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

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

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

DAVID 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

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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, the following is a list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations known to the undersigned that have an interest in the outcome of this particular case:

1. American Short Line and Regional Railroad Association
2. Association of American Railroads
3. Behravesh, Rebecca S.
4. BNSF Railway Company
5. Bose, Amit (official capacity)
6. Boyton, Brian
7. CSX Corporation (ticker symbol: CSX)
8. CSX Transportation, Inc.
9. Dupree Jr., Thomas H.
10. Federal Railroad Administration
11. FTAI Infrastructure Inc. (ticker symbol: FIP)

12. Geier, Paul M.
13. Gibson, Dunn & Crutcher, LLP
14. Gilbert, Samuel
15. Indiana Rail Road Company
16. Ishihara Fultz, Allison
17. Iyer, Subash
18. Lee, Paula
19. Midland United Corporation
20. Nebraska Central Railroad Company
21. Percy Acquisition LLC
22. Reiter, Harvey
23. Rifkind, David
24. Rio Grande Pacific Corporation
25. Schnitzer, David A.
26. Smith, Betsy
27. Spencer, Jacob T.
28. Stinson LLP
29. Texas & Northern Railway Company
30. Transtar, LLC
31. Totaro, Martin

32. U.S. Department of Transportation
33. Union Pacific Railroad Company
34. Van Nostrand, Christopher F.
35. Wright, Abby

Dated: July 26, 2024

Respectfully submitted,

/s/ David Rifkind
David Rifkind
Counsel for Petitioners

STATEMENT REGARDING ORAL ARGUMENT

Petitioners respectfully request oral argument. This case presents novel and complex issues regarding the Federal Railroad Administration's final rule on train crew size requirements. In addition, because the agency provided almost no explanation in the administrative record for its action, Petitioners anticipate that the government will attempt to expound on and supply post-hoc rationale, which may tend to confuse the issues – thus the Court may benefit from the opportunity to ask questions of counsel.

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STATEMENT REGARDING ADOPTION

Pursuant to Fed. R. App. P. 28(i), Petitioners American Short Line and Regional Railroad Association, Nebraska Central Railroad Company, and Texas & Northern Railway Company ("Short Line Petitioners") adopt by reference Argument Section IV, in its entirety, and Section I.A., in part, of the opening brief of Petitioners Florida East Coast Railway LLC, Association of American Railroads, Indiana Rail Road Company, Union Pacific Railroad Company, and BNSF Railway Company ("AAR Opening Brief").

Argument Section IV, "FRA Did Not Consider The Labor Costs The Rule Will Impose." including its Subsections A "The Rule Will Impose Substantial Labor Costs On Railroads." and B "FRA's Failure To Consider Labor Costs Was Arbitrary And Capricious." is adopted in its entirety. Short Line Petitioners also adopt Argument Section I.A., "FRA Exceeded Its Statutory Authority In Issuing The Rule." as it notes that FRA's rule arbitrarily fails to address evidence that the agency has provided no evidentiary support for its rule either as a safety measure or that the speculative safety benefits it claims would outweigh the substantial compliance costs it would entail.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The Federal Railroad Administration (FRA)'s basis for subject-matter jurisdiction is its authority as set forth in 49 U.S.C. § 20103. The FRA is a federal agency that oversees railroad safety and promulgated the final rule at issue in this appeal pursuant to this authority. This Court has jurisdiction to review FRA's orders under 5 U.S.C. § 706(2)(A), 28 U.S.C. §§ 2342(7) and 2344, and 49 U.S.C. § 351. Petitioners Nebraska Central Railroad Company and Texas & Northern Railway Company filed petitions for review on April 12, 2024. Petitioner American Short Line and Regional Railroad Association filed a petition for review on April 29, 2024. The rule was published on April 9, 2024, and these petitions were timely filed under 28 U.S.C. § 2344. This appeal is from a final order.

STATEMENT OF THE ISSUES

1. The FRA has acknowledged that regional and short line (Class II and III) railroads are differently situated than the larger (Class I) railroads and has created notice exemptions for the former from its two-person crew requirement. The largely self-executing legacy exemptions apply to regional and short line rail operations that have used one-person crews for at least two years prior to the rule's issuance, including railroads that were then carrying hazardous materials (hazmat). The FRA's final rule did not explain the basis for its two-year requirement, why its self-executing legacy exemptions do not also apply to legacy carriers subsequently

required to carry hazmat, or whether mere changes in ownership would disqualify short line railroads from claiming the exemption. Was FRA's failure to explain the scope of the exemption arbitrary and capricious?

Relevant standard of review: *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

2. FRA's new rule exempts from the two-person crew requirement regional and short line railroads that were operating legacy one-person crews two years before the rule's issuance, including those carrying hazmat. But if those railroads were not transporting hazmat and have subsequently been required to transport hazmat, they may not operate with one-person crews without the prior approval of detailed petitions. Did FRA arbitrarily fail to address arguments that adding a second crew person would not add to the safety of a train already subject to detailed hazmat regulations and otherwise permitted to operate with only a single-person crew?

Relevant standard of review: *Motor Vehicle Mfrs. Ass'n of the U.S.*, 463 U.S. at 43.

3. Prior to adoption of its two-person crew rule the FRA found that, for rail operations below 25 miles per hour, a locomotive safety device called an alerter was not necessary for safe rail operations. In now requiring alerters for all rail operations with one-person crews, FRA states that its prior regulations assumed that

all railroads were operating with two-person crews. Its prior regulations do not articulate that assumption. Given that the agency was apprised of the existence of one-person crew rail operations at the time it adopted its prior rule, is its assumption unsupported by substantial evidence or an otherwise unexplained and hence an arbitrary change in policy?

Relevant standard of review: *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683-4 (D.C. Cir. 1984).

