August 5, 2019

Mr. John Kelly  
Small Business Administration  
Office of the National Ombudsman  
409 3rd Street, S.W.  
Washington, DC 20416

Re: National Regulatory Fairness Hearing

Dear Mr. Kelly:

The American Short Line and Regional Railroad Association (ASLRRA) is writing to you in your capacity as the representative to the Small Business Administration’s Office of the National Ombudsman, to offer comments for your consideration in connection with the upcoming National Regulatory Fairness hearing.

Railroads have been regulated longer and more extensively than virtually any other industry group. In 1887, the Interstate Commerce Act created the Interstate Commerce Commission (“ICC”) and made railroads the first U.S. industry subject to comprehensive federal economic regulation. In 1893, Congress enacted the Safety Appliance Act, the first federal transportation safety standard. By the 1970s, federal regulation was driving railroads out of business. Excessive economic regulation was mitigated by the 1980 Staggers Act, but operational regulation of the railroads has continued unabated. Data from FRA’s information collection requests indicate that FRA regulatory paperwork cost alone has increased by more than 500% over the last thirty years to an annual burden of $1.7 billion. Likely, employees are both spending more time collecting and filing information required by FRA to the point where employees may have been hired solely to comply with the information collection aspects of FRA regulations.

Our specific suggestions for the repeal, replacement, or modification of existing regulations are summarized below. Recent rulemakings issued by DOT have ignored aspects of the Small Business Regulatory Enforcement Fairness Act and have afforded little or no relief for small business railroads. We have also identified a Notice of Proposed Rulemakings that should be substantially revised before issue of a final rule, the Risk Reduction rule.
The FRA Training Standards Rule

The Federal Railroad Administration “training rule”, 49 CFR 243, has become a perfect example of regulatory over-reach. The FRA has turned a statutory requirement that railroads establish minimum training standards into an encyclopedic regime that will be exceedingly difficult from a cost, expertise and time perspective for a small business to develop and implement. This rule will overwhelm the ability of the majority of our small business carriers to comply; it imposes the same training program requirements on a small railroad with five employees as it does for 50,000 employee giants like CSX or Union Pacific. That for the first time in its 103-year history ASLRRA has gone to federal court challenging the rule as it has been applied to small business illustrates the magnitude of threat it presents to our member small railroads. ASLRRA supports solid training programs but believes this overly complex regulation is not the best approach. The rule as it applies to Class II and Class III small railroads should be withdrawn to create a simplified training requirement that small railroads have the ability to implement. We have submitted a rewrite of the rule to FRA with an economic analysis.

On July 31, 2019 ASLRRA filed a petition requesting an extension of implementation of the rule by two years for Class II and Class III railroads and contractors. The petition states that, “By delaying the implementation deadline for the rules, the FRA will help ensure that their limited resources are not misdirected on preparing to comply with rules that are unnecessary, overly burdensome, and in a short while, may no longer be applicable.

Risk Reduction Rule

On February 27, 2015, FRA published an NPRM that would ensnare small business railroads in a risk reduction program that would require railroads with an ill defined “inadequate safety record” in a never-ending program. FRA’s formula to determine an “inadequate safety record” would place many small short lines into the program simply because of the lower number of employees. Further, the inclusion of violations, which are at an inspector’s discretion, could be utilized to ensure a short line’s inclusion. The lack of performance benchmarks for removal from the program means a railroad, once in the program, could never be removed from the program. The structure of the initial selection of a railroad, coupled with no performance benchmarks for removal, could conceivably have all short line railroads eventually placed into a regulated risk reduction program. ASLRRA will request Small Business Administration assistance in bringing this issue before the White House Office of Management and Budget if the NPRM progresses.

FRA has distributed grants to create the Short Line Safety Institute (SLSI) to assess, enhance and develop safety culture throughout the short line industry. ASLRRA has suggested that FRA utilize the SLSI to work with short lines as the mechanism for risk reduction within the short line industry and not place unnecessary and burdensome regulations on short lines.
Railroad Safety Enforcement

ASLRRA also suggests SBA look closely at 49 CFR 209 Appendix C – Railroad Safety Enforcement Procedures and their impact on small business railroads. The FRA is largely not adhering to this section of the CFR, as it is still levying exorbitant civil penalties to Class II and Class III railroads. We believe that FRA is not considering its obligations under SBREFA. FRA also states in this section that inspectors provide training on the requirements of all railroad safety statutes and regulations, but this training is not being conducted on a regular basis or at all. Training conducted in the past has been inconsistent and unfair. The agency is not providing the training that was offered in years past.

Obsolete Inspection Requirements

Many of the inspection regulations in place today assume that neither the material nor equipment to be inspected, nor the means of inspection, have changed in 50 years. For example, despite tremendous advances in locomotive design, brake and detection technology, railroads must comply with manual intermediate brake inspections that were last updated in 1982.

49 CFR 229.23 requires that all locomotives be inspected every 92 days. Even ignoring advances in technology since this rule was first issued, it presents an unreasonable burden on small railroads. The giant Class I freight railroads operate their locomotives 24 hours per day across thousands of miles at high speed. In contrast, small short line railroads may only operate their locomotives over short distances a few times per week, and even then at typically slow speeds of 25 miles per hour or less. Despite repeated pleas that FRA offer small railroads an alternate standard based on hours of use, the agency has not budged. As a result, the short line that runs its locomotives the same number of miles in 92 days that a Class I locomotive accumulates in 24 hours must inspect its locomotives as frequently as the Class I carrier. This is an unreasonable burden on small business that can be reduced without adversely affecting safety.

Similarly, despite advances in brake system design and operation, FRA regulations still require railroads to conduct unneeded brake tests.

Obsolete Reporting and Communication Requirements

Likewise, many of the federal recordkeeping requirements are woefully out of date. For example, the recordkeeping requirements in FRA’s track safety standards have not been updated in almost 20 years, reflecting a time when employees had to manually upload electronic records to a central database. These prescriptive regulations do not lend themselves to a smooth transition to a world of tablets, Wi-Fi, and cloud computing. See 49 CFR 213.241. Another example is DOT’s insistence that certain drug and alcohol forms be completed with a hard-copy pen-and-ink signature. See 49 CFR 40.25. In the ever-evolving digital world, there are numerous electronic signature methods and records recognized by other federal agencies. DOT should take this opportunity to update its recordkeeping provisions to allow railroads to maintain the data without prescribing the medium and/or method.
Other Proposed Regulatory Improvements

ASLRRA believes USDOT should require agencies within the Department to use current data and sound science to establish the need for a new rule, and give the public meaningful opportunity to review, assess, supplement, and comment upon it.

Further, it should be USDOT policy to provide meaningful relief to small business railroads as required under the Small Business Regulatory Enforcement Fairness Act, “SBREFA”. Too often FRA gives little or no relief to small carriers from the effects of rules designed for giant Class I railroads based on cursory economic analyses based on faulty assumptions.

Respectfully,

Jo Strang

Senior Vice President, Safety & Regulatory Policy