Nos. 24-11076, 24-11300, 24-11366, 24-11367,
24-11428, 24-11444, 24-11445, and 24-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLORIDA EAST COAST RAILWAY LLC, et al.,
Petitioners,

v.

FEDERAL RAILROAD ADMINISTRATION, et al.,
Respondents.

On Petition for Review of a Final Rule of the Federal Railroad Administration

REPLY BRIEF OF PETITIONERS AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION, NEBRASKA CENTRAL RAILROAD COMPANY, AND TEXAS & NORTHERN RAILWAY COMPANY

SARAH YURASKO
American Short Line and Regional Railroad Association
50 F Street NW, Suite 500
Washington, DC 20001
Telephone: (202) 585-3448

DAVID F. RIFKIND
HARVEY REITER
Stinson LLP
1775 Pennsylvania Avenue N.W., Suite 800
Washington, DC 20006
Telephone: (202) 969-4218

BETSY SMITH
Stinson LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Telephone: (816) 691-3383

ORAL ARGUMENT NOT YET SCHEDULED

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24-11428, 24-11444, 24-11445, and 24-12003

Florida East Coast Railway LLC, et al v. Federal Railroad Administration, et al.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Pursuant to Circuit Rules 26-1.1 and 26.1-2(b), this statement serves as a certification that the CIP contained in Petitioners American Short Line and Regional Railroad Association, Nebraska Central Railroad Company, and Texas & Northern Railway Company Opening Brief is complete.

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INTRODUCTION

The central issue in this petition is whether the Federal Railroad Administration ("FRA") acted arbitrarily in promulgating its final rule, *Train Crew Size Safety Requirements*, 89 Fed. Reg. 25052 (Apr. 9, 2024). In the Opening Brief, Short Line Petitioners argued that certain aspects of the rule rendered it arbitrary and capricious: the arbitrary scope of the rule's two-year legacy provision, the rule's inconsistent applicability to railroads carrying hazardous materials, and FRA's unacknowledged and unexplained change in its alerter policy. FRA's claim that the rule is an example of reasoned decision making relies on the unsupported assumption that a two-person operation is inherently safer than a one-person operation. But FRA's safety justifications fail for two reasons.[1]

First, FRA admits in multiple instances that it does not have the safety data that it purports to rely on. FRA states that one of the major goals that the rule accomplishes is that "it *institutes* a process for the agency to collect information about one-person train crew operations so that it 'will be better informed to respond to questions about how to maintain the safety of such an operation and be better positioned to take actions that ensure future safety improvements.'" FRA Br. 12

[1] *Amici* also advance safety justifications that fail. All of the U.S. accidents listed in the States' amici brief had a crew of at least two people, and the crew staffed during the Graniteville accident was a crew of three. *Amici Curiae* States Supporting Respondents Br. 22, 24, 25. Crew size was not a factor in any of these accidents, yet *amici* rely on these accidents to support the necessity for a crew size rule.

(emphasis added), citing 89 Fed. Reg. at 25053. FRA's use of "institute" emphasizes that FRA does not currently have a process to capture the safety data about one-person crew operations that it alleges it relied on in promulgating this rule. FRA also argues that the "fact that the agency responsible for railroad safety did not have an accurate count of Class II and III one-person train crew operations only underscores the need for regulation on this topic." FRA Br. 85. If FRA did not have data regarding the safety of one-person operations, then how can it claim to promulgate a rule in the name of the safety? FRA admittedly does not have data to support its safety justifications, a fact underscored by the agency's own decision to adopt a purportedly broad, if inconsistent, list of legacy exemptions.[2]

Second, while FRA asserts its belief that long trains, heavy tonnage and complex operations justify regulation of Class Is, it concedes these factors do not apply to short lines and does not advance a safety justification for regulating short lines. FRA Br. 2, 20, 60.

FRA's arguments, as discussed below, are based both on mistaken characterizations of the record and post hoc explanations of counsel and are hence

[2] In fact, FRA has ample safety data on short line operations with one-person crews. In accordance with the challenged rule, over 200 short lines recently notified FRA of their legacy one-person operations. Like all short lines, these carriers report safety incidents to FRA. The problem is not that the agency does not have safety data; the problem is the agency is unwilling to recognize the data it already collects.

impermissible. FRA misapprehended and thus failed to address the Short Line Petitioners' alerter argument. FRA also relies on post hoc assertions to support the rule's hazmat reporting requirements. Finally, FRA ignores the very ambiguities that made necessary Petitioners' challenge of the two-year legacy exception's arbitrary scope.

