Decision No. C24-0037

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 GRANTING, IN PART, AND DENYING, IN PART, APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISION NO. C23-0780 AND ADOPTING RULES

Mailed Date: January 17, 2024
Adopted Date: January 10, 2024

I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission addresses the Applications for Rehearing, Reargument, or Reconsideration of Decision No. C23-0780 (RRR) filed pursuant to § 40-6-114, C.R.S., on December 18, 2023, by rulemaking participants BNSF Railway Company (BNSF) and Union Pacific Railroad Company (Union Pacific). The RRRs request that the Commission reconsider certain findings in its Decision No. C23-0780, issued November 27, 2023, and modify certain of the rules adopted by that decision. Through Decision No. C23-0780, the Commission addressed the exceptions filed pursuant to § 40-6-109(2), C.R.S., by several rulemaking participants, including BNSF and Union Pacific, to Recommended Decision No. R23-0618, issued by Administrative Law Judge (ALJ) Melody Mirbaba on September 22, 2023. The Commission granted, in part, and denied, in part, the exceptions and 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. Among other updates and revisions, the rules implement the specific fining authority for noncompliance with Commission rail crossing safety orders and regulations as authorized in Senate Bill 19-236, codified at § 40-4-106(b), C.R.S. In addition, the rules are designed to improve the processes and communications between railroads

and road authorities coordinating on rail crossing projects and to better facilitate the timely completion of these Commission-approved projects.

2. By this Decision, the Commission grants, in part, and denies, in part, the Applications for RRR filed by BNSF and Union Pacific. As discussed below, the Commission finds good cause to modify one of the rules it previously adopted, thus the revised adopted rules are provided, in their entirety, 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. Issues Raised for Reconsideration in Applications for RRR

1. Purpose of Rules to Address Railroad Delay

3. In their Applications for RRR, BNSF and Union Pacific contest whether the adopted rules will achieve the Commission's intended relief of reducing delay in completion of Commission-approved rail crossing projects. The railroads dispute the Commission's finding of a pattern of railroad delay and challenge that the adopted rules do not acknowledge the role that road authorities play in the design and agreement process for these projects. They contend the rules threaten to increase delay rather than reduce it and will not achieve the intended relief. Finally, they urge the Commission to act in the best interest of public safety, not in the interest of political expediency, and reconsider its rules in view of that public safety mandate.

4. **The Commission denies this RRR request.** At ¶¶ 20-22 of Decision No. C23-0780, the Commission affirmed its initial statement from the decision opening this rulemaking that it continues to be dismayed at the pattern of delay by railroads. The Commission pointed out this

statement was supported by the recent series of rail crossing proceedings where the Commission had been asked over and over again to grant extensions and had determined these delays in complying with its decisions would postpone upgrades and installations that the Commission had approved and ordered to proceed. The Commission added that the rulemaking process in this Proceeding had provided further record of credible comments from road authorities attesting to delay by railroads. The Commission determined the record demonstrated a need to improve the processes and communications for these projects, and to better facilitate their timely completion. The Commission concluded its rules would address those issues through requirements for notice, coordination, and communication, and by setting out a process for assessing civil penalties to enforce compliance with its orders and rules.

5. We affirm those findings as reasonable as well as supported by the record. In addition to the history of Commission proceedings and decisions cited in the opening decision, rulemaking participants have since then submitted many credible comments attesting to their experiences of delay in working with railroads on crossing projects. Although the railroads claim that the Commission is ignoring "the practical realities" and urge "it should not be overlooked that delays can arise from many sources,"[1] these arguments disregard that the Commission developed these amended rules in response to both the history of proceedings before it and the pressing requests for support from the railroads' road authority partners on crossing projects.

6. During this rulemaking, the road authorities have provided into the record numerous accounts of such delay. In addition to those already cited by the ALJ and the Commission in prior decisions,[2] we point here to yet additional comments demonstrating the

[1] BNSF Application for RRR at 5.
[2] *See* Recommended Decision No. R23-0618 at ¶¶ 25-27, 31; Decision No. C23-0780 at ¶ 22.

justification for these rules. For example, the Town of Windsor explained the "biggest obstacle" it typically faces in completing a crossing project is "a failure to observe a timeline with respect to the road authority's time constraints," that the town "is dependent on the rail company to address design issues for railway components, even if the roadway elements are 90% complete," that "road authorities are often left guessing at when their project reviews will be ripe for PUC filings, action, etc.," and that "setting a reasonable schedule for both [the] railroad and road authority" is needed to ensure the road authority's project does not "lose funding, or have budget reappropriated away, when unreasonable design and estimating delays occur."[3] Douglas County similarly commented the "biggest obstacle" to project completion is "commitment to a timeline" as the railroads "have a difficult time committing to tasks necessary to move projects along."[4] The City of Louisville likewise commented the railroads have a difficult time committing to tasks necessary to move a project forward and that "for even the simplest of projects, the railroad's consultants take 4 months or more to review each submittal and provide comments."[5] Along the same lines, the City and County of Broomfield explained, when a draft construction and maintenance agreement provided by the railroad contains errors related to project descriptions, necessitating corrections identified by the city, then the railroad will claim the city caused the delay.[6] We find these, and the many similar credible comments on the record assure this Commission that our rules will achieve their intended purpose of reducing the unreasonable railroad delay that has, up to now, prevented the timely completion of approved projects.

