



VIRGINIA RAILROAD ASSOCIATION

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RE: Proposed Permanent Standard for Infectious Disease Prevention: SARS-CoV-2
Virus That Causes COVID-19, 16VAC25-220

The Virginia Railroad Association (“VRA”) respectfully submits these comments to the Virginia Department of Labor and Industry’s (the “Department’s”) proposed Permanent Standard for Infectious Disease Prevention: SARS CoV-2 Virus That Causes COVID-19, 16VAC25-220 (the “Proposed Permanent Standard”). VRA is concerned that the Proposed Permanent Standard would create uncertainty and significant burdens for its railroad members, who typically follow federal standards to operate their rail networks and are currently doing so in managing the health risks presented by the SARS CoV-2 pandemic. Below, VRA proposes modest changes to the Proposed Permanent Standard to address these concerns, to better position Virginia’s railroads to continue to provide reliable, essential service to their customers, and to avoid unreasonably burdening interstate commerce.

VRA’s Interest in the Application of Federal Policy to its Members’ Operations

VRA is a trade association representing the freight rail industry in the Commonwealth of Virginia, whose membership includes two Class I railroads and nine regional (Class II) and short line (Class III) railroads. VRA also has many customer members and associate members who depend on reliable rail transportation to conduct their business. The total freight rail network in the Commonwealth of Virginia consists of over 3000 miles of track, which interconnects with neighboring states, the District of Columbia, and important international trade facilities such as the Port of Virginia. This interconnected network provides many of Virginia’s industrial, manufacturing, and agricultural businesses with access to markets throughout North America and the world, giving them a substantial competitive advantage. In addition to providing substantial economic benefits to the customers in Virginia who are served by VRA’s railroad members, freight rail also offers many environmental benefits over competing modes of transportation, including reduced pollution, increased fuel efficiency, and reduced highway congestion.

Because of the substantial advantages of connecting their customers to a nationwide freight rail network that is the envy of the world, VRA’s members heavily rely on a national policy of regulating railroad operations at the federal level. Applying state or



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local operational regulations to railroad transportation in Virginia that are out of step with national policy will create potential barriers to accessing the nationwide freight rail network, disadvantaging not only VRA's railroad members but also Virginia businesses that depend on rail access to markets and would be at a significant competitive disadvantage without it.

VRA's Concern with the Proposed Permanent Standard

Earlier this year the Federal Railroad Administration issued a Safety Advisory encouraging railroads to familiarize themselves with federal recommendations and guidance related to COVID-19, including guidance issued by the Centers for Disease Control and Prevention ("CDC"). 85 FR 20,335 (April 10, 2020). That Safety Advisory further encouraged railroads "to take action consistent with" these federal recommendations and guidance. *Id.* at 20,336. The railroad members of VRA have taken this guidance to heart. They are following the CDC's COVID-19 guidance and other federal recommendations to keep their employees and their workplaces safe and healthy as they continue to provide essential services to their customers during the pandemic.

VRA's concern is that adoption of the Proposed Permanent Standard as written will create confusion and unnecessary operational burdens for railroads operating in the Commonwealth of Virginia because it does not square entirely with the federal COVID-19 guidelines the FRA encouraged all US railroads to follow in its Safety Advisory. This confusion would arise in part because although some railroad activities are clearly beyond the jurisdiction of Virginia's occupational and safety laws, others may not be. The Proposed Permanent Standard would apply "to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the VOSH program...." Proposed 16VAC25-220-10(C). Virginia's occupational safety and health statutes, regulations, and laws generally apply to every employer, employee, and place of employment in the Commonwealth, with certain exceptions. 16VAC25-60-20. One of those exceptions is where the federal Occupational Safety and Health Act of 1970 does not apply. 16VAC25-60-20(2). While many activities performed by railroads are not within OSHA's jurisdiction because they are subject to regulation by the Federal Railroad Administration ("FRA"), other railroad activities are not regulated by the FRA and are within OSHA's jurisdiction. *See*, FRA Policy Statement, 43 FR 10583 (March 14, 1978). Therefore, on its face, the Proposed Permanent Standard would purport to regulate those railroad activities within OSHA's jurisdiction.¹

¹ Most, if not all, employees of VRA's railroad members who would be subject to the Proposed Permanent Standard would fall into the "lower risk" category. Workers in the railroad industry typically have minimal contact with members of the public or co-workers, or are able to achieve minimal occupational impact through work practice controls. *See* 16VAC25-220-30 (Definition of "lower risk").



