



Committee on Transportation and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

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December 21, 2022

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

**Re: Train Crew Size Safety Requirements, Docket No. FRA-2021-0032 (RIN 2130-AC88)**

Dear Administrator Bose:

On July 28, 2022, the Federal Railroad Administration (FRA) published a notice of proposed rulemaking (NPRM or proposed rule) in the *Federal Register* titled “Train Crew Size Safety Requirements.”<sup>1</sup> The NPRM would amend title 49 of the Code of Federal Regulations (CFR), part 218 to impose a two-person minimum operating crew mandate (crew size mandate) on railroads.<sup>2</sup> I write to express my strong opposition to this proposed rule and my serious concerns that the Administration has failed to properly comply with both the *Administrative Procedure Act*<sup>3</sup> (APA) and the *Regulatory Flexibility Act* (RFA).<sup>4</sup>

Since enactment of the *Stagger’s Act*,<sup>5</sup> it has been the policy of Congress to allow deregulation in the railroad industry to promote a safe rail system, and to ensure effective competition among rail carriers, shippers, and other modes of transportation.<sup>6</sup> This law was enacted to address regulatory burdens on railroads that were causing significant financial harm to the industry that led to multiple railroad bankruptcies.<sup>7</sup>

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<sup>1</sup> Train Crew Size Safety Requirements, 87 Fed. Reg. 45564 (July 28, 2022) [hereinafter “NPRM”], available at <https://www.federalregister.gov/documents/2022/07/28/2022-15540/train-crew-size-safety-requirements>.

<sup>2</sup>*Id.*

<sup>3</sup> 5 U.S.C. §§ 551-559.

<sup>4</sup> 5 U.S.C. §§ 601-12.

<sup>5</sup> 49 U.S.C. Subtitle IV, Part A.

<sup>6</sup> 49 U.S.C. §10101(3) and (5).

<sup>7</sup> S. COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, REPORT 114-52, SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015 (2015) at 1.

Subsequently, several industry observers determined that the *Staggers Act* produced a variety of positive economic outcomes for the industry, consumers, and the nation's economy.<sup>8</sup> Most importantly, the law resulted in enhanced safety. One study estimated that approximately 89 percent of the decline in railroad accidents between 1978 and 2013 were attributable to the *Staggers Act* and resulting changes in railroad incentives to invest in their infrastructure and operations.<sup>9</sup>

Congress established the FRA, and the United States Department of Transportation (DOT), to “promote the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest costs...”<sup>10</sup> At the same time, Congress established or mandated FRA to implement or propose specific safety standards and requirements, including requirements covering the certification of conductors and the mandatory implementation of positive train control technologies.<sup>11</sup> To date, Congress has not enacted any legislation mandating minimum crew size.

In *West Virginia v. Environmental Protection Agency (EPA)*, the Supreme Court clarified the limitations of certain agency action.<sup>12</sup> The Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.<sup>13</sup> As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”<sup>14</sup> Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”<sup>15</sup> However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.”<sup>16</sup> Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”<sup>17</sup> As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Given this recent ruling and the lack of explicit Congressional direction, FRA does not have authority to promulgate this proposed regulation. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the

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<sup>8</sup> *The 35<sup>th</sup> Anniversary of the Staggers Rail Act: Railroad Deregulation Past, Present and Future Before the Subcomm. On Railroads, Pipelines and Hazardous Materials of the H. Comm. on Transportation and Infrastructure*, 114th Cong. (2015) (statement of John W. Mayo, Professor of Economics, Business and Public Policy, Georgetown University).

<sup>9</sup> Jerry Ellig and Patrick McLaughlin, *The Regulatory Determinants of Railroad Safety* (May 2016) at 2, available at <https://www.mercatus.org/system/files/mercatus-ellig-railroad-safety-sum-v2.pdf>.

<sup>10</sup> Pub. L. 89-670.

<sup>11</sup> 49 U.S.C. § Subchapter II.

<sup>12</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_ (2022).

<sup>13</sup> *West Virginia*, 597 U.S. at 17.