ARGUMENT

I. FRA Mischaracterizes and Then Evades Short Line Petitioners' Objection to the Alerter Requirement for Class II and III Carriers With One-Person Crews.

FRA does not dispute that when an agency changes policy it is both required to (1) acknowledge that it is making a change, and (2) offer "good reasons" for its change in course. *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). This is significant for two reasons. First, under FRA's 2012 rule *no* railroads operating trains for short distances at less than 25 miles per hour were required to carry alerters. *Locomotive Safety Standards*, 77 Fed. Reg. 21312, 21330 (Apr. 9, 2012). Second, the Short Line Petitioners' objection to the 2024 rule's adoption of an alerter requirement for such trains was that FRA failed the first prong of *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*.: it did not even acknowledge that it was changing policy.

Instead, FRA's position – a remarkable example of regulatory audacity - was that there was no change in its 2012 "no alerter" policy because, although

"unwritten," the policy which excepted operations below 25 MPH, only applied to trains operating with two-person crews. 89 Fed. Reg. 25052, 25075 n. 194. Intervenors are even bolder: "[T]here is *no question*," they claim, "that FRA was viewing the alerter requirement in the context of two-person crews." Intervenor Br. 49 (emphasis added). This, of course, is unsupportable speculation and the Short Line Petitioners said as much in our opening brief. Short Line Petitioners' Br. 32–34.

On reply, FRA now claims that the 2012 rule never said alerters were unnecessary for trains traveling short distances at low speeds, only that even if they were "not *as* important on slower moving trains," requiring them on such trains would not be arbitrary. FRA Br. 82–83 (emphasis added). It then repeats the speculative claim in the 2024 rule that the 2012 rule included the *unwritten* assumption that all trains were operating with "a minimum of two train crewmembers." *Id*., quoting 89 Fed. Reg. at 25075 n. 194. "A single comment from a decade ago stating that "many" trains run by one particular Class II railroad operated with one-person crews," it argues, "does not undermine the conclusion that FRA *believed* most trains had two-person crews." FRA Br. 84 (emphasis added). But this "single comment" was hardly inconsequential. The commenter, a local division of the Brotherhood of Locomotive Engineers and Trainmen, did not confine its comments to "one particular Class II railroad." Rather, it noted that "there are other Class II and III railroads that have only one person in the cab" and specifically

asked that the alerter requirement apply "on *all* controlling locomotives operated by a lone crew member over the road between stations" including operations below 25 MPH. Brotherhood of Locomotive Engineers and Trainmen Division 204, Comment Letter on 76 Fed. Reg. 2200 (proposed Jan. 12, 2011), at 1-2, https://www.regulations.gov/comment/FRA-2009-0094-0016 (emphasis added). An agency must respond to all material comments received during notice-and-comment rulemaking or risk its decision being found arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Brennan v. Dickson*, 45 F.4th 48, 72 (D.C. Cir. 2022). Implicit in this standard is that the agency is expected to be aware of the full record in the same way that "a trial court is presumed to know what is in the record." *See Marino v. Ragen*, 332 U.S. 561, 569 n.9 (1947). Accordingly, FRA is presumed to have knowledge of the existence of one-person crews during its 2012 alerter rulemaking, yet FRA asserts that the "'operational status quo' in the past has always been 'a minimum of two train crewmembers.'" FRA Br. 84 (quoting 89 Fed. Reg. at 25075 n. 194).

The problem with FRA's position is not simply that it ignored "a single comment" that contradicts its claimed assumption (although that itself is problematic). Rather, the problem is also that this claimed *belief* was, by the agency's own description, "unwritten."[3]

[3] 89 Fed. Reg. 25052, 25075 n. 194. For their part, Intervenors advance an argument not even made by FRA – that FRA *did* explain its changed position – asserting the FRA relied on National Transportation Safety Board ("NTSB") recommendations