[3] Town of Windsor's 9/15/22 Comments at 2-3.
[4] Douglas County 9/15/22 Comments at 4.
[5] City of Louisville/s 9/16/22 Comments at 7.
[6] City and County of Broomfield's 11/8/23 Responses to Railroad Company's Exceptions at 2.

2. Billable Railroad Consultant Time in Rule 7212(g)

7. BNSF and Union Pacific request that the Commission reconsider the limitation in adopted Rule 7212(g) on the amount of railroad consultant time that may be billed by the railroad to the road authority for a rail crossing project. Generally, the railroads contend that restricting their ability to employ consultants to perform crossing project analysis will have the unsought effect of reducing safety and efficiency. They take the position that removing or limiting railroad expertise from the design and review process for crossing projects, as they claim this rule does, ignores the practical realities of these crossing projects and poses the risk of hindering safety. They also object the adopted rule needlessly imposes both an hour as well as scope limitation. They propose, if the problem to be addressed is railroad consultants advising on vehicular traffic engineering matters, then a scope limitation alone should suffice to solve the issue. The railroads also challenge that the set hour amount in the adopted rule is arbitrary and not adequately supported by the record.

8. **The Commission grants, in part, and denies, in part, this RRR request.** Upon consideration of the railroads' arguments on RRR, and our further examination of the adopted rule, we find good cause to rework the language in Rule 7212(g) to eliminate the fixed 12-billable-hour limit and instead focus this rule on containing the permissible scope of work that may reasonably be billed to the road authority to those matters under the railroad's jurisdiction and purview.

9. The narrow purpose of this rule is to put an end to the practice described in the road authorities' comments where road authorities are expected to pay for all railroad consultant costs, without limit, without detailed invoice, and including travel, accommodations, rental car, per diem, and hourly rates, ranging from $10,000 to $100,000, which the road authorities attest amounts to

an unaccountable expense.[7] Road authorities reported in their comments that railroad consultants have, in practice, made recommendations directly to the road authority about matters that are entirely under the control and expertise of the road authority itself, which then causes needless project delay and cost to resolve in addition to additional consultant time billed to the road authority.[8]

10. To this end, we adopt new rule language for this paragraph (g), as follows:

> (g) If a railroad, railroad corporation, rail fixed guideway, transit agency or owner of the track uses a consultant to perform a public project review, in conjunction with or on its behalf, then review of the public project, including the scope of consultant time that may be billed to the road authority, is strictly limited as follows:
> (I) to preemption calculation verification using the road authority's traffic signal timing information;
> (II) shall not include the review of, or require the road authority to comment on or make changes to, any of the following matters:
> (A) construction plans that do not relate directly to the location of the highway-rail grade crossing;
> (B) traffic engineering matters including signing, striping, traffic signal cabinet wiring plans, traffic signal design and construction, and traffic signal operations; and
> (C) any other area of design, construction, implementation, and operations that is under the statutory authority and expertise of the road authority or the Commission;
> (III) the public project review shall be promptly completed, and the preparation of a road authority requested front sheet and cost estimate shall be completed within the 120-day deadline set forth in paragraph 7212(e); and
> (IV) the road authority may request that the Commission review the reasonableness of the time billed by the consultant to the road authority.

We conclude that this adjusted focus clarifies the most effective manner to accomplish the purpose of this rule, which is to make sure that any railroad consultant time billed to a road authority for a rail crossing project is only for work that the railroad needs performed in order to complete its review of those project elements under its jurisdiction and purview.

[7] Colorado Department of Transportation's 9/16/22 Comments at 3.
[8] City of Fort Collins' 12/10/21 Comments at 6.

3. Civil Penalty Process

11. In its Application for RRR, Union Pacific claims the process set forth in adopted Rule 7010 for imposing a civil penalty against a railroad does not provide the railroad with advance notice or warning that the Commission is investigating an alleged violation. Union Pacific raises concern that a railroad's first notice of an allegation may be the Commission's issuance of the civil penalty assessment notice (CPAN). Union Pacific contends there should be a procedure for the railroad to be involved earlier so that the Commission does not begin the civil penalty assessment process through a written notice that it has developed based solely on the one-sided version of events presented by the involved road authority.

