BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA—2009—0033:
TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES

PETITION FOR RECONSIDERATION
SUBMITTED BY THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,
THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION,
AND
NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE ASSOCIATION

December 22, 2014

Pursuant to 49 C.F.R. Part 211, the, the American Short Line and Regional Railroad Association (ASLRRA)[1], the American Public transportation Association (APTA)[2], and the National Railroad Construction and Maintenance Association (NRC)[3] on behalf of themselves and their member railroads and contractors, submit this petition for reconsideration of FRA's new training, qualification, and oversight for safety-related railroad employees regulations. Petitioners seek reconsideration of the relief provided to small business via a compliance manual and prefer relief in the regulation, relief from the provision that providers of template programs track their use, and relief from the provision requiring contractor oversight.

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[1] ASLRRA represents approximately 457 Class II and Class III railroads in the United States, Canada and Mexico as well as numerous suppliers and contractors to the short line and regional railroad industry.

[2] APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation.

[3] NRC is a trade association whose membership includes 180 of the nation’s largest rail construction and maintenance contractors.

Regulatory Overreach and Conflicting Statutes

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) requires regulatory agency to maintain policies concerning small entities subject to the federal railroad safety laws. These policies apply along with the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (RFA), 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.

The RFA as amended by the SBREFA, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 132725 requires federal agencies to notify Small Business Administration Office of Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and the RFA require the agency to include in any final rule the agency's response to any comments filed by Advocacy and a detailed statement of any change made to the proposed rule as a result of the comments.

As a general principle we recommend that the FRA amend the exemptions granted in the final rule. Small business railroads are defined by the Surface Transportation Board based on revenues and by the Department of Transportation by labor hours. We believe an exemption based on 400,000 labor hours is appropriate. It has been used in many other regulatory exemptions, and represents a good approximation for the small-business, small-railroad sector of the rail industry.

Turning to the requirements of the rule itself, we believe it is unlikely that the Congress intended for small business railroads and small commuter railroads to have training programs that are identical to huge Class 1 railroads. The statute specifically provides an outlet for relief for small businesses that FRA did not use though required to do so under SBREFA and RFA. The statute requires minimum training standards and FRA has prescribed in great detail training standards and documentation requirements that go far beyond a minimum standard. In fact, the statute explicitly provides relief for all categories of employees including track and mechanical inspectors. 20162 (a)(3) a minimum training curriculum and ongoing training criteria, testing, and skills evaluation measures to ensure that safety related railroad employees and contractor and subcontractor employees charged with the inspection of track or railroad equipment are qualified…and in implementing the requirements of this paragraph take into consideration existing training programs of railroad carriers.

ASLRRA, APTA, and NRC agree that training is valuable and should be scaled to the duties that are expected to be performed. However, the nature and scope of work on very small railroads is vastly different from that performed on a huge Class 1 Railroad. Short Line Railroad employees frequently perform many types of work, they may perform work as an engineer one day and may

perform maintenance or mechanical work on another day. The complexity of documenting each type of training and maintaining the documentation for lengthy periods of time even after the employee has left the railroads are another example of going well beyond a minimum standard.

The FRA has not shown any safety case for not simply accepting existing training programs as an exclusion for small businesses. ASLRRA, APTA and NRC requests that the relief mechanism for small businesses be meaningful and substantial as required by SBREFA and not simply another year before these costly and unnecessary requirements come into effect.

FRA states that it does not know the cost to develop template programs and impact. In fact ASLRRA went to great expense to develop one model program for 49 CFR 213 which we provided to FRA for comment and in fact got no response whatsoever. Despite providing FRA with data and feedback on the costs and benefits of the proposed rule, FRA chose to ignore these figures and instead maintained an unreasonably inflated safety benefit in the final rule to justify its lack of adequate relief to small businesses. Moreover, FRA's failure to accept existing training programs further illustrates the lack of flexibility and its unwillingness to provide relief to small businesses.

Relief Should be in Regulation Not Through Interpretation

Providing guidance and the opportunity to comment in a compliance manual is somewhat helpful, but a compliance manual is an interpretive document and can be changed by the agency without notice or comment as required under the Administrative Procedure Act. Therefore it is not the appropriate mechanism to provide relief for small businesses. ASLRRA and NRC request that the relief required under SBREFA be granted in the form of revised regulations.

ASLRRA, APTA and NRC Can and Should Not Keep Track of Who Uses a Program as Required Under 243.109

FRA recognized the need for model program development in the RSAC and ASLRRA, APTA and NRC concur that they will be very useful to small railroads and contractors. It is also important that these programs be available at a cost that is consistent with small business needs and the funding constraints of publicly funded commuter railroads.

The ASLRRA is a non-profit small business with 11 employees. The NRC is a non-profit small business with 4 employees. APTA is a non-profit association with 88 employees, of which 11 employees are responsible for safety, security, technical assistance and standards development activities. The ASLRRA provides content to its members through a "members only" website where any member may access the template programs developed by the ASLRRA. APTA provides its standards program publications and similar content via its public website, so that important safety information is accessible to the entire public transportation industry and not just to its members. 49 CFR PART 239.109b4 requires a "statement from an organization, business, or association that has submitted a model program pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the affected training program of the changes and the need for the employer to comply with those changes that

apply to the employer's operation."

ASLRRA, APTA and NRC request that these provisions be reconsidered. Effectively this requirement would preclude the ASLRRA, APTA and NRC from developing any template programs since we have no ability to monitor which of our members (or non-members, in the case of APTA) use the templates that we intend to create. We have no capacity to track who uses the programs and our potential failure to notify any railroad or contractor that may use them would put our small business associations at risk for enforcement activity and huge fines. This is not a statutory requirement and FRA should provide us relief as required under SBREFA.

ASLRRA and NRC Believe Oversight of Contractors in 243.205 is Unnecessary and Goes Far Beyond the Requirements as Specified in the Statute

There is no requirement for periodic oversight contained anywhere in the statute, yet these requirements are widely imposed on small railroads and contractors in the final rule. Although we appreciate the 15 or fewer exemption for small entities in the final rule, we feel that federally mandated periodic oversight goes well beyond the intent of the statute, places a burden on small contractors and railroads, and creates needless federal intervention. We believe the significant financial and administrative burdens this rule would place on small railroads and contractors justifies a full exemption from this requirement.

Contractors and railroads have a strong business incentive to properly train their employees. Contractors routinely work on railroad property at the discretion of their railroad customers and are already subject to close supervision by the railroads. If railroads observe or suspect contractors of engaging in unsafe practices, railroads do not hesitate to remove contractors from railroad property. Commuter railroads that contract for train operations and maintenance services do have general oversight duties, but normally are contractually and legally precluded from direct access to their contractor's employee personnel records, such as individual employee training records. Finally, the output of the work performed by rail contractors is already subject to an extensive array of FRA regulations (e.g. Track Safety Standards) and railroad inspections.

Mandating periodic oversight is a significant federal overreach and places an unjustified regulatory burden on small railroads and contractors without any meaningful safety benefits. FRA has repeatedly failed to provide us with data that shows where there are gaps in training and why there is a need for federal training requirements above and beyond the minimum requirements outlined in the statute. Meanwhile, the ASLRRA and NRC have repeatedly critiqued the cost estimates and lack of relief for small entities in this rule. FRA has largely ignored these comments throughout the final rule which has disproportionately placed administrative costs and burdens on small railroads and contractors.