<sup>14</sup> *Id.* at 20 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

<sup>15</sup> *West Virginia*, 597 at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 5.

people’s representatives.”<sup>18</sup> In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”<sup>19</sup>

Even if, purely for the sake of argument, we ignore the Supreme Court and clear need for Congressional direction, the NPRM still fails to follow the APA, as the proposed rule lacks a rational basis, is arbitrary, and will not achieve its desired regulatory objective to measurably improve safety. Further, the NPRM is a complete contravention of the regulatory principles as defined in Executive Order (EO) 12866.<sup>20</sup> This EO establishes the policy that agencies follow in conducting a rulemaking.<sup>21</sup> These principles include a requirement that agencies should identify the problem requiring regulation,<sup>22</sup> assess alternatives to the regulatory action,<sup>23</sup> and conduct benefit-cost analysis.<sup>24</sup> Additionally, agencies are restricted to issuing regulations that are “required by law, are necessary to interpret the law, or are made necessary by compelling public need.”<sup>25</sup> The EO also requires agencies to identify and articulate “the failures of private markets or public institutions that warrant new agency action” and “assess the significance of the problem,” and “tailor its regulations to impose the least burden on society.”<sup>26</sup>

In addition, DOT’s own Strategic Plan FY 2022-2026 safety objectives and strategies includes: “strengthen[ing] the use of informed data-driven decision-making and applying comprehensive approaches such as the Safe System approach and the safety management systems for all modes.”<sup>27</sup> With this NPRM, FRA either avoided or ignored its obligations to base crew size regulations on objective, data-driven analysis.

Moreover, this NPRM represents an example of unsound and unjustified rulemaking.<sup>28</sup> Not only does the proposed rule fail to adequately identify a particular problem that needs to be addressed, it takes an overly prescriptive approach instead of an approach to “encourage innovation and growth as well as competition among regulated entities.”<sup>29</sup> Further, the NPRM ignores the recommendation of the National Transportation Safety Board (NTSB) to capture crewmember data and use that data to evaluate the adequacy of current crew size regulations.<sup>30</sup>

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<sup>18</sup> *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

<sup>19</sup> *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

<sup>20</sup> Exec. Order No. 12866 (1993).

<sup>21</sup> *Id.* at Sec. 1(a).

<sup>22</sup> *Id.* at Sec. 1(b)(1).

<sup>23</sup> *Id.* at Sec. 1(b)(3).

<sup>24</sup> *Id.* at Sec. 1(b)(6).

<sup>25</sup> *Id.* at Sec.(1)(a).

<sup>26</sup> *Id.* at Sec.1(b)1, (11).

<sup>27</sup> U.S. DEP’T OF TRANSPORTATION, STRATEGIC PLAN FY 2022-2026 (March 2022) at 10, *available at* [https://www.transportation.gov/sites/dot.gov/files/2022-04/US\\_DOT\\_FY2022-26\\_Strategic\\_Plan.pdf](https://www.transportation.gov/sites/dot.gov/files/2022-04/US_DOT_FY2022-26_Strategic_Plan.pdf)

<sup>28</sup> Graham, *Regulators Need to Promote Tech Innovation, Not Stifle It*, THE HILL (July 14, 2016) [hereinafter “Graham”], *available at* <https://thehill.com/homenews/287768-regulators-need-to-promote-tech-innovation-not-stifle-it/>.

<sup>29</sup> Mark Febrizio, *Enduring Principles of Sound Regulatory Analysis*, The Regulatory Review (Nov. 27, 2018), *available at* <https://www.theregview.org/2018/11/27/febrizio-enduring-principles-regulatory-analysis/>.

<sup>30</sup> NATIONAL TRANSPORTATION SAFETY BOARD, NTSB RAR-16/02, DERAILMENT OF AMTRAK PASSENGER TRAIN 188 PHILADELPHIA, PENNSYLVANIA at 19 (May 12, 2015) [hereinafter “NTSB Accident Report”], *available at* <https://www.nts.gov/investigations/AccidentReports/Reports/RAR1602.pdf>.

Congress also directed FRA to collect and report train accident data that includes the number of crew members who were aboard the controlling locomotive at the time of the accident.<sup>31</sup> In testimony before the United States House of Representatives Committee on Transportation and Infrastructure’s Subcommittee on Railroads, Pipelines and Hazardous Materials, you stated that “data has to be part of the rulemaking,” indicating that FRA would have data correlating crew size with safety.<sup>32</sup> The collection of this data would undoubtedly help determine whether regulation is necessary, as well as the safety implications and tradeoffs of mandatory two person crews.