INTRODUCTION

The American Short Line and Regional Railroad Association (ASLRRA) is a non-profit trade association representing the interests of the nation's Class II (regional) and approximately 600 Class III (short line) railroads (for convenience, Petitioners refer to them together as "short lines" in this brief). Short lines operate 47,500 miles of track, or approximately 29% of the national freight network, and employ approximately 18,000 people, thereby playing a vital role in the railroad industry's strong safety record. The overwhelming majority of short line railroads are considered small businesses by both the Small Business Administration (SBA) and FRA's Policy Statement Concerning Small Entities. *See* 13 C.F.R. § 121.201 and North American Industry Classification System (NAICS) Code 482112, "Short Line Railroads," and 49 C.F.R. Part 209, Appendix C. As smaller carriers with

narrower financial margins than Class I railroads, regulations that increase their costs even modestly, but unnecessarily, can seriously impair their ability to operate economically and profitably.

In July 2022, the FRA proposed a rule that would have required two-person crews for all railroads, including ASLRRA's members. But FRA did recognize that the short line railroads were situated differently than their Class I counterparts and adopted several narrow exceptions to the two-person rule for those smaller carriers. ASLRRA's members protested that the exemptions were too narrow and the agency responded in the final rule with modifications that accepted most of ASLRRA's criticisms and created a self-executing exemption for "legacy"[1] carriers operating with one-person crews. But the final rule's scope remained arbitrary in three respects that create uncertainty and substantial, unnecessary financial risk to ASLRRA's members.

First, the scope of FRA's exemption is both vague and arbitrarily narrow. It grandfathers a railroad's one-person crew operations, but only if those operations existed an unexplained two years before the rule's issuance. And even this exemption inexplicably may be forfeited if the railroad ownership changes hands,

[1] "Legacy" operations are operations that have been established for at least two years before June 10, 2024. 49 C.F.R. § 218.129(a)(1).

whether or not the new owner changes the railroad's operating practices, or if the operation is not continuous.

Second, FRA extends self-executing legacy status to railroads that were operating one-person crews and also carrying hazmat two years ago, but requires legacy carriers that were not carrying hazmat two years ago but have since been required to carry hazmat, to forfeit their self-executing legacy exemptions. Instead, FRA requires these railroads to follow a burdensome and complicated preclearance and a duplicative pre- and post-approval reporting process before they can transport hazmat with one-person crews. FRA never explains why the preclearance process is necessary for safety notwithstanding that all railroads, including Class II and III carriers, are already subject to stringent regulations governing the transportation of hazmat. Nor does it explain the reasons for requiring information the railroads already provide as part of the post-approval reporting process.

Third, having previously found that railroads operating at less than 25 miles per hour do not need to install expensive alerters, the final rule does an arbitrary flip-flop. FRA's sole explanation for its policy reversal is that its earlier regulation "assumed" that rail operations without alerters all had two-person crews. This assumption is not only nowhere to be found in the earlier regulation, it directly contradicts the fact that the agency was expressly apprised of the existence of one-person crews when the earlier rule was adopted.

It is these substantial and unnecessary burdens that FRA has placed on the short line exemption that have prompted this appeal.

STATEMENT OF THE CASE

On April 9, 2024, invoking its general authority to prescribe regulations governing the safety of railroad operations, 49 U.S.C. § 20103, the FRA issued a rule requiring, with qualified exceptions for short lines, that railroads operate with two-person crews. Following issuance of the final rule, *Train Crew Size Safety Requirements*, 89 Fed. Reg. 25052 (Apr. 9, 2024), a number of petitioners, including the Petitioners on this brief, timely filed for review in several different circuit courts of appeal. Following a random selection pursuant to 28 U.S.C. § 2112(a)(3), all of the cases were transferred to this Court.

STATEMENT OF THE FACTS

By the FRA's own account, railroads have historically been reducing crew sizes with resulting increases in efficiency and safety. *Proposed Rule – Train Crew Size Safety Requirements*, 87 Fed. Reg. 45564, 45567 (proposed July 28, 2022). Nevertheless, in 2016, for the first time in its history, FRA proposed a rule that would regulate crew sizes on railroads as a means to promote safety. *Proposed Rule – Train Crew Staffing*, 81 Fed. Reg. 13918 (proposed Mar. 15, 2016). The 2016 proposed rule would have barred the use of one-person crews on all classes of railroads, but it

did recognize that short line railroads are small operations and proposed limited exemptions for short lines. *Id.* at 13964.

The rule drew numerous comments, including comments from the railroad industry that the rule was unnecessary to protect safety for the crew, cargo or the general public. Association of American Railroads, Comment Letter on 81 Fed. Reg. 13918, at 1, https://www.regulations.gov/comment/FRA-2014-0033-1474; American Short Line and Regional Railroad Association, Comment Letter on 81 Fed. Reg. 13918, at 3, https://www.regulations.gov/comment/FRA-2014-0033-1463. The proposed rule never became final.

In 2019, FRA withdrew the rule. *Transp. Div. of Int'l Ass'n of Sheet Metal, Air, Rail, and Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1173-4 (9th Cir. 2021). In a subsequent challenge to that ruling, the Ninth Circuit vacated the FRA's order. The Court found the agency's decision reviewable and arbitrary, vacated it and remanded the case back to FRA. *Id.* at 1185.

Then in 2022, the agency proposed a new rule that, apart from limited changes, tracked the 2016 proposed rule. 87 Fed. Reg. 45564. The 2022 Notice of Proposed Rulemaking ("NPRM") proposed a minimum requirement of two crewmembers for most railroad operations and would have required that the second

crewmember be physically located on the train.[2] In the NPRM, FRA kept the 2016 proposed rule's distinction between large railroad operations and short lines by purporting to provide an exception for smaller railroad operations,[3] but the NPRM created a number of limitations on the exemption available to short lines.

