American Short Line and Regional Railroad Association

July 13, 2023

Gelene Savage
Chief Counsel
Kansas Department of Transportation
700 SW Harrison Street, 3rd Floor West
Topeka, Kansas 66603

Sent via email to: emily.brown@ks.gov

Re: K.A.R. 36-43-1, "Crew requirements; exceptions."

Dear Ms. Savage,

The American Short Line and Regional Railroad Association ("ASLRRA"), on behalf of itself and its member railroads, submits the following comments in response to the Kansas Department of Transportation's ("KDOT") Notice of Public Hearing on Proposed Administrative Regulation, K.A.R. 36-43-1, entitled "Crew requirements; exceptions," by which the State of Kansas seeks to regulate the size of locomotive crews operating within the State. ASLRRA supports and incorporates by reference comments from Watco, the Association of American Railroads, BNSF Railway Company, and Union Pacific Railroad.

ASLRRA is a non-profit trade association representing the interests of the nation's approximately 600 Class II and Class III (short line) railroads. Short lines operate about 50,000 miles of track, or approximately 30% of the national freight network, employ approximately 18,000 people, and play a vital role in the railroad industry's strong safety record. These small businesses succeed in a competitive environment because of their flexibility, cost control, and customer-driven service.

Railroads are the most fuel-efficient way to move freight over land. It would have taken approximately 1.6 million additional trucks to handle the 28.6 million tons of freight that originated by rail in Kansas in 2021. [1] Ten short line railroads currently operate in Kansas, including at least three that provide service with a single-person crew. In fact, short lines operated about 43% of the freight miles in Kansas in 2021.[2] These small, entrepreneurial businesses operate in a highly regulated capital-intensive environment that requires efficient operating practices in order to provide the best rail service to meet customer and community needs and power Kansas's industrial and agricultural economy. Unfortunately, K.A.R. 36-43-1 rule would add costs with no safety benefit, jeopardizing short line rail service viability.

[1] Association of American Railroads, "Freight Rail in Your State." Last accessed July 5, 2023. Available at: aar.org/data-center/railroads-states/.
[2] Id.

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Inexplicably, the proposed regulation purports to mandate a two-person crew operating model knowing that only these small business railroads would be immediately impacted. The proposed regulation is preempted by federal law, unsupported by any safety data, will harm small businesses, and will force freight traffic to truck. ASLRRA urges KDOT to withdraw K.A.R. 36-43-1, or, in the alternative, to exempt short line railroads from its provisions.

I. The Proposed Regulation is Preempted by Federal Law

The proposed regulation is preempted by the ICC Termination Act ("ICCTA"), which provides that "[t]he jurisdiction of the [Surface Transportation] Board over … transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers … is exclusive." 49 U.S.C. § 10501(b) (emphasis added). Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." Id. "Congress's intent in [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. Co. v. Chi. Transit Auth*., 647 F.3d 675, 678 & n.1 (7th Cir. 2011) (collecting cases). ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) (emphasis added; quotation marks omitted). "[S]tate or local statutes or regulations are preempted categorically if they have the effect of managing or governing rail transportation." Id. at 19 (emphasis added; quotation marks omitted). And even state laws "that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation." Id. The proposed regulation clearly conflicts with and is preempted by ICCTA because it will manage and govern rail transportation.

The proposed regulation is also preempted by the Federal Railroad Safety Act of 1970 ("FRSA"). The Federal Railroad Administration ("FRA") has the authority to regulate train crew staffing pursuant to its broad authority to, "as necessary, . . . prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103; 49 C.F.R. § 1.89. The FRSA mandates that laws, regulations, and orders "related to railroad safety" be nationally uniform and allows states to enforce such rules only until the FRA has covered the subject matter. [3] As Union Pacific Railroad's comment explains, FRA has taken multiple actions over the past two decades reflecting the agency's determination that state crew-size rules lack a safety justification and burden interstate commerce. While the FRSA also includes a narrow savings clause for "essentially local safety hazards," laws and regulations that apply statewide do not address "local" concerns as a matter of law. *E.g., Duluth, Winnipeg, & Pacific Railway Co. v. City of Orr*, 529 F.3d 794, 798 (8th Cir. 2008). In any event, this exception also does not apply to state laws that burden interstate commerce, and FRA has determined that state crew-size rules do impose such a burden. Instead, the proposed regulation is an attempt by KDOT to dictate to railroads how their locomotives should be staffed and operated.