12. **The Commission denies this RRR request.** As outlined in Rule 7010, and consistent with this Commission's longstanding civil penalty assessment process across the several industries that it regulates,[9] this process starts with issuance of a civil penalty assessment *notice* to the respondent, which describes the alleged violation and the permitted time to cure, which is at minimum 14 days. If the respondent elects to contest the alleged violation, then the notice converts to a complaint, which is set for a hearing on the merits. Accordingly, the very purpose of the initial notice issued to the respondent is to provide the respondent a written description of the alleged violation including the alleged constitutional provision, rule, statute, or order violated and the date and approximate location of the alleged violation.

13. Union Pacific's request on RRR is essentially for the Commission create a pre-CPAN process to accommodate pre-litigation advocacy by the railroads concerning the alleged

[9] *See* Rules 3009–3010 of the Rules Regulating Electric Utilities, 4 CCR 723-3; Rules 4009–4010 of the Rules Regulating Gas Utilities, 4 CCR 723-4; Rules 5009–5010 of the Rules Regulating Water, and Combined Water and Sewer Utilities, 4 CCR 723-5; and Rules 6017–6019 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6.

violation. Although Union Pacific may prefer to have such an opportunity, it is neither required nor feasible. The civil penalty assessment process already provides opportunity to respond to an allegation so there is no need to allow opportunity to respond prior to the issuance of the initial descriptive notice. More problematically, there is no practical way to inject representatives from the railroad into the pre-CPAN decision-making process conducted among Commission staff and counsel. What is more, it is likely that any railroad activities leading to issuance of a civil penalty assessment notice would already occur in the context of, or related to, an ongoing proceeding, so any initial facts or allegation relied upon by Commission staff to initiate the civil penalty assessment process would typically already be public in some manner and not provided exclusively through private communications with the involved road authority.

4. Applicability of Rules to Federal-Aid Projects

a. Project Construction Support in Rule 7211(m)

14. Union Pacific requests clarification whether the requirement in this rule that a railroad provide project construction support is simply intended to reiterate that railroads must comply with the terms they have agreed to in the construction and maintenance agreement, which it finds unobjectionable, or could be read to require railroads to bear the costs of project construction support, which it opposes. Union Pacific maintains that a requirement in state rule that railroads bear project costs cannot lawfully apply to a crossing improvement project that was financed with federal funds. Citing 23 C.F.R. § 646.210(a), Union Pacific raises that state laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings do not apply to federal-aid projects.

15. **The Commission grants, in part, and denies, in part, this RRR request.** We are well aware of the federal requirements cited by Union Pacific. The intent of our rule is to confirm that a railroad must reasonably provide to the road authority the necessary support to complete the rail crossing project. In this context, we therefore agree to clarify that the term "project construction support" as used in this rule is not intended to refer solely to capital but also to services including responding timely to questions and requests for information, providing technical and construction support, and similar matters. Further, we affirm that any monetary project construction support should already be outlined in the negotiated and executed construction and maintenance agreement between the railroad and involved road authority.

b. Plan to Repair Crossing Surface in Rule 7211(n)

16. Union Pacific requests clarification whether the requirement in this rule that a railroad establish a plan to repair a crossing surface would require the railroad to bear the costs of maintaining a crossing improvement project that was financed with federal funds. Union Pacific contends such requirement in state rule would be preempted by federal law. Citing 23 C.F.R. § 646.210, Union Pacific reasons, having determined that railroads need not share the costs of federally funded grade-crossing improvement projects because they receive no ascertainable net benefit, the federal government could not have intended to allow states to discharge their statutory maintenance obligation by making railroads shoulder those costs. Union Pacific maintains the duty to maintain any project constructed under the federal-funding program is borne by the state transportation department or other direct recipient of the federal money (citing 23 U.S.C. § 116(b)) and asserts the federal regulations in 23 C.F.R. § 646.210 do not distinguish between the initial construction phase and subsequent maintenance. Union Pacific adds that maintaining installed safety equipment at a crossing so that it can continue to function as intended

ensures the elimination of hazards at highway-rail grade crossings specified in the federal regulations, and thus states cannot require railroads to share those costs.