The limitations included a hazardous materials exclusion to all the proposed exceptions that would disqualify over 100 short lines from one-person crew

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[2] "(b) *Two-person train crew staffing requirement.* Except as provided for in this subpart, each train shall be assigned a minimum of two crewmembers."

"(d) Location of crewmember(s) when the train is moving.

A train crewmember that is not operating the train may be located anywhere outside of the operating cab of the controlling locomotive when the train is moving…" 87 Fed. Reg. at 45617.

[3] "(c) *Exceptions.* Except as provided in § 218.123(c), the following freight train operations are excepted from the requirements in § 218.123 for two-person crew staffing and location of crewmember(s) when the train is moving.

(1) *Small railroad operations.* A freight train operated on a railroad and by an employee of a railroad with fewer than 400,000 total employee work hours annually may operate with one crewmember at a maximum authorized speed not exceeding 25 miles per hour under either of the following sets of conditions:

(i)(A) The average grade of any segment of the track operated over is less than 1 percent over 3 continuous miles or 2 percent over 2 continuous miles; and

(B) The total length of the train is no greater than 6,000 feet; or

(ii)(A) A second train crewmember, other than the locomotive engineer, is intermittently assisting the train's movements; and

(B) The second train crewmember and the locomotive engineer in the cab of the controlling locomotive can directly communicate with each other;" 87 Fed. Reg. at 45618.

eligibility.[4] The proposed exception also had operating rule requirements,[5] grade provisions,[6] and train length restrictions,[7] which further disqualified many short lines from qualifying for the one-person operation exception.

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[4] "None of the exceptions in §§ 218.125 through 218.133 are applicable when any train is transporting:

(1) Twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of hazardous materials identified in § 232.103(n)(6)(i)(B) of this chapter; or

(2) One or more car loads of rail-security sensitive materials (RSSM)..." 87 Fed. Reg. at 45617.

[5] "Each railroad that implements an operation, described as an exception in paragraph (c) of this section, shall adopt and comply with a railroad operating rule or practice for its train operation with fewer than two crewmembers that complies with the following requirements of this paragraph (b):

(1) A one-person train crewmember must remain in the locomotive cab during normal operations and may leave the locomotive cab only in case of an emergency affecting railroad operations;

(2) A one-person train crewmember must contact the dispatcher whenever it can be anticipated that radio communication could be lost…unless technology or a protocol is established to monitor the train's real-time progress;

(3) If the railroad cannot monitor the train's real-time progress, the railroad must have a method of determining the train's approximate location when communication is lost with the one-person crew;

(4) The railroad must establish a protocol for determining when search-and-rescue operations shall be initiated when all communication is lost with a one-person train crew;

(5) A one-person train operation's lead locomotive must be equipped with an alerter…and a one-person train crewmember must test that alerter to confirm it is working before departure;

(6) The dispatcher must confirm with a one-person train crewmember that the train is stopped before conveying a mandatory directive by radio transmission…; and

The short line railroads filed comments objecting that the limitations were overbroad or unnecessary. JPA[8] Doc. 797, at 5; JPA Doc. 12221, at 1. The short lines noted concerns with aspects of the exception, including the communication requirements and the track grade requirements. To qualify for the exception under the 2022 NPRM, a short line would have to comply with certain operating rules including having communications equipment or real-time monitoring equipment, which an ASLRRA study estimated would disqualify 120 short lines from one-person operations. 87 Fed. Reg. at 45617-18; JPA Doc. 797, at 5, 12. The short lines also pointed out that the proposed rule's communications requirements ignored that there is no federal requirement to have a dispatcher and that working radios in the controlling locomotive of trains operating at speeds less than 25 miles per hour were not required by FRA. JPA Doc. 797, at 30-31. They also maintained that the proposed rule's communication requirements were not supported by data or a showing of a new safety concern or risk associated with one-person operations. *Id.* The proposed rule's exception also would disqualify short lines operating over track

(7) A one-person train crewmember must have a working radio on the lead locomotive and a redundant, electronic device appropriate for railroad communications..." 87 Fed. Reg. at 45617-18.

[6] *See* n. 2.

[7] *See* n. 2.

[8] "JPA" is the Joint Petitioners' Appendix, and the Document number matches the last segment of the FRA docket number. See 11th Cir. R. 28-5.

of a certain grade, 87 Fed. Reg. at 45618, which an ASLRRA study estimated would disqualify 73 short lines. JPA Doc. 797, at 37. FRA acknowledged that the grade requirements were stricter than current regulations that exempt small railroad operations from additional safety devices at these same grades, but FRA did not support this proposal with safety data. 87 Fed. Reg. at 45593. Short line railroads also raised concerns that requiring two crewmembers to be present in the controlling locomotive cab would have the unintended consequence of distracting crewmembers from their duties due to non-task-oriented conversations. JPA Doc. 797, at 19, 107, 142-43. FRA did not directly respond to this concern in its final rule although, as noted *infra*, it did expand the scope of exemptions from the two crewmember rule.

Of particular concern were the agency's proposals to require the short lines to install alerters and the exception's exemption for short lines that haul certain quantities of hazmat. As to the former, short lines pointed to the agency's prior findings that alerters were not necessary for rail operations under 25 miles per hour under 49 C.F.R. § 229.140. JPA Doc. 797, at 33. Short lines also flagged that alerters are expensive to install at a cost of approximately $20,000, and that some older models of locomotives cannot possibly be retrofitted with alerters. *Id.* The significant expense of adding alerters, they added, would make many routes uneconomic. *Id.* at 34. Short lines also noted the significant costs associated both with operating and maintaining alerters and with training. *Id.* As to the latter, short

lines pointed out that given the existing safety rules governing hazmat, there was no safety difference between short lines with one-person crews carrying hazmat or not. *Id.* at 26. And, they added, FRA had not explained how two crewmembers would increase safety on hazmat trains. *Id.* The short lines put their overall concern with the undifferentiated treatment of Class I railroads and short line railroads this way:

> Short line railroads, a vital part of the national freight network, will be dramatically harmed by this NPRM. Ironically, the NPRM focuses entirely on Class I railroads, and fails to raise any safety concerns through either data or studies involving short line railroad operations. By mandating the location of the second crewmember, the NPRM threatens to upend the operational efficiencies and flexibilities that facilitate the ability of short line railroads to provide their signature customized, flexible, and responsive service to their customers.