There may be very limited circumstances under which an agency's interpretation of its own "genuinely ambiguous" rules may qualify for some deference, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2405 (2019). But there was nothing ambiguous about the 2012 rule. It contained no qualifier limiting its alerter exemption to trains operating with two-person crews. Even assuming some ambiguity in the earlier rule, the reasoning supporting an agency's rules must appear somewhere in its written decisions. *United States v. Schwarzbaum*, 24 F.4th 1355, 1364 (11th Cir. 2022) (citing *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-7 (1947)). An agency's post-hoc claim that a rule issued a decade earlier was premised on an "unwritten" assumption – one that was directly contradicted by the record amassed in that same earlier rulemaking proceeding – is surely not one of the circumstances justifying agency deference. *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012) (denying deference where the interpretation is

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that it add an alerter requirement. Intervenor Br. 49, citing 89 Fed. Reg. at 25075. But the passage to which Intervenors refer is FRA's discussion of the NTSB statements "*from 2012*" – which it reviewed to conclude "that the agency is *not* issuing conflicting statements." 89 Fed. Reg. at 25075, n. 194. (emphasis added). Even where an agency does acknowledge a change of position, it does not operate on a "blank slate," but must address whether the underlying facts have changed. *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. at 515. In this case the agency admits it is relying on the same facts in its 2024 rule that it considered in the 2012 rule. And in *that* rule, it found no need for short line railroads travelling at less than 25 MPH to install alerters.

"no more than a convenient litigating position" or is a "*post hoc* rationalization"). This Court should not entertain such bald speculation as support for FRA's ruling.

II. FRA's Post-Hoc Assertion that Its Reporting Requirements for Legacy One-Person Crews Newly Required to Carry Hazmat Are Not Duplicative Is Not Supported by the Record.

Short Line Petitioners' Opening Brief objected that FRA's final rule would arbitrarily deny a legacy exception to short line railroads otherwise eligible for legacy status that are newly required as common carriers to transport hazmat – even though short lines with one person crews already carrying hazmat would qualify for the legacy exception. The requirements for legacy one-person crews to re-obtain legacy status if later forced to carry hazmat, they argued, were duplicative of existing, extensive regulations governing hazmat rail transportation and had nothing to do with whether or not the carriers operated with one person crews. Short Line Petitioners' Br. 24–27.

Citing 89 Fed. Reg. at 25092, FRA maintains on brief that the additional information it requires in such instances is "specific to one-person crews" and the "[n]ew reporting requirements will allow the agency to learn more information about one-person crew accidents." FRA Br. 91. If that were true it might arguably support the agency's disparate treatment of one person crews newly carrying hazmat from one person crews already carrying hazmat. But that is not what the rule states or finds. Indeed, the cited page of FRA's final rule contains no reference to data linking

the risks of carrying hazmat to one-person crews.[4] The closest the page comes is in requiring five years of accident data that carriers already report "that the railroad can attribute to a one-person crew operation," 89 Fed. Reg. at 25092 – information that, by definition, will be unavailable for a railroad newly seeking to carry hazmat. The "catch-all" provision similarly will produce no information offering a nexus between one-person crew operations and new requirements to carry hazmat. It simply permits the railroad "to submit any other information describing protections that will be implemented to support the safety of the one-person train crew operation that the railroad wants to share." *Id*. Nor, finally, does the Rule's requirement that a railroad with a one-person crew "comply with operating rules that address… a release of any hazardous material" do anything more than require the railroad to comply with existing regulations. *Id*.

Put another way, nothing in the reporting requirements the agency has imposed would establish whether it is more dangerous for a one-person crew than a two-person crew to carry hazmat. Nor does FRA's promise that legacy carriers newly required to carry hazmat may seek a waiver salvage its regulation. Such

[4] The amicus brief filed by the States express a concern, shared by short line railroads, that hazardous materials be carried safely. It is for that reason *all* railroads must follow extensive safety regulations governing the transportation of hazmat. On this point states do not address, much less dispute Short Line Petitioners' argument that adding a crew member to a legacy one-person crew will not make transporting hazmat safer.

waivers are not automatic nor immediate and they require the submission of considerable information to FRA. Short lines that do not currently carry hazmat may not get notice of requests to carry hazmat sufficiently in time to continue their one-person operations even if they ultimately qualify for waiver. In anticipation that they may be required to carry hazmat, they may need to hire additional crewmembers to be on hand in the event, for example, that their Class I partner interchanges a car with hazmat to it. In other words, it effectively eliminates the one-person crew option.