17. **The Commission denies this RRR request.** Union Pacific's contention that a railroad cannot be required to bear maintenance costs is not entirely correct, as a matter of law. Union Pacific treats the terms "crossing improvements" and "maintenance" the same, despite their differing definitions under federal law as well as their plainly different meanings. First, Union Pacific is mistaken that 23 U.S.C. § 116(b) settles this issue. The federal statute imposes on the state or other direct recipient the *duty* to maintain, or cause to be maintained, any project constructed with federal aid. The purpose of this provision is to make clear the duty to maintain installments remains with states, consistent with the states' traditional role in maintaining safety at rail grade crossings, but nowhere does it prohibit states from imposing those costs on other entities.[10] Second, the operative federal regulation, 23 C.F.R. § 646.210(b)(1), provides, "Projects for grade *crossing improvements* are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs" (emphasis added). The plain wording specifies crossing improvements, not maintenance, thus we ascertain a distinction under the federal scheme between construction and maintenance costs. Third, we disagree with Union Pacific that ongoing maintenance after installation is inherently "work for the elimination of hazards at railroad-highway crossings" as used in 23 C.F.R. § 646.210. The federal definitions, 23 C.F.R. § 646.204, clarify that "construction" refers to the actual physical construction to improve or eliminate a railroad-highway grade crossing or accomplish other railroad involved work, with no indication that this is intended to also refer to subsequent maintenance work. For

[10] *See*, *e.g.*, *Union Pac. R.R. Co. v. Danner*, 2023 WL 5822460, at *8 (W.D. Wash. Sept. 8, 2023) (explaining it is clear that Congress never intended to fully usurp the states' traditional role in maintaining safety at rail grade crossings as it left the duty to maintain or cause to be maintained construction projects with the states).

these reasons, we conclude the federal standards do not preempt maintenance responsibility in federal aid rail-highway crossing projects[11] and therefore we deny the requested clarification.

c. Billable Consultant Time in Rule 7212(g)

18. Specific to federal-aid projects, Union Pacific objects that the Commission has not explained how this limit on the amount of consultant time that a railroad may bill to the road authority suffices to ensure that all necessary work is completed without imposing the costs of federally funded projects on the railroads. Union Pacific requests, at minimum, the Commission make clear that good cause will exist whenever a consultant's industry-standard work within the scope limitation would exceed 12 hours per project.

19. **The Commission grants, in part, and denies, in part, this RRR request.** As discussed above, we have determined to rework the consultant-hours rule, which should address Union Pacific's concerns on this issue.

C. Legal Challenges in Applications for RRR

1. Federal Preemption

20. BNSF once again raises the claim that our adopted rules are preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), claiming the rules intrude on the jurisdiction of the Surface Transportation Board (STB) and would impermissibly burden interstate rail transportation at crossings, the construction and maintenance of these crossings, and substantially impact railroad operations and safety.

[11] *See*, *e.g.*, *D & H Corp. v. Pennsylvania Pub. Util. Comm'n*, 613 A.2d 622, 624 (Pa. Cmwlth. 1992), *appeal den.*, 626 A.2d 1160 (Pa. 1993) (finding 23 C.F.R. § 646.210 does not specifically preempt maintenance responsibility in federal aid rail-highway crossing projects).

21. In its RRR, Union Pacific makes three challenges. First, it maintains a crossing is a "facility" subject to the ICCTA and interstate rail operations would be burdened by a regulatory patchwork if every state adopted its own requirements for these projects. It reasons, while states may adopt processes to guide road authorities and railroads in undertaking projects, those processes cannot impose varying operational or design requirements or cumulatively unreasonable financial burdens. Union Pacific argues, although the STB has noted a routine crossing issue typically avoids preemption, this rule is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Second, it disputes our previous conclusion that the Federal Railroad Safety Act of 1970 (FRSA) is the operative statute here to determine whether these state regulations are preempted. Union Pacific contends both FRSA and ICCTA preemption may apply and cites STB and judicial statements that it believes support this contention.[12] Further, Union Pacific points to a recent STB legal brief that stated the FRSA cannot be read to create a loophole in the ICCTA that would permit a patchwork of state and local regulation over rail transportation simply because the regulations touch on safety-related matters.[13] Third, and finally, it alleges the rules discriminate against rail carriers. Union Pacific reasons that, if the Commission lacks statutory authority to impose penalties on road authorities, then it cannot impose any penalties on railroads for their role in the process because road authorities are equal participants in rail crossing projects.

22. **The Commission denies this request for RRR.** While it is clear that Congress has the power to preempt state law under Article VI of the Constitution,[14] we see no indication that any existing federal law or regulation is intended to preempt our adopted rules. Federal preemption

[12] Union Pacific Application for RRR at 6.
[13] *Id*. at 5.
[14] U.S. Const. Art. VI, cl. 2.

occurs either when Congress expresses a clear intent to preempt state regulation, when there is an actual conflict between federal and state law, or when Congress pervasively occupies a field of regulation leaving no room for state regulation.[15] Accordingly, preemption analysis starts with the assumption that the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress.[16] Here, we apply these principles to consider, and reject, the railroads' RRR on this issue. We conclude the ICCTA and FRSA are two components of a multi-part federal-state regulatory partnership addressing railroad industry issues, in which this Commission, and our rules, play a vital part in the area of railroad safety.

