BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY

DOCKET NO. EPA-HQ-OAR-2022-0985; FRM-8952-01-OAR:
GREENHOUSE GAS EMISSIONS STANDARDS FOR HEAVY-DUTY VEHICLES – PHASE 3

SUPPLEMENTAL COMMENTS OF THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The American Short Line and Regional Railroad Association ("ASLRRA"),[1] on behalf of itself and its member railroads, submits the following comments in response to the Environmental Protection Agency ("EPA")'s April 27, 2023, Notice of Proposed Rulemaking ("NPRM") on "Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles – Phase 3".[2] These comments supplement comments that ASLRRA has already submitted in this docket jointly with the Association of American Railroads. In addition to the points raised previously, these comments focus on an issue specific to small business railroads: the failure of EPA to comply with the Regulatory Flexibility Act.[3]

Short Line Railroads Are Vital to the Freight Rail Network

Short lines are proud to be part of the U.S. freight rail network – the most environmentally-friendly way to move freight over land. Railroads account for roughly 40 percent of U.S. long-distance freight volume but account for only approximately 1.9 percent of

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1 ASLRRA is a non-profit trade association representing approximately 500 short line and regional railroad members and hundreds of railroad supply company members in legislative and regulatory matters.

2 88 Fed. Reg. 25,926 (April 27, 2023).

3 5 U.S.C. 601 et seq.

transportation-related emissions according to the U.S. Environmental Protection Agency.[4] Additionally, railroads can move one ton of freight nearly 500 miles per gallon of fuel and are 3-4 times more fuel efficient than trucks.[5]

Short line railroads are 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 rail cars moving each year.[6] Operating nearly 50,500 route miles, or about 30 percent of the freight rail mileage in the U.S., they play a vital role in the transportation network.[7] Short line rail service provides safe, efficient, competitive, and environmentally responsible access to transportation for nearly 10,000 rail customers.[8]

While almost all are considered small businesses, short line railroads come in many shapes and sizes.[9] Some short lines are small but have some centralized functions as part of larger short line holding companies, some are larger regional railroads with hundreds of miles of track, and many are small, independent family-owned businesses. Together they represent a diverse, dynamic and entrepreneurial collection of small businesses that make wise use of the limited resources available to them. These small businesses operate the most vulnerable segments of the railroad system and, in many cases, are the only connection for rural businesses

4 U.S. EPA, *Fast Facts on Transportation Greenhouse Gas Emissions*, https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions (last updated July 14, 2022).

5 Association of American Railroads, *Freight Rail and Preserving the Environment*, https://www.aar.org/wp-content/uploads/2020/06/AAR-Sustainability-Fact-Sheet.pdf (October 2022).

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

7 *Id.*

8 *See Id.; and* Webber, Michael. *Freight trains are our future*. Popular Science, May 9, 2019. https://www.popsci.com/power-trip-excerpt/. (last visited July 28 2022)

9 *See* 13 C.F.R. § 121.201 and North American Industry Classification System code 482112, "Short Line Railroad."

to the domestic and global marketplace. They maintain their viability by competing aggressively for business from existing and new customers, investing a significant percentage of their revenues, often 25 percent or more, into their rail infrastructure.[10] They frequently partner with their customers to offer rail transportation alternatives that would otherwise be unavailable to those customers, and they pride themselves on custom, "white glove" service to allow their customers to succeed. The majority of railroads operating across America's rail network are privately owned and pay for their own infrastructure – a point of departure from other transportation modes that utilize publicly funded roads and waterways.[11]

Short line railroads are further divided into Class II and Class III railroads.[12] Class II railroads have an average revenue of $79 million and employ an average of 204 people.[13] The average Class II railroad operates 48 locomotives and serves 73 customers.[14] Class III railroads, the smallest, represent 84 percent of short line and regional railroad miles. Class III railroads have the widest range of operations. Half of Class III railroads operate fewer than 47 track miles.[15] Class III railroads serve an average of 15 customers per railroad and have an annual

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10 Facts and Figures, supra, at 3.

11 McGurk, Russ. *Five Reasons Freight Rail is an Infrastructure Leader*. GoRail, May 14, 2018. https://gorail.org/infrastructure/five-reasons-freight-rail-is-an-infrastructure-leader.