III. The Two-Year Legacy Provision Applies to a Final Rule Fundamentally Different from FRA's Proposed Rule and Short Line Petitioners Did Not Waive Their Right to Challenge the Legacy Provision's Arbitrariness.

The Short Line Petitioners' Opening Brief objected that while FRA's final rule properly recognizes the need to create legacy exemptions from its two-person crew rule for short line carriers, "without explanation" it "severely limits who may qualify for legacy treatment." Short Line Petitioners' Br. 21–22.

More specifically, Short Line Petitioners objected that a short line operating with a one-person crew two years before the final rule – and thus otherwise qualifying for legacy status – would arbitrarily forfeit its status if it is subsequently required to carry hazmat. Short Line Petitioners' Br. 22–26. Short Line Petitioners also maintained that under FRA's application of the two-year requirement, a short line otherwise qualifying for legacy treatment may forfeit that status if the short line

is acquired – even if its operations remained unchanged. *Id*. at 27–28. While the final rule allows those denied self-executing legacy status to apply for exemptions from the two-person crew requirement, Short Line Petitioners pointed out that to do so they would have to follow a burdensome, complicated and duplicative preapproval reporting process. *Id*. at 22.

FRA's response to these concerns is that in challenging FRA's choice of "two years to determine legacy status," Short Line Petitioners "forfeited that argument by not challenging the time frame before the agency." FRA Br. 79. Intervenors make the same argument. Intervenor Br. 43–47. This argument is flawed in several fundamental respects.

First, Short Line Petitioners' objection is not primarily with the two-year period itself,[5] but, as just noted, with how and to whom that provision applies. Short Line Petitioners' Br. 21–28. The arbitrary forfeiture of legacy status for short lines forced to carry hazmat is discussed in Section II, *supra*. FRA also argues on brief that Short Line Petitioners waived the right to object to the forfeiture of legacy status

[5] To be sure, Short Line Petitioners did include an objection to FRA's unexplained choice of a two-year term as part of its overall objection to the arbitrary scope of the legacy exceptions. In this respect, Short Line Petitioners accept FRA's explanation that it intends to exercise its prosecutorial discretion to allow one-person crews not carrying hazmat to continue to operate even if those one-person crew operations began less than two years before the final rule took effect. See FRA Br. 92. That explanation, however, highlights the arbitrariness of imposing a two-year, or any, limitation on short lines' exemptions from the rule.

if carrier ownership changes hands because "[t]he proposed rule did not indicate that the agency intended to allow a legacy exception to transfer to a new owner of the one-person operation." FRA Br. 93. From this silence, FRA infers on brief that ownership transfers *would* void legacy status. But the proposed rule it quotes was not tied to ownership as it claims. *Id*. Instead, the very language it quotes proposed to create a legacy exception to "a one-person train *operation* that has been established for at least two years." *Id*. (quoting *Proposed Rule – Train Crew Size Safety Requirements*, 87 Fed. Reg. 45564, 45618 (proposed July 28, 2022)) (emphasis added). And while FRA also maintains on brief that the final rule adopts the same ownership-based nature of legacy status, again, the final rule language it quotes refers to "legacy one-person train crew freight *operation*." *Id*. (quoting 49 C.F.R. § 218.129(a)(1)) (emphasis added).

It was this very ambiguity, underscored by FRA's post-rule guidance indicating that ownership changes would result in legacy forfeiture, that prompted Short Line Petitioners' challenge. Yet FRA argues on brief that it would not be arbitrary to refuse to "*automatically* continue to provide a legacy exception" to a new owner that wants to alter the number of miles and hours a one-person crew will operate on a single day." FRA Br. 94. (emphasis added). But Short Line Petitioners' objection was to the uncertainty that forfeiture of legacy status might occur even if operations *did not change*. Short Line Petitioners' Br. 15, 27–28. FRA argues on

brief that even if Short Line Petitioners had not forfeited the argument,[6] such an outcome would be rational because an affected carrier could apply for waiver. FRA Br. 94. FRA's argument ignores the reality of the short line industry. As evidenced in part by FRA's inclusion of "Change in Ownership, Merger, or Other Transfer Operation" in the post-issuance Compliance Guide, short line operations changing ownership and continuing existing operations is common in the industry. Compliance Guide for Train Crew Size Safety Requirements 49 CFR part 218, subpart G, p. 17, at https://tinyurl.com/5sf2j6ah. Short line railroads are small businesses, and transfer of operations to a new owner is a normal occurrence.[7] The Court should reject FRA's post-hoc and inaccurate rationale of counsel. *Missouri Pub. Serv. Comm'n v. Fed. Energy Regul. Comm'n*, 234 F.3d 36, 41 (D.C. Cir. 2000) ("The court does not "give an agency the benefit of a post hoc rationale of counsel.").