Id. at 5.

In the final rule now before the court,[9] FRA agreed with a number of the short lines' concerns and significantly expanded the exemptions from the two-person crew requirement, acknowledging that short line railroads are small businesses that operate differently than Class I railroads. 89 Fed. Reg. at 25072-74.[10] The impact of

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[9] The final rule treats short line operations in which one crewmember rides on the train, but a second person accompanies the train in a motor vehicle, as a one-person crew. Class II and III railroads have long considered these to be two-person crews and to be safer than operations in which both crew members are on the train. Given the final rule's expanded scope of exemptions for short lines, however, Petitioners have chosen not to challenge the agency's definition of a two-person crew.

[10] Somewhat incongruously, while agreeing that Class II and III railroads are small businesses, it adds a *non-sequitur*, noting, without explaining the relevance of its

the short lines' comments was evident from the language of the final rule. "FRA," it stated, "also removed the NPRM's proposed prohibition on one-person train crew operations transporting certain types or quantities of hazardous materials with respect to initiating new or existing, but non-legacy, operations." 89 Fed. Reg. at 25074. And it expressly agreed with the short lines' concern with the speed, grade, or train length limitations:

> "The final rule also addresses the short line industry's comments that the proposed exceptions in the NPRM were too stringent in that they included limitations on speed, grade, or train length, by largely eliminating those proposed limitations within the exceptions and providing other criteria to govern those operations."

Id. Accordingly, "rather than requiring a special approval petition for each proposed one-person train crew operation, the final rule allows certain one-person train crew operations [including those carrying hazmat] to continue or be initiated without a special approval process." 89 Fed. Reg. at 25073.

But, while expanding the scope of the rule's exemptions, FRA added three wrinkles: (1) the exemptions would be self-executing, *i.e.*, available after giving written notice to the agency, 89 Fed. Reg. at 25090,[11] but would only be available

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observation, that "nine holding companies own approximately 250 Class II and Class III railroads." 89 Fed. Reg. 25052, n. 190.

[11] 49 C.F.R. § 218.129(b). The written notice has fourteen required elements, including: (1) contact information; (2) location of the operation "with as much specificity as can be provided," characteristics of the geographic area, and information about terrain and track segments; (3) the classes of track operated over and a list of signal and train control systems and all active and passive highway-rail

for short line one-person crew operations that commenced more than two years before the rule was adopted,[12] (2) the exemptions would apply only if the railroad installed alerters;[13] and (3) while FRA would consider exemptions for short line one-person crew operations involving carriage of hazmat that commenced less than two years ago or had not yet commenced, it would require the railroads to submit detailed petitions and obtain FRA's preapproval before such operations could qualify for exemption.[14] 89 Fed. Reg. at 25110-11. The preapproval process would require a detailed "risk assessment" for "most one-person train crew operations that will be transporting 20 or more car loads or intermodal portable tank loads of certain

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grade crossings; (4) locations of track where the average grade of any segment of the track operated over is 1 percent or more over 3 continuous miles or 2 percent or more over 2 continuous miles; (5) the maximum authorized speed of the operation; (6) the approximate number of miles and hours a one-person train crew will operate in a single tour of duty; (7) the number and frequency of trains involved; (8) information regarding hazmat; (9) any limitations placed on a person operating as a one-person train crew; (10) information regarding other operations operating on the same track or that travel on an adjacent track; (11) a detailed description of the technology used; (12) a copy of the railroad rule or practice applicable to the one-person operation; (13) five years of incident and accident data for railroads seeking to continue a legacy freight train one-person crew operation; and (14) other information describing protections provided in lieu of a second train crewmember.

[12] 89 Fed. Reg. at 25089 ("a legacy operation may continue transporting hazardous materials of the types or quantities specified in § 218.123(c) if the railroad can show it had such an established operation for at least two years before the effective date of the final rule.")

[13] 49 C.F.R. § 218.129(c)(3), 89 at Fed. Reg. at 25111.

[14] 49 C.F.R. § 218.131, 89 Fed. Reg. at 25111.

hazardous materials or one or more car loads of hazardous materials designated as rail-security sensitive materials (RSSM) as defined by the Department of Homeland Security." 89 Fed. Reg. at 25055. The risk assessment must include detailed information on preparing a train for operation, operating a train, and ensuring safety once a train has stopped moving; a description of the allocation of all functions, duties, and tasks; a risk-based hazard analysis with many required sub-elements; and a mitigation plan. 49 C.F.R. § 218.133(a).

FRA did not explain why the broad self-executing exemption would only apply to short line one-person crew operations that commenced more than two years prior to the rule's effective date. After agency and industry discussion seeking clarification as to how the rule would be applied, FRA posted guidance after the rule issued suggesting that even if a railroad's operation of a one-person crew does not change, a change in ownership might rest in forfeiture of the exemption. Compliance Guide for Train Crew Size Safety Requirements 49 CFR part 218, subpart G, p. 17, at https://tinyurl.com/5sf2j6ah. FRA later issued informal guidance that, for smaller railroads not carrying hazmat, it would not enforce the two-year limitation. *Id.* at 10.

