements also apply to the

filing of an appeal to an initial Amtrak emergency routing order decision or to a reply to such an appeal. Amtrak and affected carriers shall comply with the general service requirements of paragraph (a) of this section, to the extent they do not conflict with 49 C.F.R. § 1034.2(a) and (c).

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PART 1115 – APPELLATE PROCEDURES

9. The authority citation for part 1115 is revised to read as follows:

Authority: 5 U.S.C. § 559, and 49 U.S.C. §§ 721 and 24308(b).

10. Amend § 1115.2 by revising paragraphs (e) and (f), and adding paragraphs (h), (h)(1),(2),(3),(4), and (i) to read as follows:

§ 1115.2 Initial Decisions.

* * * * *

(e) Except as provided in paragraph (h)(1) of this section, appeals must be filed within 20 days after the service date of the decision or within any further period (not to exceed 20 days) the Board may authorize. Except as provided in paragraph (h)(2) of this section, replies must be filed within 20 days of the date the appeal is filed.

(f) Except as provided in paragraph (h)(4) of this section, the timely filing of an appeal to an initial decision will stay the effectiveness of the action pending determination of the appeal.

(g) * * *

(h) Appeals to initial decisions on Amtrak applications for emergency routing orders.

(1) Any carrier potentially affected by an initial Amtrak emergency routing order decision may appeal such a decision. Any appeal must be filed within 1 business day following service of the initial decision.

(2) A reply to an appeal of an initial Amtrak emergency routing order decision is optional. Any reply must be filed within 1 business day following the filing of the appeal. The Board will consider replies only if time permits.

(3) The entire Board shall issue a decision granting or denying an appeal to an initial Amtrak emergency routing order decision within 1 business day following the filing of an appeal.

(4) Filing of an appeal will not stay the effectiveness of an Amtrak emergency routing order that has already taken effect, or otherwise stay the effectiveness of an initial decision on Amtrak's application for an emergency routing order.

(i) When filing appeals to initial decisions on Amtrak emergency routing order applications, and replies to such appeals, parties are governed by the special service rules contained at 49 C.F.R. § 1034.2(a) and (c).

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