Second, the final rule is fundamentally different than the proposed rule. The two-year requirement in the proposed rule applied to a fundamentally different "legacy" exemption than that contained in the final rule. As originally proposed, applicants for legacy status would maintain legacy status for only 90 days after the

[6] Short Line Petitioners could not reasonably have known that FRA would interpret its legacy exceptions to be voided by a mere change in ownership (with no change in operations) until the agency's post-ruling guidance. See FRA Br. 94 (citing post-issuance Compliance Guide).

[7] As example, approximately 250 Class III railroads belong to larger holding companies. 89 Fed. Reg. at 25099.

effective date of a final rule unless the carrier had filed a petition to continue the legacy containing "evidence that the railroad has implemented certain rules and practices designed to ensure the safety of the one-person operation." 87 Fed. Reg. at 45564. By contrast, the final rule creates a wholly self-executing exemption that takes effect when the carrier simply notifies FRA that it has been operating with a one-person crew for the prior two years.[8] 89 Fed. Reg. at 25090. Tellingly, FRA predicates its support of the two-year legacy requirement on its finding that legacy railroads have "an established two-year safety record," FRA Br. 80, a conclusion starkly at odds with the very different legacy provision contained in the proposed rule.[9] And, while the proposed rule would not have given legacy treatment to railroads carrying hazmat,[10] the final rule does. 89 Fed. Reg. at 25089. In short, Short Line Petitioners did not waive their objection to the two-year legacy provision because it applies to a fundamentally different rule than the one the agency initially proposed. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health*

[8] FRA cannot claim that this simple notification is rooted in safety concerns. If it was, FRA would have given itself the discretion to approve or deny the continuance of legacy operations or would have allowed itself discretion to subsequently remove the "legacy" designation.

[9] But adding to the confusion about what the legacy provision meant, FRA adds on brief that the rule nonetheless "institutes a process for the agency to collect information about one-person train crew operations." FRA Br. 12.

[10] "In the notice of proposed rulemaking, FRA proposed a blanket prohibition on one-person crews carrying high-risk hazardous materials." FRA Br. 86 (citing 87 Fed. Reg. at 45617).

Admin., 407 F.3d 1250, 1259–60 (D.C. Cir. 2005) (noting that a party is not expected to "divine [the agency's] unspoken thoughts" when the final rule is "surprisingly distant from the proposed rule."); *Nat. Res. Def. Council v. Env't Prot. Agency*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (stating that a comment must provide "adequate notification of the general substance" of the challenge, but the court accords "some leeway in developing [an] argument").

CONCLUSION

For the reasons stated here and in Short Line Petitioners' Opening Brief, Short Line Petitioners respectfully request the Court to set aside those portions of the rule placing limitations on the legacy exemptions for Class II and III carriers.

Date: November 14, 2024

Respectfully submitted,

/s/ David F. Rifkind

SARAH YURASKO
American Short Line and Regional Railroad Association
50 F Street NW, Suite 500
Washington, DC 20001
Telephone: (202) 585-3448
syurasko@aslrra.org

DAVID F. RIFKIND
HARVEY REITER
Stinson LLP
1775 Pennsylvania Avenue N.W., Suite 800
Washington, DC 20006
Telephone: (202) 969-4218
david.rifkind@stinson.com
harvey.reiter@stinson.com

BETSY SMITH
Stinson LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Telephone: (816) 691-3383
betsy.smith@stinson.com

CERTIFICATE OF COMPLIANCE

The foregoing complies with the limits of Fed. R. App. P. 32(a)(5)-(7) because it is set in proportionally-spaced typeface using 14-point Times New Roman font in a plain, roman style and is 3,555 words in length, excluding the parts of the brief exempted by 11th Cir. R. 32-4. This brief has been scanned for viruses and is virus-free.

/s/ David F. Rifkind

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

/s/ David F. Rifkind