As to the alerter requirement, many short lines do not presently operate with alerters because they are not required for Class II and III railroads under existing FRA alerter regulations promulgated in 2012. 49 C.F.R. Part 229; 77 Fed. Reg. 21312 (Apr. 9, 2012). FRA maintained in its final rule, however, that the 2012 alerter

regulation was inapplicable to railroads operating with single-person crews because the earlier rule was premised on the assumption that all railroads had two-person crews.[15] While that assumption is not stated in the 2012 final rule, FRA stated that it was an "unwritten expectation." 89 Fed. Reg. at 25075 n. 194. The 2012 rulemaking record, however, included comments acknowledging the existence of one-person operations.[16]

Finally, while FRA's self-executing exemptions included in the final rule extended to existing short line railroads currently carrying hazmat with single-person crews, the self-executing exemption would not apply to otherwise exempt short lines that subsequently are required to transport hazmat.[17] In their comments, the short line railroads pointed out that regardless of their categorization as Class I, II or III railroads, all railroads are subject to the same extensive safety rules governing the transportation of hazmat. JPA Doc. 797, at 25-28. The agency did not cite any

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[15] 89 Fed. Reg. 25052, n. 194.

[16] Brotherhood of Locomotive Engineers and Trainmen Division 204, Comment Letter on 76 Fed. Reg. 2200 (proposed Jan. 12, 2011), at 1, https://www.regulations.gov/comment/FRA-2009-0094-0016. ("The Indiana Rail Road currently operates many of its trains with only one person in the cab of the locomotive on runs that can exceed 100 miles… There are other Class II and III railroads that have only one person in the cab and there is the possibility in the future that one-person crews could be used on Class I railroads.")

[17] Because railroads are common carriers, they are obligated to carry all goods, including hazmat, upon reasonable request. 49 U.S.C. § 11101(a).

underlying safety data to distinguish between short lines already carrying hazmat with those that may become obligated to do so in the future.

The various timely petitions for review of FRA's rule followed and have since been consolidated in this Court.

STANDARD OF REVIEW

Final orders of the Federal Railroad Administration are subject to judicial review under the Administrative Procedure Act and may be set aside if FRA's finding and conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). *See, e.g., BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 910 (5th Cir. 2023). An agency acts arbitrarily when its decisions are not supported by substantial evidence, *Ass'n of Data Processing*, 745 F.2d at 683-4 ("in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same"). Substantial evidence, in turn, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. Nat'l Lab. Rel. Bd.*, 305 U.S. 197, 229 (1938). But "[s]ubstantiality of evidence must take into account whatever in the records fairly detracts from its weight." *Universal Camera Corp. v. Nat'l Lab. Rel. Bd.*, 340 U.S. 474, 488 (1951). Thus an agency must "explain why it rejected evidence that is contrary to its findings." *Carpenters and Millwrights v. Nat'l Lab. Rel. Bd.*, 481 F.3d 804, 809 (D.C. Cir. 2007).

Administrative agency final action is also arbitrary where it has failed to consider the relevant issues and reasonably explained its decision, *Prometheus Radio Project*, 141 S. Ct. at 1158, or failed to articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S.*, 463 U.S. at 43. It also acts arbitrarily where it has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

While an agency may change its policy within the scope of its authority, when it does so it must acknowledge that it is changing course and articulate "good reasons" for the change. *Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2012). But where reliance interests are affected, the agency does not write on a "blank slate." *Id*. A more detailed explanation is required "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.*

SUMMARY OF THE ARGUMENT

1. FRA has imposed several unsupported limitations on the legacy exemptions available to Class II and III railroads, rendering the scope of the exemption arbitrary. First, the FRA's legacy exemption sets an unexplained

two-year limitation on legacy status. Operations denied the self-executing legacy status because they do not meet the two-year limitation face the significant consequence of burdensome preclearance and duplicative reporting requirements, yet FRA provides no explanation for the two-year limitation. Second, the legacy exemption distinguishes between legacy short lines that were carrying hazmat two years before the rule's issuance and those that are subsequently required to carry hazmat. This arbitrarily narrow exemption ignores the facts that a railroad has no control over whether it may be required to carry hazmat, and that a railroad otherwise qualifying for legacy status would lose its legacy status if subsequently forced to carry hazmat. This arbitrary limitation further ignores that railroads carrying hazmat are already extensively regulated to ensure safe operations. Third, agency guidance posted after the Rule's adoption has underscored latent ambiguities in the Rule's scope that render the Rule's scope arbitrarily vague. Its guidance leaves uncertain whether and how it will enforce the two-year limitation and whether changes in ownership – with no changes in operations – would cause a carrier to lose its legacy status.

2. FRA's rule arbitrarily subjects Class II and III railroads otherwise entitled to continue operating one-person crews to a burdensome and duplicative pre-approval risk assessment procedure process if they are subsequently obligated to carry hazmat even though one-person crews carrying hazmat two years prior to

the Rule's adoption are not subject to this procedure. The rule illogically obligates these carriers to assess whether a second train crewmember may be removed, even though they have been operating with one-person crews and cannot remove a second crewmember. Nor does FRA explain the safety purpose of the risk assessment process given that these operations are already regulated by extensive hazmat regulations that require the carrier to provide much of the information that the rule would needlessly duplicate.

3. An FRA rule issued in 2012 stated that alerters were not needed for rail operations below 25 miles per hour, but the final rule reverses course, requiring Class II and III railroads otherwise qualifying for legacy status to install alerters. The FRA's explanation for this about-face is to argue that there was no change at all. The 2012 alerter rule, it stated, "included the *unwritten* expectation that a second crewmember would be available." 89 Fed. Reg. at 25075 n. 194. (emphasis added). Not only was there no evidence to support the agency's unwritten assertion, it directly contradicted public comments submitted in the 2012 rulemaking proceeding documenting the existence of one-person crews operating without alerters.

