

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Rulemaking Petition  
of

SMART Transportation Division,

To Adopt Experience Requirements For  
Railroad Employees

DOCKET TR- 230876

ORDER 01

DENYING PETITION

**BACKGROUND**

- 1 On October 9, 2023, SMART’s Transportation Division (SMART) filed a Petition for Rulemaking (Petition) with the Washington Utilities and Transportation Commission (Commission), which was assigned to Docket TR-230876. The Petition requests that the Commission initiate a rulemaking “to require railroad employees to have a minimum amount of work experience in a safety sensitive supervisory or lead position within that service division.” The Petition references safety incidents in Ohio and California, and it includes copies of national FRA safety bulletins.
- 2 On October 31, 2023, the Commission issued a notice requesting comments, and requiring that any responses to the Petition be filed on or before November 20, 2023.
- 3 On November 20, 2023, SMART contacted Commission staff to request that the Commission extend the deadline for responses and comments, informing the Commission that there had been some confusion as to the process for commenting.<sup>1</sup> The Commission found good cause to extend to December 5, 2023, the deadline to respond to or comment on the Petition.

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<sup>1</sup> The Commission also received a filing, characterized as a petition, from the Brotherhood of Locomotive Engineers (BLET), requesting to join the rulemaking as a party. However, the Commission has not initiated a rulemaking process, and is declining to do so here. We therefore decline to reach BLET’s request as unripe.

4 The Commission received comments from Columbia Basin Railroad, Central Washington Railroad, BNSF Railways Co., BNSF Railway Co., American Short Line and Regional Railroad Association, Union Pacific Railroad Company, Washington Eastern Railroad, the Association of American Railroads, Cascade and Columbia Railroad, Belmore Railroad, Puget Sound and Pacific Railroad, and the Brotherhood of Locomotive Engineers.<sup>2</sup>

## DISCUSSION

5 Within 60 days after receiving a petition for rulemaking, the Commission either must:

(a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rulemaking proceedings in accordance with RCW 34.05.320.

We deny SMART Transportation Division's Petition for the reasons we explain below.

6 Any rules the Commission promulgates must derive from statutory authority.

7 Legislative grants of authority to the Commission typically, if not uniformly, are prescriptive and are included in statutes dedicated to establishing the nature and scope of the Commission's jurisdiction and the legal obligations of the companies it regulates.<sup>3</sup>

8 The Petition identifies no statutory directive to require railroad employees to have a minimum amount of work experience, as proposed by SMART, and we are not aware of any such mandate. RCW 81.40.150 provides that "the highest priority and paramount obligation of the commission must be its duty to ensure the safety and protection of the public, passengers, railroad employees, communities, environment, and areas of cultural significance in the furtherance of the highest degree of safety in railroad transportation." To those ends, RCW 81.40.095 requires the Commission to "adopt and enforce rules and regulations relating to sanitation and adequate shelter as it affects the health of all railroad

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<sup>2</sup> This Order will not attempt to summarize each received comment, but the comments have been considered in arriving at the findings in this Order.

<sup>3</sup> *E.g.*, RCW chapter 81.40 (Railroads—Employee Requirements And Regulations).

employees . . . .” None of those statutes, however, expressly require or authorize the Commission to establish minimum experience requirements, as proposed by the Petition.

- 9 Even if the Commission had the discretion under existing law to impose such a requirement, we would not exercise that discretion. The Commission is not the only government agency with some measure of authority over railroad safety. The Federal Railroad Administration (FRA) has broad jurisdiction to regulate rail safety.<sup>4</sup>
- 10 There are a number of federal regulations that appear to cover the related subject matter as the proposed rules.<sup>5</sup> Regardless of the potential merits of the policy issue in question, the Commission must be cognizant of these parallel federal rules, lest it violate federal and state law.
- 11 Pursuant to 49 U.S.C. § 20106(a), “[l]aws, regulations, and orders related to railroad safety” should be “nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a) (titled “Preemption”). To effectuate that goal, federal law preempts state law to the extent that federal railroad regulations “prescribe a regulation or issues an order covering the subject matter of the State requirement.” *Id.* We observe that many of the comments in this docket have argued that the Commission is preempted from rulemaking on this subject. We have considered these comments but also note that the Commission would be duty-bound to carry out a rulemaking if this was required by the legislature. The Petition has not, however, identified any state statutes requiring the Commission to carry out this proposed rulemaking, and we decline to reach the issue of whether the rulemaking is preempted by federal law.
- 12 Even if the Commission proceeded with initiating the rulemaking requested by SMART, it would be unclear whether the Commission could finalize the proposed rules pursuant to the requirements of Washington state law. In a rulemaking proceeding, the Commission

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<sup>4</sup> 47 U.S.C. § 20101-55.

<sup>5</sup> 49 CFR § 240.127 (setting proficiency standard for locomotive engineers to become qualified on a territory); 49 CFR § 240.123 (requiring continuing education for engineers).; 49 CFR § 242.301 (setting qualification for conductors on physical characteristics of territory) 49 CFR § 242.119 (setting continuing legal education requirement for conductors; 49 CFR § 217.9(b) (requiring railroads to have internal controls that ensure supervisors are qualified).

is required to evaluate a list of enumerated items.<sup>6</sup> One of those enumerated items is an evaluation under RCW 34.05.328(1)(h) to:

Before adopting a rule described in subsection (5) of this section, an agency must: . . . Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

(i) A state statute that explicitly allows the agency to differ from federal standards; or

(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives [of the statute that the rule implements]. . . .

13 The Commission does not believe that it would be able to meet these threshold requirements of 34.05.328(1)(h). The Commission is not presented with (1) any state statute that explicitly allows the agency to differ from federal standards or (2) substantial evidence that a differing state standard is necessary to achieve the goals prescribed to the Commission by the state legislature, such as uniquely local hazards. This is significant.

14 This analysis, as required by RCW 34.05.328(1)(h), conserves agency resources. It benefits no interested party to engage in a lengthy rulemaking process which may fail to meet the standards of the Administrative Procedure Act, or potentially be preempted by federal law. After careful review of comments and applicable law, the Commission denies the Petition. The filings and comments received were insufficient for the Commission to conclude otherwise at this time.

### ORDER

15 THE COMMISSION ORDERS That the Rulemaking Petition of SMART Transportation Commission is DENIED.

DATED at Lacey, Washington, and effective January 17, 2024.

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<sup>6</sup> See RCW 34.05.320 (requiring issuance of a “a statement indicating whether RCW 34.05.328 applies to the rule adoption . . .”). See also RCW 34.05.328(5)(a)(ii); WAC 480-07-210.

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner

MILTON H. DOUMIT, Commissioner