23. As brief background, we review that Congress enacted the FRSA[17] in 1970 to "promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents."[18] The FRSA grants the Secretary of Transportation the authority to prescribe regulations and issue orders for every area of railroad safety.[19] It mandates that throughout the United States "[l]aws, regulations, and orders related to railroad safety … shall be nationally uniform to the extent practicable."[20] The FRSA permits, however, that a state may adopt a law, regulation, or order related to railroad safety until the Secretary (or the FRA, as delegate of the Secretary of Transportation) issues a rule or order covering the subject matter,[21] and a state may adopt an additional or more stringent law, regulation, or order related to railroads safety when necessary to eliminate or reduce an essentially local safety or security hazard if it is not

[15] *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990).
[16] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).
[17] 49 U.S.C. §§ 20101–20167.
[18] 49 U.S.C. § 20101.
[19] 49 U.S.C. § 20103(a). The Secretary of Transportation has delegated his authority under the FRSA to the Federal Railroad Administration (FRA) (with respect to railroad safety matters).
[20] 49 U.S.C. § 20106(a)(1).
[21] 49 U.S.C. § 20106(a)(2).

incompatible with the federal regulation and does not unreasonably burden interstate commerce.[22] Thus, states retain the ability to adopt rail safety regulations that are consistent or additive to the federal regulations.

24. Subsequently, in 1995, Congress enacted the ICCTA,[23] which created the STB and vested it with exclusive jurisdiction over "transportation by rail carriers."[24] "Transportation" is defined under the ICCTA as "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement."[25] The ICCTA's preemption clause states "the remedies provided ... with respect to regulation of rail transportation are exclusive" and thus preempt state laws on the covered subjects.[26] Although the ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, this does not encompass everything touching on railroads; states may continue to enact and enforce laws and regulations having a more remote or incidental effect on rail transportation.[27] The STB has articulated a framework for preemption analysis that considers whether state actions are preempted either categorically or as applied.[28] State actions are expressly preempted where they would directly conflict with exclusive federal regulation of railroads.

[22] 49 U.S.C. § 20106(a)(2)(A)-(C).
[23] 49 U.S.C. §§ 10101–16106.
[24] 49 U.S.C. § 10501(b)(1).
[25] 49 U.S.C. § 10102(9)(A) & (B).
[26] 49 U.S.C. § 10501(b)(2).
[27] *See, e.g., Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 102–03 (2nd Cir. 2009) ("The pre-emption inquiry focuses on 'the degree to which the challenged regulation burdens rail transportation.'"), *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) ("Notwithstanding the 'expansive' definition of transportation, all of the circuits have concluded that it 'does not encompass everything touching on railroads.'").
[28] *CSX Transp., Inc.–Petition for Declaratory Order*, 2005 WL 1024490, at *2-3 (1) (STB May 3, 2005).

Implied preemption requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.

25. As relevant here, courts generally agree the FRSA provides the appropriate basis for analyzing whether a state action affecting rail safety is preempted because the principal federal regulatory authority for rail safety is placed with the FRA.[29] The STB agrees, stating ICCTA preemption "applies only to non-safety railroad regulation and that Congress intended to retain the well settled safety authority of the FRA and the states under [the] FRSA when it enacted [the ICCTA]."[30] Although the STB has recognized there may be circumstances where a state action falls at the intersection of the ICCTA's realm of economic regulation and the FRSA's realm of safety regulation,[31] our rules do not fall in that area as they are safety-related and cannot reasonably be said to affect interstate rail transportation. Thus, the railroads' reliance on ICCTA preemption is misplaced. Nonetheless, under either preemption analysis, we see no reason to find our rules preempted as they narrowly regulate within an area where neither the FRA nor the STB have acted. We consider both analyses below and find no preemption.

26. As to FRSA preemption, only state laws "covering the same subject matter" as FRA regulations are preempted by the statute's preemption clause.[32] "Covering" in this context means state action is only preempted if the federal regulations substantially subsume the subject matter of the relevant state law.[33] The railroads have pointed to no clear FRA regulation that specifically addresses the subject matter of our rules. We also see no grounds that the rules would be preempted

[29] *BNSF Ry. Co. v. Hiett*, 22 F.4th 1190, 1195 (10th Cir. 2022) quoting *Island Park*, 559 F.3d at 107; *see Rhinehart v. CSX Transportation, Inc.*, 2017 WL 3500018, at *5 n.3 (W.D.N.Y. Aug. 16, 2017) ("FRSA provides the appropriate basis for analyzing whether a state … regulation … affecting rail safety is pre-empted by federal law.")
[30] *In re Waneck*, No. FD 36167, 2018 WL 5723286, at *5 n.6 (STB Oct. 31, 2018).
[31] *Id*. at *7.
[32] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).
[33] *Id*.

by implication. For that assessment, we weigh the legitimate state interest effected by our rules against any amount of burden on interstate commerce. Throughout this rulemaking, we have made clear the purpose of the rules is the end, intent, and purpose that accidents at rail crossings may be prevented and the public safety at rail crossings be promoted, and that railroads comply with Commission orders and rules relating to rail crossing projects, which we view as a critical state interest. Yet for their part, railroads have provided only assertions that the rules would affect rail transportation and have not clearly articulated for us how exactly the rules would have the effect of unreasonably burdening or interfering with rail transportation such that we cannot proceed with our state efforts. Thus, the record provides no compelling basis to find that our rules are preempted because of an alleged burden. Instead, the rules complement the federal safety regulations of the FRA and are well within the FRSA's intent of shared authority between the FRA and the states with regard to rail safety.

