

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21R-0538R

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES REGULATING RAILROADS, RAIL FIXED GUIDEWAYS, TRANSPORTATION BY RAIL, AND RAIL CROSSINGS, 4 CODE OF COLORADO REGULATIONS 723-7.

**COMMISSION DECISION DENYING APPLICATIONS FOR
REHEARING, REARGUMENT, OR RECONSIDERATION**

Mailed Date: March 1, 2024
Adopted Date: February 28, 2024

I. BY THE COMMISSION

A. Statement

1. Through this rulemaking, the Commission has adopted amendments to its Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, contained at 4 *Code of Colorado Regulations* (CCR) 723-7. By this Decision, we address the Applications for Rehearing, Reargument, or Reconsideration (RRR) of Decision No. C24-0037, filed pursuant to § 40-6-114, C.R.S., on February 6, 2024, by BNSF Railway Company (BNSF) and Union Pacific Railroad Company (Union Pacific). The railroads request that the Commission reconsider the rules adopted by Decision No. C24-0037, issued January 17, 2024, which addressed prior Applications for RRR filed by BNSF and Union Pacific.

2. As discussed below, the Commission denies in full these Applications for RRR. Accordingly, the rules adopted by Decision No. C24-0037 remain the adopted rules. The adopted rules are provided for reference in legislative format (*i.e.*, ~~strikeout~~/underline) as Attachment A to

this Decision, and in final format as Attachment B to this Decision. These attachments are publicly available through the Commission's E-Filings system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=21R-0538R

B. Discussion and Findings

1. BNSF's RRR Claims

3. BNSF requests reconsideration of its arguments that the Commission's adopted rules are preempted under the Interstate Commerce Commission Termination Act of 1995. BNSF contends that Decision No. C24-0037 fails to acknowledge the role of preemption and asserts that the Commission abused its discretion by reaching incorrect conclusions concerning the preemption arguments. BNSF argues the adopted rules would broadly and unreasonably interfere with railroad transportation at railroad crossings and the construction and maintenance of those crossings, and would have substantial impacts on railroad operations and safety. Additionally, BNSF requests reconsideration of its arguments that the adopted rules are barred by the U.S. Constitution's Fourteenth Amendment, the Contract Clause, and the Commerce Clause, and represent an improper use of the state's police powers.

4. **The Commission denies this RRR.** The Commission has already considered, and denied, these substantive arguments. BNSF raises nothing new in its Application for RRR that would warrant reconsideration of our prior determinations on these same issues.

2. Union Pacific's Request to Reconsider Rules 7212(c) and (g)

5. Union Pacific contends that adopted Rules 7212(c) and (g) violate the recently issued 11th Edition of the Federal Highway Administration's MUTCD, dated December 2023.¹

¹ *Manual on Uniform Traffic Control Devices for Streets and Highways*, 11th Edition, December 2023, Federal Highway Administration – U.S. Department of Transportation. Available at:

6. Union Pacific contends Rules 7212(c) and (g), should be revised for the following reasons: (1) Rule 7212(c) removes the railroad from decision-making regarding determinations as to aspects that directly relate to control and direction of vehicular traffic; (2) Rule 7212(c) provides the road authority has the ultimate and sole authority to determine such aspects that directly relate to control and direction of vehicular traffic; and (3) Rule 7212(g) prohibits the involvement of the railroad in regard to construction plans that do not relate directly to the location of the highway-rail grade crossing, traffic engineering matters, and any other area of design, construction, implementation, and operations that is under the statutory authority and expertise of the road authority or the Commission.

7. As to exact provisions in the revised national MUTCD, Union Pacific cites to three sections of alleged conflict. First, Union Pacific cites the following language in the Introduction to Chapter 8A, which is designated as Support:²

Grade crossings and the traffic control devices that are associated with them are unique in that in many cases, the highway agency or authority with jurisdiction, the regulatory agency with statutory authority (if applicable), and the railroad company or transit agency are jointly involved in the development of engineering judgment or the performance of an engineering study. This joint process is accomplished through the efforts of a Diagnostic Team made up of the highway agency with jurisdiction, the regulatory agency with statutory authority (if applicable), and the railroad company and/or transit agency (if applicable).