Unfortunately, no such data exists in the NPRM. Instead, the proposed rule cites outdated studies, with the most recent one published almost a decade ago.<sup>33</sup> The NPRM also relies on anecdotal observations from previous incidents,<sup>34</sup> though FRA previously noted these indirect connections between crew size with respect to these occurrences are “tangential at best and do not provide a sufficient basis for FRA regulation of train crew staffing requirements.”<sup>35</sup> FRA also acknowledged that the post-accident mitigation actions in the Casselton, North Dakota, accident were likely also achievable with “one properly trained crew member, technology, and/or additional railroad emergency planning.”<sup>36</sup>

Moreover, FRA has at its disposal several different, and better, approaches beyond this NPRM to determine whether a crew size standard is necessary. For example, FRA could have issued an Advanced Notice of Proposed Rulemaking to solicit input and data on accident incidence and crew size. The Administration could also have requested the input of the Railroad Safety Advisory Committee (RSAC). FRA’s own website acknowledges that the RSAC:

... shall seek agreement on the facts and data underlying any real or perceived safety problems, identify cost effective solutions based on the agreed-upon facts, and identify regulatory options where necessary to implement those solutions. In determining whether regulations are necessary, the Committee shall take into account section 1(a) of Executive Order 12866.<sup>37</sup>

These approaches would have been consistent with both the principles of effective regulation and DOT’s own internal policies.

Furthermore, where valid data and analysis concerning the safe operation of single crew freight trains is available, FRA appears to ignore or discount it.<sup>38</sup> FRA makes this same error with evidence that demonstrates either a neutral safety benefit, or negative safety benefits to two-

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<sup>31</sup> Pub. L. 117-58 §22421(b)(2).

<sup>32</sup> *Examining Freight Rail Safety: Hearing Before the Subcomm. On Railroads, Pipelines and Hazardous Materials of the H. Comm. on Transportation and Infrastructure*, 117th Cong. (2022) (Questions from the Honorable Dusty Johnson to FRA Administrator Bose) (on file with the Comm.).

<sup>33</sup> NPRM at 45572.

<sup>34</sup> NPRM at 45569-70.

<sup>35</sup> 84 Fed. Reg. 24735, 24738 (2019).

<sup>36</sup> *Id.*

<sup>37</sup> U.S. DEP’T OF TRANSPORTATION, FED. RAILROAD ADMIN., RAILROAD SAFETY ADVISORY COMM., *available at* <https://rsac.fra.dot.gov/>.

<sup>38</sup> *Supra* note 35 at 24737.

person crew operations.<sup>39</sup> For example, operations that would now require two person crews have been safely conducted in the United States by a one person crew for decades.<sup>40</sup> One person crew trains work in complex environments throughout Europe as well.<sup>41</sup> Additionally, FRA fails to consider how the NPRM may undermine safety. Rather than enhance situational awareness, the presence of two crew members in a cab may increase operator distractions.<sup>42</sup>

The NPRM also discounts the evolution of train operations in recent years through the nationwide implementation of statutorily mandated Positive Train Control Technology (PTC)<sup>43</sup> and how pending advances in this technology will improve safety absent human factors.<sup>44</sup> Despite acknowledging the substantial safety benefits of PTC, the NPRM claims a second in-cab crew member is necessary to protect against single point human failures.<sup>45</sup> However, NTSB has found that full PTC implementation will substantially address the potential for single-point human failures.<sup>46</sup> Additionally, NTSB does not have enough data to conclude whether two-person crews on non-PTC tracks would adequately address such single point human errors.<sup>47</sup> Curiously, while DOT pushes for driverless cars and commercial motor vehicles, the Department is moving in the opposite direction when it comes to freight railroads.<sup>48</sup>

In addition to the recent Supreme Court decision and the APA requirements ignored in this NPRM, I am further concerned that the RFA was not appropriately followed. The RFA requires agencies to consider the effects of their proposed regulations on small entities.<sup>49</sup> If an action is expected to have a significant impact on a substantial number of small entities, then the agency should conduct an initial regulatory flexibility analysis (IRFA), which includes proposing less costly and burdensome alternatives that accomplish a similar regulatory objective.<sup>50</sup> While FRA conducted an IRFA, it failed to determine whether the rule would have a significant economic impact on a substantial number of small entities per the RFA and instead invited stakeholders to make this determination.<sup>51</sup> This misconstrues the process since agencies must make such an assessment.