27. As to ICCTA preemption, regulation over rail transportation and state regulation over highway-rail grade crossing safety are two different things. Section 10501(b) of the ICCTA was not intended to preempt state actions having a more remote or incidental effect on rail transportation, which at most would be the effect of our rules. Under the categorical analysis, our rules do not on their face regulate rail transportation. The question for ICCTA preemption is whether the state regulation has the effect of managing or governing, and not merely incidentally affecting, rail transportation.[34] Our rules do neither. They merely provide a framework for completion of rail crossing projects with road authorities. The terms, timelines, and requirements

[34] *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010); *see also Wichita Terminal Ass'n, B.N.S.F. R. Co. & Union Pac. R. Co.—Petition for Declaratory Order*, STB Finance Docket No. 35765, 2015 WL 3875937, at *4 (STB June 22, 2015) ("[S]tate or local actions that have the effect of managing or governing, and not merely incidentally affecting, rail transportation, are expressly or categorically preempted under § 10501(b).").

in our rules are directed to this specific purpose and are simply not in the nature of regulation governed by the exclusive jurisdiction of the STB. Likewise, under the as-applied analysis, we see no clear demonstration by the railroads that our rules will unreasonably burden or interfere with railroad operations. This is a fact-specific inquiry, and the railroads have put forth speculation and concern about implementation of the rules but no actual data or concrete illustrations. Moreover, what matters is the degree to which the challenged regulation burdens rail transportation.[35] Consequently, we see no reason why our rules are incapable of being applied in a manner that would not unreasonably interfere with railroad operations.

2. 14th Amendment

28. The railroads renew their claim on RRR that the rules are prohibited by the U.S. Constitution's 14th Amendment. They argue both that the rules violate the Amendment's equal protection clause, and that the proposed civil penalty assessment process violates the Amendment's due process requirements.

29. **The Commission denies this request for RRR.** The test for constitutionality under the equal protection clause of the 14th Amendment is whether the regulation is rationally related to a legitimate governmental purpose, and whether there is a rational basis to uphold the classifications or distinctions created by the regulation.[36] Here, the rules' purpose is not to advance local interests for road authorities or even state-specific interests, rather, the purpose is to prevent accidents and promote public safety at rail crossings, consistent with the Commission's

[35] *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).
[36] *City of Leadville v. Rood*, 600 P.2d 62, 63 (Colo. 1979); *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n.,* 640 P.2d 238, 242 (Colo. App. 1981).

jurisdiction.[37] The reason for opening this rulemaking in the first place was to address the pattern of delay and noncompliance *by railroads* in their role in rail crossing projects.

30. While the Colorado legislature has not imbued this Commission with authority to penalize road authorities, it has authorized us to address the railroads' frequent delay and noncompliance. The record reflects railroad delays and failures to comply with Commission orders including delays in finalizing necessary construction and maintenance agreements; failing to provide cost estimates and schematic diagrams by a Commission-ordered deadline; and failing to comply with Commission orders requiring that if the railroad is unable to provide a cost estimate and schematic diagram by the ordered deadline, to make a filing explaining its failure.[38] The record does not reflect that road authorities have demonstrated the same pattern. The adopted rules provide a necessary process to enforce compliance by railroads with the orders and rules that the Commission has deemed necessary to ensure safety at rail crossings in this state. This is plainly a legitimate governmental interest to which the rules have a rational relation.

31. As to procedural due process concerns, procedural due process requires advance notice and an opportunity to be heard.[39] As the ALJ previously found, and we reiterated in our

[37] *See* Notice of Proposed Rulemaking Decision No. C21-0737 at 4-8 (reviewing background for rulemaking and proposed rule changes); § 40-4-106(2)(a), C.R.S. (authorizing Commission to, among other powers, prescribe the terms and conditions of installation and operation, maintenance, and warning at public highway grade crossings to the end, intent, and purpose that accidents may be prevented, and the safety of the public promoted).

