

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21R-0538R

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.

**AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND
CONCURRENCE WITH UNION PACIFIC RAILROAD COMPANY'S EXCEPTIONS**

The American Short Line and Regional Railroad Association (“ASLRRA”), by and through its undersigned counsel, files this, its exceptions (“Exceptions”) to Decision R23-0618 (the “Recommended Decision”), pursuant to Section 40-6-109(2), C.R.S., and Colorado Public Utilities Commission (“Commission” or “PUC”) Rule of Practice and Procedure, 4 CCR 723-1-1505(a). In addition, ASLRRA concurs with the Exceptions filed by Union Pacific Railroad Company (“UP”) in this matter on October 26, 2023.

Preliminary Statement

On November 22, 2021, the Public Utilities Commission (“PUC”) issued a Notice of Proposed Rulemaking (“NOPR”) to amend the Rules governing rail crossings contained in Rules 7001 through 7301, 4 CCR 723-7. On that same date, the Commission assigned the matter to an Administrative Law Judge, who held public comment hearings on the proposed Rules on January 11, 2022; March 24, 2022; October 17, 2022; January 17, 2023; and June 1, 2023. ASLRRA participated in each of the hearings and filed written comments. In addition, the ALJ established a schedule for participants to hold an informal workshop meeting and to file a status report and proposed consensus Rules and ASLRRA participated in the workshop held on November 15, 2022. ASLRRA was a party to Joint Status Report Submitting Partial Consensus Rules (“Status

Report”) filed with the ALJ on December 12, 2022. With minor exceptions, the railroad entities either supported or did not object to the proposed Consensus Rules.

On January 17, 2023, the ALJ held a public comment hearing, raised questions and concerns about the Consensus Rules, and invited public comments on the matter. ASLRRRA and several stakeholders filed comments responding to these items. The last public comment hearing was held on June 1, 2023, and again ASLRRRA and several stakeholders filed additional public comments in response to issues raised during that hearing.

Interest of ASLRRRA

ASLRRRA is a non-profit trade association representing the entrepreneurial owners and operators of the approximately 600 short line and regional railroads (“short lines”) throughout North America, of which there are eleven in Colorado. These short lines provide the first mile and last mile freight rail service, connecting shippers and receivers to the national rail network. Each of the short lines in Colorado are small businesses and stand to be harmed by the proposed Rules.¹

ASLRRRA submitted that it had concerns about the breadth of the proposed rules, the PUC’s regulatory authority on the interstate railroad system in general, and the viability of the proposed rules related to federal preemption, judicial review, and/or agency review.

Accordingly, it adopted and incorporated BNSF Railway Company’s (“BNSF”) Stakeholder Comments Filed in Response to Proposed Amendments to Rules filed on April 14, 2021, and UP’s Comments filed on April 15, 2021, in their entirety on these issues.²

¹ See ASLRRRA’s December 17, 2021 Comments at 1-2.

² *Id.* at 2.

ASLRRA's Exceptions to the Recommended Decision

ASLRRA's Exceptions are limited in scope and pertain to the failure of the ALJ to fully consider the size and scope of the proposed Rules and their adverse effects on short line railroads' financial viability and on their operations and the ALJ's rejection of the alternative suggestion ASLRRA made that the Commission engage in a partnership with the Federal Railroad Administration in its Rail State Participation Program as an alternative to the proposed Rules.³

I. Exception to the Finding Regarding the Adverse Effects on Colorado Short Lines

In its Comments, ASLRRA said that all eleven short line freight railroads that operate in Colorado would be negatively impacted by the proposed Rules. It also questioned the relationship between the proposed Rules and any improvements in safety, and more specifically whether the proposed Rules would have the opposite effect on safety due to actions to avoid a punitive consequence, especially as it relates to small businesses.⁴ Additionally, ASLRRA submitted that proposed Rules 7010 and 7011 did not consider the size and scope of a railroad's operations.⁵

In response to these concerns, the ALJ found that there are no grounds to assume that ASLRRA's member railroads will be assessed penalties that will impact operations. The finding stated that Proposed Rule 7010 and additional changes to the proposed Rule 7010 regarding due process protections afford ASLRRA's members due process if they become respondents in CPAN proceedings and would be assessed civil penalties only if found to have committed the

³ *Id.* at 3-4.

