BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA-2021-0035:
RISK REDUCTION PROGRAM

COMMENTS OF
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION
AND
THE NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE ASSOCIATION

The American Short Line and Regional Railroad Association ("ASLRRA"), on behalf of itself and its member railroads, and the National Railroad Construction and Maintenance Associations ("NRC"), on behalf of itself and its contractor members, submit the following comments in response to the Federal Railroad Administration ("FRA")'s Notice of Proposed Rulemaking ("NPRM") to solicit information to help determine whether FRA should retain or remove a provision in the Risk Reduction Program ("RRP") final rule defining contractors who perform a "significant portion of a railroad's operations" as "directly affected employees" for purposes of the RRP rule.[1] Instead of attempting to define a "significant portion of the railroad's operations," for purposes of including a contractor as a "directly affected employee," FRA should instead follow the longstanding and well-defined precedent set by the Railroad Retirement Board ("RRB") to include only contractors performing the role of conductors,

---

[1] ASLRRA is a non-profit trade association representing the interests of approximately 500 short line railroad members and additional railroad supply company members in legislative and regulatory matters. Operating 50,000 miles of track, or approximately 30% of freight rail in the United States, short line railroads play a vital role in the transportation network. The NRC is a non-profit trade association representing businesses from across the nation in the rail construction and maintenance field. The NRC's nearly 200 contractor member companies range in size from small family businesses to the largest companies in the industry. NRC members perform work for transit, commuter, intercity passenger, industrial, and freight rail. 87 Fed. Reg. 54,938 (Sept. 8, 2022).

locomotive engineers, and dispatchers as directly affected employees. The RRB already has significant precedent dedicated to the question of who is or isn't a railroad employee – relying on this precedent would be preferable to creating a new vaguely defined standard.

A "Significant Portion of a Railroad's Operations" is Too Vague for ISP Railroads

On February 18, 2020, FRA published an RRP final rule that added regulations at 49 C.F.R. part 271 requiring each Class I railroad and Class II and Class III railroads that FRA has determined to have inadequate safety performance ("ISP") to develop and implement an RRP.[2] On April 10, 2020, the Association of American Railroads ("AAR") submitted a petition for reconsideration asking, inter alia, that FRA reconsider the inclusion of 49 C.F.R. § 271.3(c), which requires that employees of railroad contractors who perform "a significant portion of a railroad's operations" be considered as a railroad's "directly affected employees." In section 271.207(a) of the RRP rule, railroads are required to consult in good faith, and use best efforts to reach agreement with, its directly affected employees on the contents of its RRP plan. While section 271.3(c) did not exist in the NPRM, FRA justified its inclusion by noting that it was included in FRA's System Safety Program ("SSP") final rule, which is applicable to passenger rail operations.[3] FRA further stipulated in the RRP final rule that contractors and contractor employees would be considered affected employees only when the contracts were ongoing and involved significant aspects of the railroad's operations. FRA further suggested that railroads should contact FRA for guidance if they were unsure whether a contracted entity and its employees would be directly affected employees for purposes of the RRP rule.[4]

---

2 85 Fed. Reg. 9,262 (Feb. 18, 2020).
3 81 Fed. Reg. 53,850, 53,883 (Aug. 12, 2016).
4 *See* 85 Fed. Reg. at 9,277.

In the NPRM's preamble, with regard to ISP railroads, FRA states that there is a large amount of organizational diversity among Class II and Class III freight railroads, and FRA believes some of these Class II and Class III freight railroads may hire operationally significant contractors. The agency has requested public comment to better understand the nature of contractors and their work for Class II and Class III freight, or "short line," railroads. FRA is correct that there is a large amount of organizational diversity among Class II and Class II freight railroads and diversity among how they use contractors – but that is why such a vague provision as "a significant portion of a railroad's operations" is unworkable for purposes of the RRP rule.

Short line railroads in the U.S. today vary widely in terms of operating practices and characteristics. The vast majority of short line railroads are independently owned. Class II railroads have an average line length of 701 miles and a median of 377 miles. Class III railroads represent 84% of short line and regional railroad miles and have a wide range of operations. Half of Class III railroads operate fewer than 47 track miles, although the average skews higher due to the inclusion of switching and terminal operations in this category. Switching and terminal operations typically operate a much higher number of track miles than local carriers. Short line employees must wear many hats to make a small business railroad function in an economically viable and flexible manner. Due to limited resources and the cross-functional nature of many employees, it is challenging to comply with the variety of regulatory requirements in the same way as the much larger Class I railroads.

FRA's reference to a "significant portion of a railroad's operations," does not provide the regulatory certainty small businesses need to aid their compliance with regulatory obligations. What could be considered a "significant portion" of one Class III railroad's operations might not be considered a "significant portion" of another Class III railroad's operations. Such a broad

description, without any clear guidance other than "contact FRA for guidance," risks the result of FRA determining which individuals should be included as "directly affected employees" on a case-by-case basis. While Class II and Class III railroads that FRA has determined to have ISP will face the financial and logistical burden of developing and implementing an RRP, they should be able to at least rely upon plain regulatory language to define which individuals need to be consulted with during the RRP development. Railroads and contractors, especially small business railroads and contractors, should not be subject to an unwritten law subject to malleable agency interpretation, especially one that involves potential costs and burdensome logistical considerations.