ARGUMENT

I. The Scope of FRA's Legacy Exemption is Arbitrary.

Standard of Review – *Fed. Commc'n Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (administrative agency final action is arbitrary where agency has failed to consider the relevant issues and reasonably explain its decision)

FRA has acknowledged that short line (Class II and III) railroads are situated differently than their Class I counterparts and has created a consolidated list of self-executing exemptions for the former from its two-person crew rule, what it labels in 49 C.F.R. § 218.129 as "Conditional Exceptions." 89 Fed. Reg. at 25089. But it has imposed several limitations on these legacy/grandfathering-type exemptions that it never explains or has left too vague to provide the affected railroads with reasonable guidance. Its failure to justify the limitations or to adequately explain their scope renders the limitations arbitrary and capricious, as discussed in more detail below.

A. The two-year limitation on legacy status is unexplained and hence arbitrary.

FRA states that the purpose of 49 C.F.R. § 218.129(a)(1) of its final rule "is to provide a way for each Class II and III railroad to continue a legacy one-person train crew freight operation after the effective date of this final rule, while ensuring each railroad with such a legacy operation will have sufficient time to add any necessary, minimum safeguards to protect rail employees, the public, or the environment." 89 Fed. Reg. at 25089. But, without explanation, FRA then severely

limits who may qualify for legacy treatment, "defining a legacy one-person train crew freight operation as one that a railroad established at least two years before the effective date of this final rule." 89 Fed. Reg. at 25089. This arbitrary limitation has significant consequences for Class II and III railroads. While those denied self-executing legacy status may still apply for an exemption from the two-person crew requirement, they must first follow a burdensome and complicated preclearance and a duplicative pre- and post-approval reporting process before they can operate with one-person crews.[18]

It is a fundamental principle of administrative law, however, that an agency must "articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

To be sure, there may well be sound reasons for an agency to place limits on eligibility for legacy status. It might, for example, be concerned that in the absence of a time limit, parties would try to qualify days or weeks before the deadline, leaving

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[18] ASLRRA discusses the duplicative and burdensome nature of these preclearance procedures, *infra* in Section I.B.

no meaningful record of safe one-person crew operations on which to premise legacy status. But why two years? FRA offers no clue.

As this Court has stated: "The APA does not, however, direct the court to do the agency's job for it." *United States v. Schwarzbaum*, 24 F.4th 1355, 1364 (11th Cir. 2022). The court, it added, "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* (quoting *Sec. Exch. Comm'n v. Chenery Corp. (II)*, 332 U.S. 194, 196-7 (1947)). As the D.C. Circuit said in the context of utility rate regulation: "[I]t is a small matter to abide by the injunction of the arithmetic teacher: Show your work! For the Commission to do less deprives the ratepayer of a rational explanation of its decision." *City of Holyoke Gas & Elec. Dep't v. Fed. Energy Regul. Comm'n*, 954 F.2d 740, 743 (D. C. Cir. 1992). The unexplained nature of FRA's two-year limitation renders it arbitrary and capricious.

Underscoring the arbitrary nature of the two-year limitation is the agency's statement, contained in guidance posted since issuance of the rule, indicating that it will grant legacy status to railroads operating with one-person crews for less than

two years if they are not carrying hazmat.[19] Courts, of course, may not consider an agency's *post hoc* explanations to offer justifications for rules not found in the rules themselves. *Chenery Corp. (II),* 332 U.S. at 196-7. But where, as here, the agency has offered guidance that *contradicts* the rule, courts are not logically bound to ignore what would be tantamount to an admission that a rule is arbitrary.[20]

B. The self-executing exemption arbitrarily distinguishes between legacy short lines that were carrying hazmat two years before the rule's issuance and those that are subsequently required to carry hazmat, extending to the former and denied to the latter.

Under the FRA rules at issue here, "a legacy operation may continue transporting hazardous materials of the types or quantities specified in § 218.123(c) [of the final rule] if the railroad can show it had such an established operation for at least two years before the effective date of the final rule." 89 Fed. Reg. at 25089; *see* also, 89 Fed. Reg. at 25055 n. 10. Put another way, the self-executing notice process to qualify for legacy status applies equally to regional and short line carriers whether or not they were carrying hazmat. But if a carrier otherwise entitled to the grandfathering/legacy exemption has been required to carry hazmat less than two

[19] Compliance Guide for Train Crew Size Safety Requirements 49 CFR part 218, subpart G, p. 10, at https://tinyurl.com/5sf2j6ah.

[20] Reviewing courts can and do consider agency requests for voluntary remand where, post-agency decision, the agency has confessed error and a remand would not prejudice the party seeking review. *See, e.g., Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018). *A fortiori*, they may also consider tacit admissions of error as grounds for remand.

years before the rule took effect, or is asked to carry hazmat in the future, it must obtain preclearance for waiver and must provide a post-clearance report that duplicates information the agency already possesses (see Table I.B.1). 49 C.F.R. § 218.131. That makes no sense.

Duplicative Reporting Requirements*, *Table I.B.1

Existing Requirement	Citation	Requirement under Final Rule	Citation
All highway-rail grade and pathway crossings, including crossing numbers, must be reported	49 C.F.R. § 234.403 U.S. DOT Crossing Inventory Form FRA F 6180.71	Provide "a list of all active and passive highway-rail grade crossings, including crossing numbers"	49 C.F.R. § 218.131 (b)(3)
Railroads must submit monthly reports of the following railroad accidents/incidents described below: (1) Highway-rail grade crossing accidents/incidents; (2) Rail equipment accidents/incidents; and (3) Death, injury and occupational illness accidents/incidents	49 C.F.R. § 225.11(a)	"Five (5) years of accident and incident data, as required by part 225 of this chapter, for the operation identified in paragraph (b)(2) of this section, when operating with two or more crewmembers, or, for operations established less than five (5) years before June 10, 2024, accident and incident data for the operation from the date the operation was established"	49 C.F.R. § 218.131 (b)(14)

While reviewing courts will generally accord deference to agency expertise, that deference "is not a license to. . . treat like cases differently." *Airmark Corp. v. Fed. Aviation Admin.*, 758 F.2d 685, 691 (D.C. Cir. 1985). *See also, Epic Sys. Corp.*

v. Lewis, 138 S. Ct. 1612, 1623 (2018) ("The law of precedent teaches that like cases should generally be treated alike"). Railroads, as common carriers, are obligated to carry goods, including hazmat, "on reasonable request." 49 U.S.C. § 11101(a). As FRA acknowledged, these carriers "may not refuse to provide service merely because it would be inconvenient or unprofitable." 89 Fed. Reg. at 25070 (citing 49 U.S.C. § 11101(a)). Under FRA's rule, however, a railroad otherwise qualifying for legacy status, and that has no control over whether it may be required to carry hazmat, will lose its legacy status.