Union Pacific contends the Federal Highway Administration has added language in this section to clarify the role of railroads within the decision-making process.

https://mutcd.fhwa.dot.gov/pdfs/11th_Edition/mutcd11thedition.pdf

² Union Pacific erroneously claims this is a “Standard,” while it is designated as “Support.” As defined in Section 1.C.01, a “Standard” is a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device; “Guidance” is a statement of recommended practice in typical situations; an “Option” is a statement of practice that is a permissive condition; and “Support” is an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition.

8. Second, Union Pacific quotes the following portion of the Standard in Section 8A.03, which concerns traffic control systems and practices at grade crossings:

Before any new grade crossing traffic control system is installed or before modifications are made to an existing system, approval shall be obtained from the highway agency with jurisdiction, the regulatory agency with statutory authority (if applicable), and the railroad company and/or transit agency.

The Diagnostic Team members shall make a recommendation, documented in an engineering study, on new grade crossing traffic control systems and on proposed changes to an existing grade crossing traffic control system. The Diagnostic Team recommendation shall be made based on the Diagnostic Team's site visits, meetings, conference calls, or a combination of some or all of these methods.

Among the types of changes at a grade crossing for which a Diagnostic Team shall conduct an engineering study are: additions, removals, or modifications of the lanes approaching or traversing the grade crossing; addition or removal of tracks; significant changes in the number or speed of trains; significant changes in the number or speed of vehicles; addition of vehicle access near the grade crossing; additions or modifications to sidewalks; additions or modifications to bicycle lanes, especially if a counterflow bicycle lane is added on a one-way street; changes to roadway use, including conversion to or from one-way operation or reversible lanes; and the installation of or significant operational changes to traffic control signals that might affect the grade crossing.

9. Third, Union Pacific cites the following language from the Standard in Section 8A.05, which concerning engineering studies at grade crossings:

The appropriate traffic control system to be used at a grade crossing shall be determined based on an engineering study conducted by a Diagnostic Team involving the highway agency with jurisdiction, the regulatory agency with statutory authority (if applicable), and the railroad company and/or transit agency (as applicable).

Union Pacific also cites to the Guidance in Section 8A.05:

Among the factors that should be considered in the determination by a Diagnostic Team of which traffic control devices would be appropriate to install at a grade crossing are road geometrics, stopping sight distance, clearing sight distance, the proximity of nearby roadway intersections (including the traffic control devices at the intersections), adjacent driveways, traffic volume across the grade crossing, extent of queuing upstream or downstream from the grade crossing, train volume, pedestrian and bicycle volumes, operation of passenger trains, presence of nearby passenger station stops, maximum allowable train speeds, variable train speeds, accelerating and decelerating trains, multiple tracks, high-speed train operation,

number of school buses or hazardous material haul vehicles, and the crash history at or near the location.

10. Based on these provisions, Union Pacific concludes, by removing the railroad from certain portions of the decision-making process regarding crossing projects, the Commission's adopted rules violate the MUTCD. Union Pacific states, pursuant to 23 C.F.R. § 655.603(b)(1), Colorado is required to adopt the national MUTCD or provide a supplement or its own MUTCD that must be in substantial conformance with changes to the national MUTCD within two years.

11. **The Commission denies this RRR request.** We find it is premature to consider changes to our rules simply because a new edition of the national MUTCD has now been released.

12. While the MUTCD is indeed the national standard approved by the Federal Highway Administration, this national standard is not a binding document on individual states and none of these changes has yet been adopted in Colorado. Under federal regulation, 23 C.F.R. § 655.603(b)(1), the states have a two-year adoption period in which to adopt any changes issued by the Federal Highway Administration. And pursuant to § 42-4-104, C.R.S., the Colorado Department of Transportation (CDOT) is the state agency that has jurisdiction to adopt the state manual.

