

United States Senate

WASHINGTON, DC 20510

December 21, 2022

The Honorable Amitabha Bose
Administrator
Federal Railroad Administration
1200 New Jersey Avenue SE
Washington, DC 20590

RE: Rulemaking Docket FRA-2021-0032

Administrator Bose:

The Federal Railroad Administration (FRA) published a notice of proposed rulemaking (NPRM) on July 28, 2022, that would amend title 49 of the Code of Federal Regulations, part 218, to impose a two-person minimum operating crew mandate (crew size mandate) on railroads.¹ Some of the analytical approaches employed in the NPRM are puzzling: it seems to assume the worst of any innovation, propose new restrictions based on incomplete data, ignore common operating practices, and stretch the lessons that can be drawn from particular incidents. I appreciate your consideration of my comments.

Philosophically, the NPRM assumes that all changes, including new infrastructure and equipment, inherently introduces risk that must be analyzed and mitigated:

A certain amount of risk is inherent in all transportation activities, including railroad operations. Generally, FRA's existing safety regulations address known risks in railroad operations (*i.e.*, risks that have been realized and have resulted in accidents and injuries). Changes to any existing process, operating condition, or even equipment or infrastructure, however, may introduce new risks.²

The NPRM fails to acknowledge that changes to operations and infrastructure may produce benefits, including safety benefits. Under the logic in the NPRM, the specter of risk is sufficient to prohibit preemptively any innovation. If this logic is applied to infrastructure investment, it could severely burden the Department of Transportation's implementation of more than \$550 billion in new funding from the bipartisan infrastructure law. When applied to regulation, as in this NPRM, it threatens to render our transportation network less competitive and less safe over time.

The result of deterring innovation will be to maintain the status quo rather than reap the benefits of investments and new technologies that will improve safety. This concern is particularly

¹ 87 Fed. Reg. 45564 (July 28, 2022).

² NPRM at 45582.

relevant to the freight railroad industry, which owns and maintains its own infrastructure.³ Further, FRA has not given adequate consideration to the implications of removing crew size standards from the collective bargaining process and how this may disrupt economic decisions and result in modal shifts.⁴

FRA also published the NPRM without developing data, thoroughly examining the status of operations in the industry, and evaluating the level of burden the proposed rule would impose. The NPRM instead outsources the requirement for expertise to the regulated community:

Because, as noted previously, with the exception of certain freight and passenger operations, railroads have historically operated with at least two crewmembers, insufficient historical accident and incident data exists to demonstrate the potential impacts of crew size on rail safety generally, and insufficient historical data exists on the impacts of crew size under specific operating scenarios. Accordingly, rather than taking a “wait and see” reactive approach to potential new hazards introduced with changes to crew size, FRA is proposing to require railroads to conduct a risk assessment when seeking to initiate new train operations staffed with fewer than two crewmembers (and railroads seeking to materially modify legacy fewer-than-two-crewmember operations).⁵

FRA could and should have remedied this lack of data in advance of proposing a rule. The collection of this data would undoubtedly have helped to determine whether regulation is necessary at all, while allowing for a more complete evaluation of the safety implications and tradeoffs involved in mandating crew size.

As a consequence of the decision to proceed without sufficient data, the NPRM provides a dramatic underestimate of its impact on small railroads.⁶ While FRA counted only seven small railroads affected, the American Short Line and Regional Railroad Association (ASLRRA) surveyed its membership and found that 176 of 280 respondents would be affected. Worse still, many would be ineligible for the small railroad exception and unable to even apply for special approval for legacy one-person operations — at least 34 small railroads would be disqualified by their transportation of hazardous material alone.⁷ FRA also ignores any potential future costs to larger railroads that would now be restricted from negotiating smaller crew sizes through collective bargaining, even as FRA admits that it “is not certain” how many fewer railroads would implement smaller crew sizes without the proposed rule.⁸

³ Benjamin Dierker, “The Safety Impact of Technology and Crew Size,” Alliance for Innovation and Infrastructure, at 12 (Dec. 2022), *available at* <https://www.aii.org/wp-content/uploads/2022/12/The-Safety-Impact-of-Technology-and-Crew-Size.pdf>.

⁴ *Id.* at 9.

⁵ NPRM at 45583.

⁶ NPRM at 45578, n. 155.

⁷ FRA Hearing on Crew Size Mandate NPRM, National Association of Home Builders (December 14, 2022) (Testimony of Mr. Baker, President of ASLRRA, and Dr. Coffey, PhD Economist).

⁸ NPRM at 45605.