[38] *See*, *e.g.*, Proceeding No. 18A-0332R (after Commission approved plans, Town of Milliken had to seek numerous extensions to file executed construction and maintenance agreement with Union Pacific prior to start of construction, stating it diligently pursued negotiations but Union Pacific delayed negotiating and finalizing agreements, resulting in a year's delay); Proceeding No. 18A-0631R (City of Boulder sought Commission relief because BNSF did not provide it with a cost estimate and schematic design consistent with Commission order and due to delays in BNSF responding to attempts to negotiate a construction and maintenance agreement so that construction could proceed); Proceeding No. 18A-0636R (City of Louisville sought Commission relief because BNSF failed to provide it with a cost estimate and schematic design consistent with Commission order; failed to provide it with the cost estimate and schematic design after being specifically ordered to do so by date certain, and failed to make a filing explaining why it did not provide cost estimate and schematic design as ordered).

[39] *Blood v. Qwest Servs. Corp.,* 224 P.3d 301, 318 (Colo. App. 2009) (quoting *Mountain States Tel. & Tel. Co. v. Dep't of Labor and Emp't,* 520 P.2d 586, 588 (Colo. 1974)).

prior decision, the adopted rules provide ample notice and a thorough process that protects respondents to a civil penalty assessment notice from being fined for a violation they did not commit and that gives respondents ample protection and opportunity to present their evidence and arguments.[40] Thus, the adopted civil penalty rules adequately satisfy both requirements.

3. Contract Clause

32. The railroads renew their claim on RRR that the rules are prohibited by the U.S. Constitution's Contract Clause.

33. **The Commission denies this request for RRR.** We recognize that the Contract Clause prohibits states from passing laws impairing "the obligation of contracts."[41] However, the test for whether a law impairs a contract in violation of the Contract Clause asks whether the change in law has operated as a substantial impairment of an existing contractual relationship, which we observe has not occurred under our rules.[42] Moreover, if the law touches on an area that has historically been regulated by the legislature, the law is less likely to be found to have violated the Contract Clause.[43] Here, the railroads have not identified or explained how the rules impair their contractual obligations. They have not identified an existing contract that gives them a vested right that is impaired by the rules. We therefore see no credible claim that our rules violate the Contract Clause.

4. Commerce Clause

34. The railroads renew their claim on RRR that the rules are prohibited by the U.S. Constitution's Commerce Clause. BNSF incorporates by reference the arguments in its

[40] Recommended Decision No. R23-0618 at ¶ 50; *see also* Decision No. C23-0780 at ¶ 43.
[41] U.S. Const. art. I, § 10, cl. 1.
[42] *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).
[43] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

exceptions. Union Pacific adds on RRR the challenge that the cumulative effect of the civil penalty rules and the railroad consultant-hours restrictions imposes an unreasonable burden on interstate commerce that clearly exceeds any local benefit, thus violating the Commerce Clause.

35. **The Commission denies this request for RRR.** We recognize the Commerce Clause grants Congress the power to "regulate Commerce ... among the several States."[44] And it is well recognized that this provision is both an authorization for Congress to regulate interstate commerce and a restraint on states, the "dormant commerce clause," which precludes states from erecting obstacles to interstate commerce such as regulations designed to benefit in-state economic interests by burdening out-of-state competitors.[45] However, where a law regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are incidental, it will be upheld unless the burden imposed on commerce is excessive in relation to the putative local benefits.[46] Here, our rules advance the legitimate state interest of ensuring that railroads operating in our state comply with Commission orders and rules relating to rail crossing projects that they undertake with road authorities.[47] Any "effect" of the civil penalty rules that we have adopted can be entirely avoided if a railroad simply complies with state law and Commission orders and rules regarding these projects; this *potential* does not unduly burden interstate commerce. Further, our rules include due process to make certain that any penalty is assessed only after notice, an evidentiary hearing, adjudication, and appeal. In addition, we have reworked the 12-billable-hour railroad consultant time rule to eliminate the hour component and focus instead on ensuring that time billed to a road authority is for matters properly under the railroad's

[44] U.S. Const. art. I, § 8, cl. 3.
[45] *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).
[46] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[47] *Thorpe v. State*, 107 P.3d 1064, 1072-73 (Colo. App. 2004).

jurisdiction and purview for completion of the project. We therefore find no merit to the contention that the effect of these rules imposes an unreasonable burden on interstate commerce.

5. State Police Powers

36. The railroads renew their claim on RRR that the rules constitute an improper use of state police powers.

37. **The Commission denies this request for RRR.** It is well established that state regulations do not amount to an abuse of police power where they bear a reasonable relation to the public health, safety, and welfare.[48] Whether an exercise of police power is proper depends on the facts of the particular case; courts will presume the regulation valid and sustain the regulatory body's intent even where it is fairly debatable.[49] Here, we see a substantial connection between compliance with these rules and rail crossing safety because failing to comply results in an unreasonable delay in completing a rail crossing project that the Commission has already ordered to proceed. Moreover, given there is no specific application of the Commission's rule to examine at this point, all that exists is conjecture and assumptions that the Commission will improperly exercise this police power. The ample due process afforded to civil penalty respondents guards against such outcome, and there is nothing in the record to substantiate conclusions that the Commission will improperly exercise this police power.