⁴ Recommended Decision at ¶ 42, pp. 17-18.

⁵ Recommended Decision at ¶ 75, pg. 30; Recommended Decision at ¶ 81, pp. 32, 34-35; and Recommended Decision at ¶ 85, pp. 36-37.

alleged violations.⁶ Furthermore, the finding stated that the proposed Rule requires that when the Commission assesses a civil penalty, that it considers the respondent's ability to pay; the effect on the respondent's ability to continue in business; the size of the respondent's business, and any other factors as equity and fairness may require (among other factors). It stated that this provides additional protections for ASLRRA's members for whom a significant penalty would impact operations.⁷ Having made those findings, the ALJ then concluded that they have carefully considered the concerns the railroads have about the potential adverse effects the civil penalties may have on them. The ALJ found that establishing a fine of \$2,000 per violation with a cap of \$150,000 maximum on the total amount a railroad may be assessed in a consecutive 12-month period would balance the concerns raised by short lines.⁸

ASLRRA takes exception to each of these findings. While the ALJ acknowledged ASLRRA's concerns about being assessed civil penalties, the Recommended Decision then proceeds to totally dismiss the concerns. The record shows that short lines are small businesses, which have significantly different characteristics than large railroads. 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 annual revenue. These small businesses operate the most vulnerable segments of the railroad system and succeed by competing aggressively for business and investing significant revenues in rail infrastructure. As ASLRRA has previously shared, costly regulatory fines will divert limited revenue away from infrastructure investment resulting in a negative net impact on rail safety.⁹ While ASLRRA disagrees with the level of fines proposed in the Rule, it specifically

⁶ Recommended Decision, ¶ 75, pg. 30.

⁷ *Id.*

⁸ Recommended Decision, ¶ 81, pp. 32, 34-35 and ¶ 85, pp. 36-37.

⁹ *See* ASLRRA's December 17, 2021 Comments at 3.

submits that the proposal to levy a \$2,000 fine per violation could result in heavy fines on small railroads that could only be reduced by 50%. The limitation of \$150,000 is far too severe for small business railroads in Colorado. While the due process the Recommended Decision recites does provide the respondents certain rights, at the end of the day, the process itself would be costly to these small businesses and, if found to be in violation of one or more parts of the rule, could result in hefty fines with only a limited ability to have them reduced. Simply stated, the proposed rules are an attempt to impose a “one size fits all” approach regarding the level of the fines, the maximum amount that can be levied, and the limited ability to have any such fines reduced. This approach is harmful to small business railroads that serve primarily rural areas of Colorado and it does not provide any balancing benefits to the public.

II. Exception to Rejection of FRA Rail State Participation Program

The ALJ rejected the suggestion ASLRRRA made that the Commission engage in a partnership with the Federal Railroad Administration in its Rail State Participation Program as an alternative to the proposed Rules. Joining the partnership would save Colorado money that it would otherwise have to spend enforcing the proposed punitive system of levying fines. Thirty states have already partnered with the FRA, successfully resulting in both strengthening protections to the public and having consistent standards vis-à-vis crossing standards. The partnership would take nothing away from the ability of the PUC to enforce its rules, it would just provide uniformity regarding investigative and surveillance capabilities to the benefit of the railroads, the road authorities, and the public.¹⁰

On behalf of short line railroads in Colorado, ASLRRRA appreciates the opportunity to participate in this matter. ASLRRRA urges the Commission to reject the ALJ’s two findings as

¹⁰ See ASLRRRA’s December 17, 2021 Comments at 3-5.

described in these Exceptions to avoid the adverse effects on Colorado short lines and thereafter reopen the docket to make new findings consistent with the record to protect the interests of the small business railroads in the state.

Respectfully submitted on behalf of ASLRRA

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2023, the foregoing motion and associated documents were filed with the Commission via e-file and served on those parties via the e-filing system as shown on the Commission's Certificate of Service accompanying such filing.

By: Sarah Yurasko