The NPRM expresses concern about several potential types of misconduct by a lone operating crewmember, but it does not take into account how these issues could be addressed by existing or alternative rules. For example, FRA claims that a second operating crewmember could detect instances of drug or alcohol violations. This seems at odds with FRA’s elected random testing rates for covered service employees in 2022, which are well below the 50 percent maximum allowed under the existing regulation.⁹ FRA exercised discretion to impose lower testing rates due to the low incidence of positive tests during the prior year (less than 1 percent for drug use and less than 0.5 percent for alcohol use).¹⁰ Moreover, a drug or alcohol violation, or any other potential violation by a lone crewmember – such as prohibited use of a personal cell phone¹¹ – might be caught from reviews of inward-facing camera footage. Based on a regulatory impact analysis, however, FRA previously declined to propose a mandate for installation of inward-facing cameras in freight locomotives because “the cost to freight railroads of implementing such a requirement outweighs its potential safety benefits.”¹² If concerns about operating crew misconduct while on duty could not justify the expense of cameras, it strains credulity that those concerns could justify the expense of maintaining a second employee if not otherwise operationally-necessary as technology advances. Finally, FRA does not explain why the current practice of having only a locomotive engineer in the cab in most passenger operations, with the conductor or conductors in the passenger compartments, does not raise similar concerns about lone crewmember conduct.¹³

The crew size mandate NPRM also focuses on operations as they existed a decade ago, apparently ignoring advances in technology. For example, FRA does not seriously address the full benefits of the costly implementation of positive train control (PTC), which will prevent essentially all train-to-train collisions, overspeed derailments, incursions into established work zones, and movements of trains through switches left in the wrong position on the territories subject to the mandate.¹⁴ FRA also suggests that a second operating crewmember is essential for receiving mandatory directives from a dispatcher by radio,¹⁵ even as technology is changing the practice for conveying mandatory directives. PTC systems must be able to receive and enforce mandatory directives electronically,¹⁶ and FRA foresees that railroad-provided electronic devices will be used to receive mandatory directives, having tasked the Railroad Safety Advisory Committee to propose updates to the 49 CFR part 220 restrictions on electronic devices for this reason.¹⁷

The NPRM also stretches the lessons that can reasonably be drawn from the accidents in 2013 at Lac Megantic, Quebec, and Casselton, North Dakota. The NPRM discusses the tragic Lac

⁹ See 49 CFR § 219.625 (giving the FRA Administrator discretion regarding random testing rates).

¹⁰ FRA, “Drug and Alcohol Testing: Determination of Minimum Random Testing Rates for 2022,” 86 Fed. Reg. 74215, 74215 (December 29, 2021).

¹¹ NPRM at 45573.

¹² FRA, “Locomotive Image and Audio Recording Devices for Passenger Trains,” 84 Fed. Reg. 35712, 35713 (July 24, 2019).

¹³ NPRM at 45579.

¹⁴ NPRM at 45581.

¹⁵ NPRM at 45575.

¹⁶ See, e.g., 49 CFR 236.1005(a)(4).

¹⁷ See RSAC Task 2022-02.

Megantic derailment at length,¹⁸ but it fails to overcome a key element of the Transportation Safety Board (TSB) of Canada’s report: “it could not be concluded whether [single-person train operation] contributed to” the accident.¹⁹ TSB further observed that single-person train operations had already been implemented in many countries as of 2014, including the United States, with advances in technology mitigating any risks.²⁰ FRA fails to describe even one specific foreign operation; rather, it hypothesizes that they might be too different from typical domestic operations to be relevant.²¹ I appreciate that FRA has invited comment on this important information.

Operating crew size also has no nexus to the cause of the Casselton derailment (a broken axle), but FRA focuses on the aftermath of the derailment and subsequent collision to suggest that additional operating crewmembers are necessary for effective post-accident response. This NPRM describes how “certified crewmembers were responsible for moving approximately 70 loaded crude oil cars” away from the resulting fire.²² In doing so, however, this NPRM omits pertinent facts found in FRA’s own accident report: specifically, that the movement occurred only after a supervisor arrived on the scene, briefed the potential movement with the crew, and assisted with uncoupling some cars.²³ Accordingly, even a one-person crew would have been able to assist with the movement of the crude oil cars at Casselton, since a non-crewmember had already responded to the scene anyway. Naturally, I agree with FRA that the operating crewmembers who moved loaded crude oil tank cars away from the fire “performed admirably” – as did the railroad employee who was not on their train. Still, reliance on their efforts does not, in fact, support a crew size mandate.

Overall, the crew size mandate NPRM appears to have some shortcomings that should give the agency pause. Fortunately, FRA has an opportunity to learn more about the current state of railroad operations and consider a more complete range of regulatory approaches that may be more viable. I appreciate your consideration of these comments and look forward to continuing to work with you to advance railroad safety.

Sincerely,



Roger F. Wicker
Ranking Member
U.S. Senate Committee on Commerce, Science, and
Transportation

¹⁸ NPRM at 45568–69.

¹⁹ Transportation Safety Board of Canada, Railway Investigation Report R13D0054, at 2.12 (August 20, 2014), available at <https://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054.html>.

²⁰ *Id.* at 1.23.25.

²¹ NPRM at 45580.

²² NPRM at 45570.

²³ FRA, Accident Investigation Report HQ-2013-31, Narrative, available at https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/16953/HQ-2013-31%20Final_Casselton%2C%20ND.pdf.