D. Requests to Stay Decision and Rules

1. BNSF

38. BNSF moves, pursuant to Rule 1506(e) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, for the Commission to stay implementation of the rules, at least pending

[48] *See Western Income Properties, Inc. v. Denver*, 485 P.2d 120, 122 (Colo. 1971); *Olin Mathieson Chemical Corp., v. Francis*, 301 P.2d 139, 149 (Colo. 1956).
[49] *See Western Income*, 485 P.2d at 121-22.

resolution of these Applications for RRR. Rule 1506(e) provides that the filing of an Application for RRR does not stay the underlying Commission decision unless the Commission itself orders a stay.

39. We find there is no need to stay these rules from taking effect. Although the Commission has adopted the rules by a series of decisions, the rules will not take effect, as a matter of law, until exhaustion of the RRR process, issuance of the Attorney General's Office rule opinion, and 20 days after publication in the *Colorado Register*. We therefore deny this request.

2. Union Pacific

40. Union Pacific requests, pursuant to § 40-6-115, C.R.S., that the Commission stay its Decision No. C23-0870 and the enactment of these rules while any legal challenges are addressed.

41. We note that § 40-6-115, C.R.S., provides that parties may, within 30 days of a final decision by the Commission in any proceeding, apply to the district court for judicial review.[50] We do not find good cause on this record to take this extraordinary action of staying our own 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. These rules are lawful, and the Commission proposed them 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 it is imperative that they take effect now and not years after the judicial process has run its course. The Commission has

[50] We note that § 40-6-116, C.R.S., specifies that judicial review does not itself stay the Commission decision "but … the district court, in its discretion, may stay or suspend" the decision. The statute requires the court provide notice and hearing and provide in its stay order a specific finding based upon evidence submitted to the court that great or irreparable damage would otherwise result to the petitioner and specify the nature of the damages.

thoroughly considered all of the preemption and constitutionality concerns raised by the railroads and found no merit to those claims. To the extent the railroads continue to have legal concerns with the substance or effect of our adopted rules, they have the ability to pursue those claims in court, but we will not further delay implementation of these critical state safety rules simply because the railroad participants have indicated they intend to appeal to the courts. We therefore deny this request.

E. Request for Oral Argument

42. In its Application for RRR, BNSF requests oral argument before the Commission, which we decline to grant. BNSF has not provided us compelling grounds to find that we must accommodate yet additional opportunity for advocacy in this matter. This rulemaking has already extended for several years and participants, including BNSF, have had full opportunity to be heard through several iterations of written comments and multiple rulemaking public comment hearings before the ALJ, and now two rounds of written argument before the Commission. We therefore deny this request.

F. Conclusion

43. The statutory authority for the rules adopted by this Decision is found at §§ 40-2-108, 40-4-106, 40-7-105, 40-9-108(2), 40-18-102, 40-18-103, 40-29-110, and 40-32-108, C.R.S. In light of our decision to grant, in part, the Applications for RRR, we adopt the rules shown in legislative (*i.e.*, strikeout/underline) format (Attachment A) and final format (Attachment B) attached to this Decision, consistent with the discussion above. The rule redlines are to the currently effective rules.

II. ORDER

A. It Is Ordered That:

1. The Application for Rehearing, Reargument, or Reconsideration filed by BNSF Railway Company (BNSF) on December 18, 2023, is granted, in part, and denied, in part, consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration filed by Union Pacific Railroad Company (Union Pacific) on December 18, 2023, is granted, in part, and denied, in part, consistent with the discussion above.

3. The Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, contained in legislative format in Attachment A to this Decision and final format in Attachment B to this Decision, are adopted. The 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

4. The motion to stay included in Union Pacific's Application for Rehearing, Reargument, or Reconsideration filed on December 18, 2023, is denied.

5. The request for oral argument included in BNSF's Application for Rehearing, Reargument, or Reconsideration filed on December 18, 2023, is denied.

6. Subject to a filing of a further application for rehearing, reargument, or reconsideration, the opinion of the Attorney General of the State of Colorado shall be obtained regarding constitutionality and legality of the rules as finally adopted.

7. A copy of the final, adopted rules shall be filed with the Office of the Secretary of State. The rules shall be effective 20 days after publication in the *Colorado Register* by the Office of the Secretary of State.

8. The 20-day period provided for in § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration begins on the first day after the effective date of this Decision.

9. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 10, 2024.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners

ATTEST: A TRUE COPY

Rebecca E. White,
Director