12 *See* 49 C.F.R. part 1201, General Instructions § 1-1(a). The Surface Transportation Board groups railroads into one of three classes for purposes of accounting and reporting. The class to which any rail carrier belongs is determined by its annual operating revenues after application of a revenue deflator adjustment. 49 C.F.R. pt. 1201, § 1-1(b)(1). Currently, Class I carriers have annual operating revenues of over $900 million, Class II railroads have annual operating revenues of less than $900 million but in excess of $40.4 million, and Class III railroads have annual operating revenues of $40.4 million or less.

13 Facts and Figures, supra, at 13.

14 Id.

15 Facts and Figures, supra, at 9.

total freight revenue of only $4.7 million. They employ an average of 22 people per railroad. Class III railroads have a median of only six locomotives per railroad.[16]

The NPRM's Proposed Change to Locomotive Preemption Targets Small Business Railroads

The NPRM proposes a dramatic change to EPA's regulations on the scope of preemption-specific provisions for locomotives and locomotive engines, which stand to disproportionately impact small business railroads.[17] Current regulations at 40 C.F.R. § 1074.12 states that States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives, and further specifies the period of time, 133 percent of the useful life of the locomotive or engine, and types of requirements that are preempted, including emission standards, mandatory fleet average standards, certification requirements, retrofit and aftermarket equipment requirements, and nonfederal in-use testing requirements. The NPRM proposes to eliminate section 1074.12 and combine existing section 1074.10 with a new paragraph (b) that only specifies, "States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives."[18]

EPA states that the service life of a locomotive "can extend to 40 years and beyond," and that "States have expressed interest in regulating non-new locomotives."[19] Further, the NPRM provides that 93% of the locomotives of Class II and Class III railroads (short line railroads) are

16 Facts and Figures, supra, at 12.
17 88 Fed. Reg. at 26,092.
18 Id. at 26,161.
19 Id. at 26,093.

older, Tier 2 or earlier locomotives.[20] This appears to be a reasonable assertion, as most short line railroads buy used locomotives and maintain and use their locomotive fleets for decades.[21] This change would have a dramatic impact on short line railroads. Often operating on razor-thin margins, small business railroads currently rely on preemption explicitly granted in the regulation that prevents States and localities from enacting their own regulations on locomotive emissions.

The NPRM Fails to Follow the Regulatory Flexibility Act

EPA states that the changes proposed in the NPRM will not have a significant impact on a substantial number of small entities, but only addresses the changes proposed to EPA's Phase 2 greenhouse gas requirements, but it does not mention the locomotive preemption change and its impact to small business railroads.[22] Thus, the NPRM fails to assess how such a transformative change would significantly impact a substantial number of short line railroads in accordance with the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA") – and it also declines to provide regulatory relief or consider less burdensome alternatives for small businesses.[23] Further, the RFA, as amended by SBREFA, also requires the EPA to convene a Small Business Advocacy Review ("SBAR") panel for most proposed rules unless the agency can certify that a rule will not have a significant economic impact on a substantial number of small entities.[24]

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20 Id. Seventy-four percent of Class I railroad locomotives are Tier 2 or earlier.

21 While there is not a complete data set on short line locomotives, information from the Universal Machine Language Equipment Registry (UMLER) shows that only 11% of short line locomotives that have been used in interchange service were built after 2000. For information on UMLER, *see* public.railinc.com.

22 88 Fed. Reg. at 26,097.

23 5 U.S.C. 601 et seq.

24 5 U.S.C. § 609(b).

Most Class II and Class III railroads fit the SBA's definition of a small entity in the railroad industry, as they have fewer than 1,500 employees.[25] As 93% of the locomotives operated by the approximately 600 short line railroads are Tier 2 or older, the change in preemption coverage would impact a substantial number of these small entities.

Conclusion

The locomotive preemption provisions in this rulemaking have the potential to impact 93% of the locomotives owned by the approximately 600 short line railroads. This constitutes a significant impact on a substantial number of small entities. ASLRRA urges EPA to remedy its shortcoming under the RFA by holding a SBAR panel, as required by law, with the Small Business Administration and the Office of Information and Regulatory Affairs. This process offers the necessary opportunity for small businesses to provide advice and recommendations to ensure that EPA carefully considers small entity concerns.

Respectfully submitted,

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[25] NAICS Code 48211, "Short Line Railroads," at SBA, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes." Effective Dec. 19, 2022. Available at: https://www.sba.gov/document/support-table-size-standards.