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Independent Regulatory Review Commission

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Pennsylvania Public Utility Commission :
Regulation #57-286 : IRRC #2916
Rail Transportation :

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking Amending 52 Pa. Code :
Chapter 33 : Docket No. L-2011-2233841
:
: **Filed Electronically**

**JOINT COMMENTS OF CONSOLIDATED RAIL CORPORATION,
CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN
RAILWAY COMPANY TO COMMENTS OF THE INDEPENDENT
REGULATORY REVIEW COMMISSION**

The Independent Regulatory Review Commission (“IRRC”) submitted comments dated December 21, 2011, and published in the *Pennsylvania Bulletin* on January 7, 2012, at 42 Pa.B. 113, to the Proposed Rulemaking Order of the Pennsylvania Public Utility Commission (“PUC”) published in the October 22, 2011, *Pennsylvania Bulletin* at 41 Pa.B. 5634. Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“Norfolk Southern”) (collectively referred to herein as “Railroads”) submit the following comments in response to those of the IRRC for consideration of the PUC in regard to its final-form regulations in this rulemaking proceeding.

1. The Federal Railroad Administration's recent final rules regulating camp cars completely preempt any PUC regulation of that subject matter.

In its third comment, the IRRC *inter alia* questions how the PUC's definition of "camp car or trailer" is consistent with federal law in light of a commentator's suggestion that this definition be deleted from the proposed regulations as preempted by recent changes to federal law. See 49 CFR Part 228 (changes published in the *Federal Register*, 76 F.R. 67073-01).

Going hand-in-hand with the IRRC's comment regarding the continued efficacy of the "camp car or trailer" definition in light of recent changes in federal law was the Railroads' comment to the Proposed Rulemaking Order that the PUC's authority to regulate camp cars had been entirely preempted by the recent FRA final rules and thus Section 33.65 of the Railroad Transportation Regulations should be deleted.

The FRA's final rule amending 49 CFR Part 228 creates comprehensive regulations prescribing minimum safety and health requirements for camp cars provided by railroads as sleeping quarters. The comprehensiveness of these regulations is shown by the "Purpose and Scope" of the safety and health requirements regulations in Subpart E as follows:

The purpose of this subpart is to prescribe standards for the design, operation, and maintenance of camp cars that a railroad uses as sleeping quarters for its employees or MOW workers or both so as to protect the safety and health of those employees and MOW workers and give them an opportunity for rest free from the interruptions caused by noise under the control of the railroad, and provide indoor toilet facilities, potable water, and other features to protect the health and safety of the employees and MOW workers.

49 CFR § 228.303.

The comprehensiveness of these regulations is shown by the fact that they cover the topics of the structure of camp cars, emergency egress, lighting, temperature, noise level standards, minimum space requirements, beds, storage, sanitary facilities, electrical system requirements, vermin control, toilets, lavatories, showering facilities, potable water, food service, waste collection and disposal, housekeeping, and first aid and life safety. See 49 CFR §§ 228.309 through 228.331.

The Railroads explained the basis for federal preemption under the Federal Railroad Safety Act of 1970, as amended, 49 U.S.C. § 20101 *et seq.* (2008) (“FRSA”), in their Joint Comments to the Proposed Rulemaking Order at pages 4-7. The FRSA provides that after the FRA has issued a regulation covering the same subject matter, “[a] state may adopt or continue in force a law, regulation, or order related to railroad safety or security” only when such an Order “(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation or order of the United States Government; and (C) does not unreasonably burden interstate commerce.” 49 U.S.C. § 20106(a)(1).

A federal regulation preempts a state regulation even though the federal regulation does not specifically address each and every concern addressed by the state regulation, so long as the federal regulation appears to “cover” the safety area addressed. For example, as the U.S. Supreme Court stated in holding that the federal regulation setting maximum allowable train speeds preempted common law claims of speed in crossing accident situations:

On their face, the provisions of Section 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were

taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner.

...

Read against this background, Section 213.9(a) should be understood as covering the subject matter of train speeds with respect to track conditions, including the conditions imposed by grade crossings. Respondent nevertheless maintains that preemption is inappropriate because the Secretary's primary purpose of enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments. Section 434 does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether the regulations have been adopted that in fact cover the subject matter of train speed . . . We thus conclude that Respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in Sections in Section 213.9.

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 673-675, 113 S.Ct. 1732, 1742-1743 (1993) (emphasis added).

The FRA was so certain of the preemptive effect of its camp car regulations that it removed and reserved former § 228.13, which covered the preemptive effect of the prior regulations, as "this section is unnecessary because it is duplicative of statutory law at 49 U.S.C. § 20106 and case law." 76 F.R. at 67080. Therefore, Section 33.65 of the PUC's Railroad Transportation Regulations should be deleted in their entirety.

2. **Federal regulations govern the subject of track cars and four-wheel self-propelled maintenance-of-way cars and therefore Section 33.61 of the Railroad Transportation Regulations should be deleted in their entirety, as proposed by the PUC.**

In its fifth comment, the IRRC noted that the existing Section 33.61 of the PUC's Railroad Transportation Regulations requires various safety equipment and appurtenances for track cars and four-wheel self-propelled maintenance-of-way cars "after December 31, 1959." It further notes that the PUC seeks to delete this section in its entirety, as 49 CFR Part 214 now governs the subject matter. The IRRC further states that another commentator "indicates that this part of the FRA only applies to equipment manufactured after 1991, and therefore this language should remain for these particular vehicles. *See* 49 CFR § 214.517." The IRRC requests the PUC to further explain why it is deleting this section in its entirety.

The other commentator was incorrect that federal regulations only apply to on-track roadway maintenance machines manufactured on or after January 1, 1991. To the contrary, § 214.513 provides general requirements for the retrofitting of all existing on-track roadway maintenance machines. Other sections of Part 214 include additional requirements applicable to all such existing machines. *See* 49 CFR § 214.515 (regarding overhead covers); 49 CFR § 214.519 (concerning floors, decks, stairs and ladders of all on-track roadway maintenance machines); 49 CFR § 214.521 (regarding flagging kits); 49 CFR § 214.525 (regarding towing devices).

Section 214.517, on the other hand, merely specifies additional requirements for the retrofitting of existing on-track roadway maintenance machines manufactured on or after January 1, 1991. As Part 214 of the FRA regulations "cover" the subject matter of on-track roadway

maintenance machines, the PUC is correct to delete Section 33.61 of its Railroad Transportation Regulations in its entirety, for the reasons set forth above.

Respectfully submitted,
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