II. The Proposed Regulation Provides No Safety Data to Justify a Two-Person Crew Mandate

The Economic Impact Statement ("EIS") suggests that requiring a minimum of a two-person crew is a public health and safety concern for Kansas. It states that derailments, explosions, hazardous material spills, injuries and fatalities have occurred because of trains with a minimal crew. However, the EIS fails to reference a single derailment, explosion, hazardous material spill, injury or fatality that

[3] 49 U.S.C. § 20106(a)(1).

occurred because of a single-person crew operation. Instead, the EIS references anecdotal material from labor unions speculating on operations with less than a two-person crew.

Before passing a law that will fundamentally change the operations of small business railroads, ASLRRA encourages KDOT to examine the safety data of railroads operating in the state. ASLRRA is unaware of any accident or incident occurring due to a single-person crew operation in Kansas. At least three short line railroads maintain current single-person crew operations in Kansas, providing KDOT with real data to compare with the record of railroads operating with two-person crews in the state. The EIS does not show that any sort of comparison was conducted, despite having this readily available data set. Likewise, the EIS does not examine the safety of other known single-person crew operations, such as domestic passenger and foreign freight services.

III. The Proposed Regulation Will Disproportionately Impact Small Business Railroads in Kansas

The EIS correctly states that most railroads in Kansas operate today with a two-person crew. However, it is incorrect that some portion of additional railroad operational costs would be passed on to railroad customers. Many short line railroads cannot pass this additional train staffing cost to their customers because of either line haulage agreements with a Class I partner or the realities of a competitive economic marketplace. Instead, without any data showing a safety concern with current single-person crew operations in the state, the Proposed regulation inexplicably mandates that several small business railroads incur the entire cost of compliance with the new mandate.

For example, the Cimarron Valley Railroad ("CVR") safely operates unit grain trains with a single-person crew. In this operation, a trainmaster or conductor typically drives a locomotive engineer to Dodge City to pick up the train, and a single-person crew will operate the train. As the train moves to its destination, the conductor will drive ahead to the customer's facility in a utility vehicle to remove derails, line switches, and perform any other necessary work prior to the train's arrival. Under the Proposed regulation, this short line railroad would have to hire and train two new employees. Like many short lines, this railroad is considered a handling line and paid on a per-car basis from its Class I partner. CVR estimates that the addition of employees would cost $400,000 annually and the railroad would have no ability to adjust their rates to compensate. Further, as these unit grain trains are largely seasonally driven, the additional work force would not be needed for lengthy periods of the year, making it difficult to recruit, train and retain employees.

Additionally, the South Kansas and Oklahoma Railroad ("SKOL") and the Kansas and Oklahoma Railroad ("KO") maintain current safe operations in Kansas with a single-person crew. Both of these railroads provide valuable service to their customers and the public in the state, transporting commodities such as grain, grain products, cement, coal, chemicals, steel, and plastics. Each of these railroads operates at speeds less than 25 mph, reducing the risk profile for any sort of accident or incident. SKOL and KO each estimate that they would have to hire twenty additional employees on each railroad to comply with the proposed regulation. The total cost of compliance with the Proposed regulation for each railroad would be approximately $2.2 million per railroad, an astronomical cost for a small business.

The annual cost of compliance with the proposed regulation for the CVR, SKOL and KO totals $4.8 million. This is dramatically higher than the approximately $1.5 million annual impact stated in the EIS. Further, it is especially disappointing that the entire cost to comply with the proposed regulation would be solely felt by small businesses.

IV. The Proposed Regulation Will Force Freight to Truck

Finally, the increase in costs to short line railroads in Kansas, due to the need to add additional crew members, will inevitably result in a modal shift of freight traffic from rail to its competing mode of truck transportation. The freight that had previously moved by rail will move to trucks and onto the highways, leading to an increase in accidents, injuries, and fatalities, not to mention an increase in pollution, CO^2 emissions, and cost to the public to maintain the road network.[4]

The most recent data from the U.S. Department of Transportation with a direct comparison of fatalities per billion ton-miles is incorporated in the Federal Railroad Administration's 2010 National Rail Plan Progress Report to Congress and as shown below – it is illustrative of the vast difference in safety between shipping by rail vs. truck.[5] This difference has only grown over the past twelve years as rail safety has consistently improved and truck safety has declined.