Additionally, FRA's definition of an "affected employee" exceeds the statutory language of the Rail Safety Improvement Act of 2008, codified at 49 U.S.C. § 20156, which does not include contractors within the definition of an "affected employee," The statutory text requires each applicable railroad to "consult with, employ good faith, and use its best efforts to reach agreement with, all of its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program." 49 U.S.C. § 20156(g). As a much more workable alternative, the FRA should look to the precedent set by the Railroad Retirement Board.

Precedent for "Railroad Employee" Definition Set by the Railroad Retirement Board

The RRB, an independent federal agency created in the 1930s, administers comprehensive retirement-survivor and unemployment-sickness benefit programs for the nation's railroad workers and their families, under the Railroad Retirement Act, 45 U.S.C. § 231 et seq. ("RRA") and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 et seq.

("RUIA").[5] The Board has both policy-making and quasi-judicial functions. In its policy-making role, the Board establishes and promulgates rules and regulations to resolve matters arising under the Acts it is charged with administering. In its quasi-judicial role, the Board decides controversies of fact and law in accordance with the Act and the Board's regulations. Through its decisions regarding an entity's status as a covered employer under the Acts, the RRB has developed precedent for considering a contractor performing work as a locomotive engineer, conductor, or dispatcher, to be a railroad employee.[6]

Section 1(a)(1) of the RRA defines a covered employer as "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle 49, United States Code."[7] The RRB defines a covered employer as a "carrier operating in interstate commerce." *See, e.g.,* Boothill & Western Railway Company Employer Status Determination, B.C.D. 02-83, Nov. 21, 2002. After determining an entity to be a covered employer, the RRB then determines whether the entity has employees which it must report to the Board within the meaning of the RRA and the RUIA. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation.[8]

---

[5] "An Agency Overview," U.S. Railroad Retirement Board, January 2022. Available at: www.rrb.gov/OurAgency/AgencyOverview

[6] "Conductor" encompasses both a "brakeman" and a "switchman".

[7] Sections 1(a) and 1(b) of the RUIA contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act, 26 U.S.C. 3231 ("RRTA").

[8] Section 1(e) of the RUIA contains a definition of service substantially identical to the RRA, as do sections 3231(b) and 3231(d) of the RRTA.

The focus of the test at paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work, but also the way he performs such work. The RRB has held that the duties of a locomotive engineer are so integral to the operation of a rail carrier that the railroad must retain control over the manner in which these individuals perform their service. *See* Boothill & Western Railway Company. Further, the RRB has held that the operation of rail service requires that the railroad must direct and control the duties of a brakeman/switchman as well. *See* Railway Express Agency v. Railroad Retirement Board, 250 F.2d 832 (7th Cir. 1958).

The RRB has likewise held that individuals performing the work of train dispatchers must be considered railroad employees for purposes of complying with the RRA and the RUIA. The Board has stated, "dispatching is as inextricable a part of the actual motion of trains as is the operation of a train's locomotive controls by the engineer." *See*, e.g., Employer Status Determination, Decision on Reconsideration, of Trinity Railway Express – Train Dispatching and Herzog Transit Services, Incorporated, B.C.D. 09-53, October 28, 2009. The RRB unequivocally states that "a railroad cannot fulfill its obligation to provide rail service without dispatching services."

The entity determined to be a covered employer, i.e., the railroad carrier, must report the service of individuals working as locomotive engineers, switchmen, and brakemen to the RRB for purposes of compliance with the RRA and RUIA, as railroad employees, whether they are employees of the carrier or a contractor. The RRB has also held that a company providing temporary operating personnel, including engineers, conductors, trainmen and dispatchers, to a rail carrier employer was itself a rail carrier employer. *See*, e.g., B.C.D. 03-38, citing an earlier

decision in B.C.D. 03-23 that concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

All rail carriers must comply with the direction of the RRB with regard to reporting covered railroad employee service. Instead of stipulating that small business railroads, with a myriad of organizational diversity, must rely on agency guidance, subject to change and without a requirement for notice and comment, to determine which individuals should be considered "directly affected employees," ASLRRA and NRC urge FRA to follow the well-defined and longstanding precedent set by the RRB and include only operating personnel contract employees, including engineers, conductors, trainmen and dispatchers, to be "directly affected employees" for purposes of section 271.207(a). FRA should amend section 217.3(c) to read:

> "If a railroad contracts out train operations, the contractor and its employees, including locomotive engineers, conductors, and dispatchers, shall be considered directly affected employees for purposes of this part."

This modification would be consistent with the RRB and provide regulatory certainty for short line railroads and contractors subject to the RRP rule.

Respectfully submitted,

Chuck Baker
President
American Short Line and
Regional Railroad Association
50 F Street NW Suite 500
Washington, DC 20001
(202) 628-4500

Ashley Wieland
President
National Railroad Construction and
Maintenance Association
80 M Street, SE
Washington, DC 20003
(202) 975-0365

November 7, 2022