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The problem is that while the Proposed Permanent Standard recognizes that some employers in the Commonwealth are following CDC guidance to control the spread of COVID-19, following that guidance is only deemed to be compliant with the Proposed Permanent Standard “provided that the CDC recommendation provides *equivalent or greater protection* than provided by a provision of this standard.” 16VAC25-220-10(G.1) (Emphasis added). It is unclear how a railroad in the Commonwealth would determine whether a particular CDC recommendation it intends to continue following “provides equivalent or greater protection” than an analogous provision of the Proposed Permanent Standard. While following CDC guidance “shall be considered evidence of good faith in any enforcement proceeding” (*Id.*), that is cold comfort to VRA’s railroad members, who will wonder not only whether such “evidence of good faith” will be sufficient to carry the day in any enforcement proceeding, but also whether an eventual determination that following CDC recommendations was *not* sufficient to comply with state law will expose them to civil liability. That decision will not necessarily be made by the Department, but by a judge or a jury.

The uncertainty that would be created by the Proposed Permanent Standard will put Virginia railroads in the very unfortunate position of having to guess at which set of standards it should follow. Even after analyzing whether an activity falls within FRA’s jurisdiction or OSHA’s - which in and of itself is often a complex undertaking that sometimes yields less than clear answers – a Virginia railroad doing its best to follow the rules may then have to ask itself whether following CDC guidance provides “equivalent or greater protection” than the Proposed Permanent Standard – a question impossible to answer with any degree of certainty.

What will make it especially difficult for railroads operating in Virginia is figuring out how to apply a different set of rules once a state border is crossed. Railroads are network businesses, with complex interstate operations. The two Class I railroads that operate in Virginia, CSX Transportation, Inc. and Norfolk Southern Railway Company, have extensive networks that reach most of the Northeastern United States, the Midwest, and the South. Several smaller railroads with Virginia operations also operate in other states. Even those railroads operating solely in Virginia interchange traffic with interstate carriers and could be impacted by a set of state COVID-19 standards that do not align precisely with federal recommendations. Applying one set of rules to a carrier’s Virginia operations, and another set of rules elsewhere on the carrier’s network, would introduce complexity that would ultimately burden interstate commerce. That burden would grow even larger if other states were to follow Virginia’s lead and provide similarly weak assurances that following CDC guidelines will be sufficient to comply with state COVID-19 regulations.

Forcing railroads to try to manage their complex multi-state networks within a patchwork of different state operational regulations would undermine federal interstate transportation policy, which heavily favors one set of standards created at the federal level. This policy preference was perhaps best expressed by Congress in the Interstate



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Commerce Commission Termination Act (the “ICCTA”), which vests exclusive jurisdiction over interstate transportation by rail carriers in a federal agency – the Surface Transportation Board. 49 USC 10501(b). The Board’s broad grant of exclusive jurisdiction has been interpreted to preempt a broad range of state and local laws when applied to railroads. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied* 527 U.S. 1022 (1999); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp. 2d 1096 (D. Minn. 1998); *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D. Mon. 1997).

VRA’s Proposed Revision to the Proposed Permanent Standard

Fortunately, VRA believes that its concerns with the Proposed Permanent Standard can be addressed by a modest change to subsection (G.1) of 16VAC25-220-10. VRA proposes revising that subsection by adding the double-underlined text below:

G.1. To the extent an employer actually complies with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 virus and COVID-19 disease related hazards or job tasks addressed by this standard, and provided that the CDC recommendation provides equivalent or greater protection than provided by a provision of this standard, the employer’s actions should be considered in compliance with this standard. An employer’s actual compliance with a recommendation contained in CDC guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 and COVID-19 related hazards or job tasks addressed by this standard shall be considered evidence of good faith in any enforcement proceeding related to this standard. Anything to the contrary in this section notwithstanding, to the extent that an employer engaged in interstate commerce complies with a recommendation contained in CDC guidance or other federal standards or guidelines, whether mandatory or non-mandatory, to mitigate SARS-CoV-2 and COVID-19 related hazards or job tasks addressed by this standard, the employer’s actions shall be considered in compliance with this standard.

By making this minor change to the Proposed Permanent Standard, the Department will address the concerns of VRA and its members, while better aligning its proposed regulation with federal transportation policy and the ICCTA.

Respectfully submitted,

Cannon Moss, President
Virginia Railroad Association