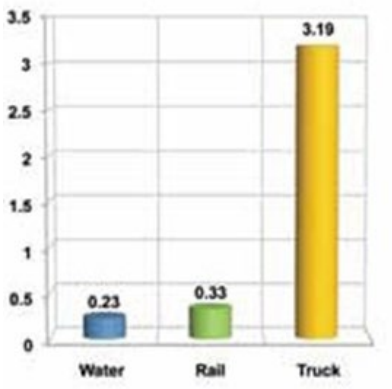

Figure 1: Fatalities (per billion ton-miles) in 2008[6]

A study of FRA safety data shows that train accidents per million train-miles have dropped 33 percent since 2000 and five percent since 2020.[7] On the other hand, the total estimated fatalities in crashes involving at least one large truck increased by 13 percent from 2020 to 2021. This estimate is based on the involvement of large trucks, both in commercial and non-commercial use at the time of the crash. Nationwide, in 2008 there were 4,245 truck-involved fatalities, and in 2021, there were 5,601 fatalities, an increase of nearly 32 percent.[8] On the other hand, freight trains incur 14 percent of the fatalities that large trucks do per trillion ton-miles.[9] Additionally, freight trains incur about 3 percent of the injuries that large trucks do per trillion ton-miles.[10] The freight railroad rate of hazmat incidents per

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[4] *See, e.g.,* AAR, *Oppose Longer & Heavier Trucks on Our Nation's Roads*. October 2022. Available at: https://www.aar.org/wp-content/uploads/2020/08/AAR-Truck-Size-Weight-Fact-Sheet.pdf.

[5] Federal Railroad Administration (2010). *National Rail Plan, Moving Forward: A Progress Report.* Available at: https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1336/NRP_Sept2010_WEB.pdf

[6] Id. at 7.

[7] Sources: http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx. Note: Excludes grade crossing accidents. Data for 2021 is preliminary, as of March 2022.

[8] National Highway Traffic Safety Administration, *Early Estimates of Motor Vehicle Traffic Fatalities and Fatality rate by Sub-Categories in 2021*. DOT HS 813 298. May 2022. Available at: https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813298.

[9] Sources: Freight rail-related fatalities from FRA website https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TenYearFreightPassengerOperationsOverview.aspx 2018. Large truck-related fatalities from NHTSA Traffic Safety Facts, https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813021. Both rail and large truck ton-miles in 2018 from Table 1-50 USDOT BTS National Transportation Statistics at https://www.bts.gov/topics/national-transportation-statistics (Truck ton-miles unavailable for 2019-2020.) Large trucks are trucks with a gross vehicle weight rating (GVWR) greater than 10,000 pounds.

[10] Sources: Freight rail-related injuries from FRA website, at https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TenYearFreightPassengerOperationsOverview.aspx

billion ton-miles is about 7 percent that of trucks, and railroads incurred zero fatalities from 2012 through 2020 when transporting hazmat while trucks incurred 81.[11]

Rail is an efficient and environmentally sustainable mode of freight transportation. U.S. freight railroads, on average, are three-to-four times more fuel efficient than trucks and can move one ton of freight nearly 500 miles on one gallon of fuel.[12] Moving freight by train instead of truck reduces greenhouse gas emissions for such transportation by up to 75%.[13] Railroads account for around 40% of long-distance freight volume, but only 1.9% of U.S. transport-related greenhouse gas emissions.[14]

Short line railroads play an integral role in the freight role network, contributing to its safety and environmental benefits. Given the high cost to add additional crew members to trains in Kansas, short line railroads might be forced to cease operations, forcing freight transportation to truck, thus reducing safety and increasing pollution.

V. Conclusion

ASLRRA and its short line member railroads have always supported and been involved in the development of safe practices and procedures that shape and lead the industry, and we can assure you that we intend to continue that practice as we strive for zero accidents. However, in this situation, we do not believe that the law or safety data supports the need for legislation mandating a two-person crew in Kansas. ASLRRA urges KDOT to withdraw the proposed regulation as it is preempted by federal law, lacks safety justification, inexplicably targets small businesses, and will force freight traffic to truck, to the detriment of safety and the environment. If KDOT will not withdraw the proposed regulation, at the very least, it should exclude short line railroads from its provisions.

Sincerely,

Sarah Yurasko
SVP Law, and General Counsel

2018. Large truck-related injuries from USDOT, FMCSA, Large Truck and Bus Crash Facts, 2018 Trends Table 7, at https://www.fmcsa.dot.gov/safety/data-and-statistics/large-truck-and-bus-crash-facts-2017#A5
Both rail and large truck ton-miles in 2018 from Table 1-50 USDOT BTS National Transportation Statistics at https://www.bts.gov/topics/national-transportation-statistics (Truck ton-miles unavailable for 2019-2020.).

[11] Source: USDOT, Pipeline & Hazardous Materials Safety Administration, Hazardous Materials Incident Fatalities By Year & Mode, from: https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Dashboard for 2012 through 2020, as of March 2022. PHMSA is experiencing a backlog in processing 2021 data as of March 2022.

[12] *See* Association of American Railroads, Freight Rail & Preserving the Environment. October 2022. Available at: https://www.aar.org/wp-content/uploads/2020/06/AAR-Sustainability-Fact-Sheet.pdf.

[13] Id.

[14] Id. According to the U.S. Environmental Protection Agency.