One will search FRA's rule in vain for any explanation for this disparate treatment. The legacy exemption for Class II and III railroads already carrying hazmat two years before the final rule issued is implicitly premised on the fact that it is safe for railroads allowed to operate one-person crews to be carrying hazmat. This conclusion stands to reason. As FRA notes, "the revisions from the proposed rule's approach regarding the transportation of hazardous materials reflects FRA's consideration of ASLRRA's comment that the common carrier legal obligation prohibits a railroad from refusing service to a customer that provides a properly packaged hazardous material." 89 Fed. Reg. at 25074. Indeed, there are already extensive, separate safety regulations governing the transportation of hazmat by rail and they apply to all railroads, including those qualifying for legacy status. 49 C.F.R. Parts 171-180; s*ee also*, 89 Fed. Reg. at 25055 ("there are [other] Federal agencies

that enforce requirements regarding the safety and security of hazardous materials shipments." (citing 87 Fed. Reg. at 45576-78)).

Petitioners have previously explained why the two-year cut off is arbitrary. There is no logical reason, and in fact, FRA offers no reason at all, why a railroad safely operating with a one-person crew, that has been required to carry hazmat in the last two years is not eligible for the self-executing legacy exemption. Nor, similarly, has FRA offered any reason why a qualified legacy railroad would lose its exemption if, in the future it is required to carry hazmat. FRA's failure to offer any explanation, much less a plausible one, for this disparate treatment renders this aspect of its rule arbitrary and capricious.

C. The undefined scope of the legacy provision renders it arbitrarily vague.

In the months following issuance of FRA's rule, public guidance provided by the agency has revealed two latent ambiguities in the scope of the rule's legacy exemption from the two-person crew requirement. First, FRA has indicated that it might grant legacy status to otherwise qualified Class II and III non-hazmat, one-person crew operations that began less than two years ago. Compliance Guide for Train Crew Size Safety Requirements 49 CFR part 218, subpart G, p. 10, at https://tinyurl.com/5sf2j6ah. That would be a welcome development, but it is not predictable from the text of the rule. Conversely, it has also left uncertain whether simple changes in ownership, common in the industry, but involving no changes in

operations, would cause a carrier to lose its legacy status. *Id.* at 17. That, too, was not a foreseeable interpretation of the rule.

The Constitutional "void for vagueness" doctrine typically implicates free speech concerns. But as the Supreme Court has said:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 253, 132 S. Ct. 2307, 2317 (2012). The uncertainty engendered by FRA's post-issuance guidance further supports vacating and remanding the two-year cut off for smaller railroads to qualify for legacy status.

II. The Pre-Approval Process for Regional and Short Line Railroad Operations Involving Carriage of Hazmat to Qualify for One-person Crews is Arbitrary.

Standard of Review - *Motor Vehicle Mfrs. Ass'n of the U.S.,* 463 U.S. at 43 (agency must articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made").

Petitioners have discussed in Section I above why the lines drawn by FRA between Class I and II railroads allowed self-executing legacy status and those that cannot so qualify are arbitrary. But even assuming that FRA could rationally justify different treatment of short line railroads operating with one-person crews two years

before the rule's issuance and all others, it has not offered a reasoned explanation why the preclearance process it mandates for other Class II and Class III railroads seeking to *continue* or commence operating with one-person crews is not unreasonably burdensome and duplicative and hence arbitrary.

Two categories of smaller railroads fall into this category: (1) railroads that otherwise satisfy the criteria for the self-executing exemption but that commenced one-person operations less than two years before the rule took effect and (2) railroads that had been operating with one-person crews two years before the rule took effect, but that have only subsequently been required to carry hazmat.

Under section 218.131 of the proposed rule, smaller railroads falling into the two categories above must undertake a risk assessment "focus[ing] on known safety and security risks associated with operating trains transporting large amounts of hazardous materials and with transporting the hazardous materials known to present the greatest safety and security risks." 89 Fed. Reg. at 25055. "Without a properly completed risk assessment," FRA states, "it "would be unable to accurately assess whether a railroad has taken appropriate measures to compensate for the *removal of a second train crewmember*." *Id.* (emphasis added). This explanation makes no sense for two reasons.

First, the carriers subject to the risk assessment requirement include railroads that currently operate with one-person crews, but who have been required to carry

hazmat in the last two years. So, by definition there would be no "removal of a second train crewmember."

Second, the required risk assessment serves no safety purpose. As FRA itself notes, not only does it have existing regulations governing the transportation of hazmat, it is already the case that "there are [other] Federal agencies that enforce requirements regarding the safety and security of hazardous materials shipments." *Id*. (citing 87 Fed. Reg. at 45579-80). These hazmat safety requirements are extensive[21] and apply to railroads with legacy one-person crews and all other railroads alike. FRA has already decided "to permit Class II and III legacy one-person train crew freight operations, including those transporting hazardous materials, *to continue without a risk assessment or special approval*." 89 Fed. Reg. at 25074 (emphasis added).

