

**BEFORE THE
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.**

DOCKET NO. FRA-2006-25274

**PROPOSED REVISIONS TO THE SCHEDULES OF CIVIL PENALTIES FOR
A VIOLATION OF A FEDERAL RAILROAD SAFETY LAW OR FEDERAL
RAILROAD ADMINISTRATION SAFETY REGULATION**

**COMMENT OF THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) respectfully submits its comments concerning the Federal Railroad Administration’s (FRA) proposed revisions to the schedules of civil penalties for violations of federal railroad safety laws and FRA safety regulations. These comments are submitted in response to the December 5, 2006 Notice published by the FRA soliciting public comment on the proposed schedule changes.¹

Statement of Interest

ASLRRA represents approximately 425 Class II and Class III railroads in the United States, Canada and Mexico as well as numerous suppliers and

¹ 71 Fed. Reg. 70590-70637 (Dec. 5, 2006).

contractors to the short line and regional railroad industry. ASLRRA thanks the Federal Railroad Administration for inviting the comments of interested parties.

Comments

The announcement of its proposal to virtually double the current fines it assesses the railroad industry for safety violations brings the FRA – and the small railroad industry – to a momentous fork in the road of this particular government – industry relationship. One fork takes the stakeholders further down a familiar path of adversarial encounters, inconsistent rule enforcement, and arbitrary and sometimes vindictive punishment. The other fork leads toward a cooperative path, successfully trod by other agencies and the industries they supervise, in which all parties work together to achieve the common goal of safety.

In recent times there have been numerous indications that the FRA recognizes that a safe rail industry is not only good public policy but is also good business and therefore a top priority for small railroads. The RSAC process has worked well with full participation from small railroad representatives and ASLRRA. FRA and ASLRRA have jointly presented safety seminars to small railroad personnel on topics ranging from locomotive and car inspections to drug and alcohol training with more to come in future months. In addition, senior FRA

officials have called for less confrontation and more collaboration with the rail industry in the pursuit of ever-higher levels of safety.

Recent history and public rhetoric aside, the true measure of FRA's chosen path will be its doggedness in pursuit of a virtual 100% increase in the level of fines it intends to collect. The imposition of fines and penalties in the past has been anything but collaborative, and doubling the level of punishment can only be seen as vengeful by the small railroad industry. At best, civil penalties have been inconsistent from Region to Region, and at worst they have been capricious and arbitrary in their enforcement of the rules contained in 49 C.F.R. In that environment, doubling fines can only exacerbate those management problems and will belie calls for a more collaborative approach.

The inconsistent imposition of civil penalties across Regions hits small railroads particularly hard. By definition, Class I railroads are so vast that all bridge several FRA Regions. Their large and sophisticated regulatory and legal staffs are quick to note the inconsistencies of enforcement among their Regions and are adroit at using those inconsistencies to negotiate dramatic reductions in bulk of the penalties they pay across their systems. In contrast, small railroads rarely transect more than one FRA Region, and are beholden to the particular views of its inspectors. Fines must be dealt with one on one, not in bulk, and rare

is the small railroad that can afford a sophisticated staff of regulatory lawyers who can travel to Washington to argue a reduction in an individual fine or two.

The face value of fines also hurts small railroads far more than the Class I railroads, even if they are uniformly imposed. A \$2,500 fine against the multi billion dollar revenues of even the smallest Class I railroad is infinitesimally insignificant to a Class I railroad – in the aggregate not even a line item on the profit and loss statement. But to a small Class III railroad, a \$2,500 fine is punitive, painful, and in some cases even threatening in its impact. Doubling the fines imposed on Class I's in the aggregate is still too inconsequential to appear as a profit and loss line item, but to a small railroad it becomes a tool for intimidation and mayhem, drawing much needed cash away from use in upgrading the infrastructure of the right of way.

While some might conclude that the ratio of civil penalties to miles of track operated is no higher for small railroads than for Class I's, it is axiomatic that Class I railroads generate much higher revenues per mile of track they operate than do small railroads. That is why they spun off so many of their "lower density" lines in the first place. Thus, imposing the same level of fines on small railroads as on Class I railroads imposes a much higher burden on the much smaller revenue stream generated on a mile of small railroad track than it does on that same length of track operated on a Class I railroad.