13. Consistent with § 42-4-104, C.R.S., CDOT has adopted the 2009 Edition of the MUTCD for use in Colorado, with a Colorado-specific supplement that includes exceptions, adaptations, or additions to the national publication where necessary for the proper and lawful application of the MUTCD in Colorado in compliance with state statutes.³ Through § 40-2-104, C.R.S., the General Assembly directs CDOT to adopt the national manual and other related standards, *subject to* such exceptions, additions, and adaptations as are necessary for Colorado.

³See <https://www.codot.gov/safety/traffic-safety/assets/documents/mutcd>.

The Administrative Law Judge who conducted this rulemaking addressed the role of CDOT in adopting the state-specific manual in her Recommended Decision No. R23-0618 at ¶ 223, issued in this Proceeding on September 22, 2023. There, the Administrative Law Judge explained:

Under § 42-4-104, C.R.S., CDOT is required to adopt a manual and specifications for a uniform system of traffic control devices consistent with article 4, title 42, Colorado Revised Statutes for use upon highways within Colorado. The uniform system must correlate with, and as possible, conform to the system set forth in the most recent edition of Manual on Uniform Traffic Control Devices for Streets and Highways, known as the MUTCD, and other related standards issued or endorsed by the federal highway administrator. CDOT complies with § 42-4-104, C.R.S., by publishing a state manual, or by issuing a traffic control manual supplement adopting the national manual, and other related standards, subject to adaptations, additions and exceptions necessary for lawful and uniform application in the state.

Consequently, the Commission finds it appropriate to proceed with its adopted rules and to consider revisions, if necessary, once CDOT has considered and adopted these updates, with any state-specific modifications.

14. In addition, we disagree with Union Pacific's characterization of the adopted Rules 7212(c) and (g). These rules simply specify the road authority retains discretion over aspects that relate to control and direction of vehicular traffic and that railroad consultant time that may be billed to a road authority is limited to preemption calculation verification using the road authority's traffic signal timing information and may not include review of areas of design, construction, implementation, and operations that are under the statutory authority and expertise of the road authority or the Commission. Accordingly, these remain reasonable rules and are consistent with Colorado law and policy. If CDOT ultimately adopts a Colorado revision that requires us to consider amendments to our rules, we will address that issue once it arises.

3. BNSF Motion to Stay Rules

15. BNSF moves, pursuant to Commission Rule 1506(e), 4 CCR 723-1, for the Commission to stay its Decision No. C24-0037 and implementation of the adopted rules while all

legal challenges to the rules are under review. BNSF contends that refraining from implementing the rules while legal challenges remain outstanding will prevent the imposition of penalties upon railroads that railroads could likely not recoup if the rules took effect and were later struck down.

16. As in Decision No. C24-0037, where we denied a similar request by Union Pacific, we do not find good cause to take the extraordinary action of staying our adopted rules. We initiated this rulemaking to address safety concerns at rail crossings and we have conducted a lengthy and robust rulemaking to reach this point. We find no cause to now prevent these rules from taking effect. The Commission proposed these rules to address the real and urgent problems being raised to it by road authorities in rail crossing proceedings; we believe the adopted rules will solve those problems and that it is imperative they take effect now and not years after the judicial process has run its course. We have thoroughly considered, and found unconvincing, the railroads' preemption and constitutionality claims. To the extent the railroads continue to have concerns with the substance or effect of our rules, they can seek judicial review, but we will not agree to delay implementation of these critical state safety rules simply because the railroads have indicated they intend to appeal to the courts.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0037 filed by BNSF Railway Company (BNSF) on February 6, 2024, is denied.
2. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0037 filed by Union Pacific Railroad Company on February 6, 2024, is denied.
3. The motion to stay included in BNSF's Application for Rehearing, Reargument, or Reconsideration filed on February 6, 2024, is denied.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
February 28, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

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Commissioners