Implicit in that determination is the finding that it is safe for legacy one-person crews to carry hazmat. As FRA explains, its decision was "based on the final rule's imposition of minimum requirements on these legacy operations." 89 Fed. Reg. at

[21] The Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Department of Homeland Security and its Transportation Security Administration (TSA) extensively regulate hazmats under 49 C.F.R. Parts 171-180. These rules include additional operational restrictions or require railroads to take certain actions to ensure the safe transportation of hazmats via rail. The rules also include substantial training requirements and annual risk assessments.

25074. Those requirements remain in place for all legacy operations. To pass the test of reasoned decision-making, however, an agency must "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

That connection is missing here. FRA, in fact, acknowledges that the risk assessment requirement will impose burdensome costs of compliance on smaller railroads and expressed a willingness "to work with the short line industry in developing a model risk assessment that could potentially reduce the paperwork burden on short lines and accelerate the petition process." 89 Fed. Reg. at 25074. But that potential future accommodation is not an explanation for adopting an admittedly burdensome risk assessment requirement in the first place. Having found that a legacy railroad that meets the "minimum requirements" to operate with a one-person crew need not conduct a risk assessment, FRA simply does not explain what, if any, additional safety value is added by a duplicative risk assessment requirement applicable only to legacy one-person crews that are newly required to carry hazmat.

III. FRA's Requirement that Regional and Short Line Railroads with One-Person Crews Install and Operate Alerters is an Unexplained Reversal of Existing Policy Unsupported by Substantial Evidence.

Standard of Review - *Fox Television Stations, Inc.*, 556 U.S. at 515 (agency changing policy much acknowledge change and offer "good reasons" for change);

Ass'n of Data Processing, 745 F. 2d at 683-4 (agency final action not supported by substantial evidence is arbitrary).

Prior to adoption of its two-person crew rule the FRA concluded in a 2012 rule that alerter devices were not needed for rail operations below 25 miles per hour, finding that "there is a reduced safety need for requiring alerters on locomotives conducting these shorter, low speed movements." 77 Fed. Reg. at 21330. Such operations account for a significant portion of short line railroad operations. JPA Doc. 797, at 33. By contrast, the final rule under review in this case requires regional and short line railroads otherwise qualifying for legacy status to install alerters. 89 Fed. Reg. at 25075.

It is well settled that before an agency may change an existing regulation, it must acknowledge that it is changing course and must provide "good reasons" for doing so. *Fox Television Stations, Inc*., 556 U.S. at 515. But here, FRA refuses to even acknowledge its about-face, asserting that it "is not issuing conflicting statements." 89 Fed. Reg. at 25075. Its explanation: the 2012 rule's alerter exemption "included the *unwritten* expectation that a second crewmember would be available to apply the emergency brake if the locomotive engineer was fatigued or incapacitated." 89 Fed. Reg. at 25075 n. 194 (emphasis added). This "explanation," however, does not even meet the threshold requirement that an agency acknowledge its policy change, much less provide the requisite "good reasons" for doing so.

First, FRA's contention that the earlier rule was premised on the *unwritten* expectation that railroads operating at slow speeds all had two-person crews, strains credulity past the breaking point. It is fundamental that an agency's rationale for its action can *only* be ascertained from its written word. *Schwarzbaum*, 24 F. 4th at 1364. While there are extremely narrow circumstances under which an agency is entitled to deference in interpreting its own regulations, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2405-6 (2019), the agency is not entitled to deference where its interpretation is "a merely convenient litigating position." *Id*. at 2417 (cleaned up). That is certainly the case here, as the agency has simply conjured up its conveniently unwritten intent to justify its new rule.

Second, even assuming that twelve years after the rule was issued, FRA had the ability to divine its earlier self's unwritten intentions, to qualify for deference, its interpretation still "must in some way implicate its substantive expertise." *Id*. Here, FRA fails too because the facts contradict the unwritten assumption it claims to have found. At the time the 2012 rule issued, FRA was aware, because it had been told so in testimony, that there were regional and short line railroads operating with one-person crews. Brotherhood of Locomotive Engineers and Trainmen Division 204, Comment Letter on *Locomotive Safety Standards*, 76 Fed. Reg. 2200 (proposed Jan. 12, 2011), at 1, https://www.regulations.gov/comment/FRA-2009-0094-0016. Thus, even ignoring the seemingly contrived nature of FRA's interpretation of its

2012 rule, there is no substantial evidence to support it. On the contrary, the evidence directly contradicts FRA's position.

IV. FRA Acknowledged There is No Safety Benefit for Class II and IIIs by its Creation of the Limited Exemptions, Yet FRA is Placing Significant Costs on the Railroads that do Not Automatically Qualify.

As discussed earlier in this brief, FRA's adoption of legacy exemptions from its two-person crew rule for Class II and III railroads is at least a tacit recognition that the use of one-person crews by those carriers poses no material safety risk, but would unnecessarily impose significant compliance costs on those carriers. Section I.A. of the AAR Opening Brief notes that FRA's rule arbitrarily fails to address evidence that the agency has provided no evidentiary support for its rule either as a safety measure or that the speculative safety benefits it claims would outweigh the substantial compliance costs it would entail. The Short Line Petitioners adopt and incorporate that section of AAR's Opening Brief.

Short Line Petitioners adopt by reference and in its entirety Argument Section IV, "FRA Did Not Consider The Labor Costs The Rule Will Impose." including its Subsections A, "The Rule Will Impose Substantial Labor Costs On Railroads." and B, "FRA's Failure To Consider Labor Costs Was Arbitrary And Capricious." of AAR's Opening brief. *See* Statement Regarding Adoption, at vii of this Opening Brief.

CONCLUSION

For the reasons stated above, 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.

Dated: July 26, 2024

Respectfully submitted,

/s/ David 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 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 8,295 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 Rifkind

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

/s/ David Rifkind