The FRA has publicly and properly acknowledged its statutory responsibility to small railroads under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA). In introductory comments to its Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws (49 C.F.R. Pt. 209, App. C, 2003) the FRA noted:

SBREFA, among other things, requires federal enforcement agencies to institute two new policies.... The second is an enforcement policy, required by section 223 of SBREFA, in which each agency must establish a program to provide for the reduction and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. 68 Fed. Reg. 24892 (May 9, 2003).

In that same introductory analysis, the FRA acknowledged the SBREFA statutory mandate:

Similarly, FRA's enforcement program devotes special attention to ensuring that the limited financial resources of small entities are considered during the enforcement process. FRA inspectors have and utilize discretion when determining whether a civil penalty citation or other enforcement action should be taken against a small entity. Staff attorneys in FRA's Office of Chief Counsel regularly assess information provided by a company concerning the degree to which fines will impact the viability of a small business, and the extent to which a fine may prevent the business from improving the safety of its operation. In fact, the federal railroad safety laws include the requirement that agency personnel consider a respondent's ability to pay in any civil penalty action taken. (citing 49 U.S.C. 21301-21303) Id. at 24894.

While the intent expressed by this explanation is commendable, in practice the FRA's announced proposal to double most minimum and maximum civil

penalties without regard to the size of the railroad affected clearly ignores its overwhelmingly disparate effect on small railroad businesses. The promise that inspectors take into consideration the financial impact of the penalties they impose on small railroads is a weak and ambivalent gesture in comparison with the obvious opportunity to codify a lower schedule of penalties for small railroads in its current proposal. Further, in view of the apparent disparity in assessment of penalties among the various FRA regions, granting inspectors discretion creates an arbitrary if not capricious scheme of relief to some small railroads in some locations some of the time. Even that disparity may be a moot point because although ASLRRA has not conducted a survey on the issue, members consistently report that FRA inspectors *always* assess their small railroads the maximum penalty despite the apparent discretion to impose lesser fines. ASLRRA respectfully submits that such a system does not meet the intent of SBREFA.

A more robust response is required. ASLRRA urges the FRA to revise its rulemaking proposal to *reduce* the level of civil penalties it imposes upon small railroads to level the impact of its penalties across the *entire* railroad industry. At the very least it should exempt Class II and Class III railroads from its proposed increases to begin to create an equitable penalty system between the smallest and largest carriers.

A rational, risk-based means to provide fairness to small railroads and meet the requirements of SBREFA is readily available. ASLRRA respectfully suggests that the FRA adopt a sliding scale of penalties based on track classification. Most short line railroads operate on class I and class II track. These classes have the slowest authorized train speeds and thus have a much lower accident severity risk than the higher speed class V and class VI tracks which carry large volumes of hazardous materials and passengers. Thus, the adoption of a graduated penalty scheme based on track class would meet two goals: it would both create an objective system which in a practical way meets the requirements of SBREFA because almost all small railroads operate on lower classes of track, and it would also rationally assess penalties on the basis of overall risk severity. Or, in the alternative, FRA could create a lower penalty schedule for railroads operating with fewer than 400,000 man-hours per year. FRA has already employed that measure to give small railroads relief from certain record-keeping responsibilities at 49 C.F.R. 217.9.

In contrast, the current proposal to double the amount of most civil penalties sends a strong signal to the small railroad industry that FRA has already chosen to take the familiar fork in the road. It is a path that leads to suspicion, resentment and inequity. ASLRRA strongly believes that it is not too late to take the other path of partnership and cooperation. ASLRRA members recognize that safety is the

fundamental lynch pin of successful small railroad participation in the burgeoning national rail network, and with or without a “partnership” for safety with the FRA they will seek to make their portion of the rail industry the safest mode of transportation. ASLRRA urges the FRA to drop its proposal to double civil penalties, especially for the small railroads least able to sustain these increases and instead embrace small railroads on the road paved with collaboration and a joint commitment to safety.

Respectfully submitted,

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