

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

PROCEEDING NO. 21R-0100R

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES REGULATING RAILROADS, RAIL FIXED GUIDEWAYS, TRANSPORTATION BY RAIL, AND RAIL CROSSINGS, 4 CODE OF COLORADO REGULATIONS 723-7.

**THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION'S
WRITTEN COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED
RULEMAKING**

The American Short Line and Regional Railroad Association (“ASLRRA”) submits the following written comments in response to the Public Utilities Commission's ("Commission") Notice of Proposed Rulemaking ("NOPR"). By submitting these comments, ASLRRA does not agree or concede that SB 19-236 is an appropriate exercise of the General Assembly’s authority, nor does ASLRRA agree that the statutory provisions implemented by SB 19-236 are not preempted in part or in whole by federal law.

GENERAL COMMENTS

ASLRRA is a nonprofit trade association representing the entrepreneurial owners and operators of short line and regional railroads throughout North America. Short line freight is a critical part of the U.S. freight network. The nation’s approximately 600 short line carriers provide the first and last mile service for one in every five cars moving each year.¹ Operating nearly 50,000 track miles, or 30% of freight rail in the U.S., they play a vital role in the

¹ Short Line and Regional Railroad Facts and Figures. American Short Line and Regional Railroad Association, 2017; reprint Dec. 2019. Page 1.

transportation network.² Short line rail service provides safe, efficient, competitive, and environmentally responsible access to transportation for nearly 10,000 rail customers.³ Eleven short line freight railroads operate in the state of Colorado, all of whom would be negatively impacted by the fining authority and proposed rules.

ASLRRRA has concerns regarding the breadth of the proposed rules, the Commission's regulatory authority in general, and the viability of the proposed rules as it relates to federal preemption, judicial review, and/or agency review. Therefore, ASLRRRA incorporates BNSF Railway Company's Stakeholder Comments in Response to Proposed Amendments to Rules filed on April 14, 2021, and Union Pacific Railroad Company's Comments filed on April 15, 2021, in their entirety, and objects to the NOPR for the reasons set forth therein.

Furthermore, ASLRRRA questions the relationship between the proposed rules and improvements in safety, and more specifically whether the proposed rules would have the opposite effect on safety due to actions taken or projects completed without evaluation of all necessary and appropriate considerations and based upon arbitrary and impractical deadlines in order to avoid a punitive consequence, especially as it relates to small businesses. As such, ASLRRRA incorporates Great Western Railway's Comments filed on April 21, 2021, in their entirety, and objects to the NOPR for the reasons set forth therein.

COMMENTS ON SPECIFIC PROPOSED AMENDMENTS

The proposed civil penalty provisions at Rules 7010 and 7011 do not consider the size and scope of a railroad's operations. Most short lines are small businesses, which have

² *Id.*

³ *See Id.*; and Webber, Michael. "Freight trains are our future." *Popular Science*, May 9, 2019. Available at: <https://www.popsoci.com/power-trip-excerpt/>.

significantly different characteristics than large carriers and shippers. On average, short line railroads employ fewer than 30 people, run an average of only 79 miles, and have \$7.7 million or less in revenue.⁴ These small businesses operate the most vulnerable segments of the railroad system. They succeed by competing aggressively for business and investing significant revenues in rail infrastructure. Costly regulatory fines will divert limited revenue away from infrastructure investment, resulting in a negative net impact on rail safety. The nature of small businesses necessitates careful consideration in order to ensure that these entities receive appropriate treatment on compliance and enforcement matters to enhance the safety of railroad operations. Therefore, the Commission should develop programs to respond to compliance-related inquiries of small entities, and to ensure proper handling of civil penalty and other enforcement actions against small businesses.

As an alternative to promulgating its own independent civil penalties, the Commission should instead engage in a partnership with the Federal Railroad Administration (“FRA”) in its Rail State Safety Participation Program.⁵ The principal role of the State Safety Participation Program in the national railroad safety effort is to provide an enhanced investigative and surveillance capability through assumption, by participating State agencies, of responsibility for planned routine compliance inspections. The FRA encourages further State contributions to the national railroad safety program consistent with overall program needs, individual State capabilities, and the willingness of the States to undertake additional investigative and surveillance activities.⁶

⁴ Short Line and Regional Railroad Facts and Figures. American Short Line and Regional Railroad Association, 2017; reprint Dec. 2019. Page 1.

⁵ Currently, thirty (30) States and the District of Columbia participate in FRA’s Rail State Safety Participation Program. <https://railroads.dot.gov/elibrary/state-managers-contact-list>

⁶ 49 C.F.R. § 212.101(d).

If the Commission were to join FRA’s State Safety Participation Program, it would benefit from the efficiencies of a strong existing federal regulatory and enforcement framework. Further, the training of State inspectors is one of FRA’s major customer service initiatives. FRA reimburses States for travel and subsistence expenses associated with rail safety inspector technical training. The training program helps States to develop rail safety programs and enables qualified State inspectors to maintain technical proficiency. FRA routinely provides on-the-job training to State inspector candidates as well.⁷

In addition to the efficiencies that would be gained in a partnership with FRA, the Commission would also then follow FRA’s Policy Statement Concerning Small Entities.⁸ Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), FRA’s policies have been developed to take into account the unique concerns and operations of small businesses in the administration of the national railroad safety program, and have promised to continue to evolve to meet the needs of the railroad industry.⁹

Under FRA’s policy, agency personnel timely respond to the inquiries of small entities concerning rail safety statutes, safety regulations, and interpretations of these statutes and regulations. Also, FRA staff provide guidance to small entities, as needed, in applying the law to specific facts and situations that arise in the course of railroad operations. Additionally, FRA has adopted an enforcement policy that addresses the unique nature of small entities in the imposition of civil penalties and resolution of those assessments. For example, in the context of

⁷ See “State Rail Safety Participation” U.S. Dept. of Transportation, Oct. 9, 2020. Available at: <https://railroads.dot.gov/divisions/partnerships-programs/state-rail-safety-participation>

⁸ 49 C.F.R. Part 209 Appendix C.

⁹ For purposes of this policy statement, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the “excessive demand” provisions of the Equal Justice Act (5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D)), Class III railroads, contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 CFR 1201.1-1, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less constitute the class of organizations considered “small entities” or “small businesses.”

violations by small entities, FRA considers whether the violations were made in good faith (e.g., based on an honest misunderstanding of the law), and whether the small entity has moved quickly and thoroughly to remedy the violation(s). FRA's small entity enforcement policy is flexible and comprehensive, and the FRA is committed to obtaining compliance and enhancing safety with reasoned, fair methods that do not inflict undue hardship on small entities. A partnership with FRA would be a better alternative than the proposed civil penalties, which do not take into account the operational and financial realities of Class III railroads and would result in undue hardship on small entities and thus a diversion of limited resources away from infrastructure investment.

Dated this 17th day of May 2021.

A handwritten signature in black ink that reads "Sarah Yurasko". The signature is written in a cursive, flowing style.

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