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<sup>39</sup> Frank N. Wilner, *Are Two-Person Crews Less Safe Than a Single Engineer?*, RAILWAY AGE, (Dec. 12, 2013), available at <https://www.railwayage.com/news/are-two-person-crews-less-safe-than-a-single-engineer/>.

<sup>40</sup> Comments of the American Short Line and Regional Railroad Administration, Before the Federal Railroad Administration, Docket No. FRA-2014-0033 (June 15, 2016) at 6.

<sup>41</sup> Oliver Wyman, *Crew-Related Safety and Characteristic Comparison of European and US Railways* (April 5, 2021), available at <https://raillaborfacts.org/wp-content/uploads/2022/09/Carriers-Exhibit-11-Report-of-Oliver-Wyman-Comparison-of-European-and-US-Railways.pdf>.

<sup>42</sup> Alliance for Innovation and Infrastructure, *The Safety Impact of Technology and Crew Size* (December 2022) at 20 [hereinafter “AFII Study”], available at <https://www.aii.org/wp-content/uploads/2022/12/The-Safety-Impact-of-Technology-and-Crew-Size.pdf>.

<sup>43</sup> 49 U.S.C. §20157.

<sup>44</sup> AFII Study at 20.

<sup>45</sup> NPRM at 44581.

<sup>46</sup> NATIONAL TRANSPORTATION SAFETY BOARD, NTSB/RAR-16/02, DERAILMENT OF AMTRAK PASSENGER TRAIN 188 (May 12, 2015) at 18, available at <https://www.nts.gov/investigations/AccidentReports/Reports/RAR1602.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> Graham.

<sup>49</sup> 5 U.S.C. §§ 601-612.

<sup>50</sup> *Id.* at §603.

<sup>51</sup> NPRM at 45606.

Unfortunately, the NPRM's IRFA appears to vastly undercount the number of small railroad entities impacted by the proposed regulation, as well as the economic burden on these entities. FRA estimates that only seven Class II and Class III railroads operate single crew trains.<sup>52</sup> However, an assessment by the American Short Line Railroad Association (ASLRRRA) found that over 420 short line railroads operate a train with a single crew member in the cab.<sup>53</sup> Had FRA taken the necessary time to solicit and collect this relevant data by issuing an Advanced Notice of Proposed Rulemaking, consulting with the RSAC, or complying with Congressional directives, it would have easily discovered the large number of small entities affected. Such information would have better informed this NPRM as a true and accurate reflection of the industry FRA now seeks to regulate.

Had FRA conducted a valid IRFA, it also would have discovered the burdens and inadequacies of its special approval process for single person crews.<sup>54</sup> In testimony before the United States Small Business Administration's Office of Advocacy Roundtable on the FRA's NPRM, the ASLRRRA noted many of its members would be ineligible for both legacy train special approval process and the small railroad exemption process.<sup>55</sup> Railroads would have to prepare unique risk assessments in addition to existing risk management requirements. FRA would then require each petition to be published in the *Federal Register* and be made open for public comment.<sup>56</sup> This arduous process would prove especially burdensome to small entities and needlessly delay approval or disapproval of petitions.

In addition, FRA appears to lack sufficient historical data to justify its prospective regulatory approach, despite being encouraged to collect data. The problem is not the inability to collect data and conduct analysis, but the will of FRA to do so. If the agency collected the necessary data as it was directed to, it would be in a better position to determine the potential safety benefits of two person crews, as well as potential tradeoffs to both safety and the railroad incentives to invest in technology and innovation and intermodal competition.<sup>57</sup>

Ultimately, FRA's NPRM fails on several fronts to meet the requisite standards required of proper and effective rulemaking. Instead, this stands as an arbitrary and capricious proposed rule that simply fits a campaign promise by President Biden<sup>58</sup> rather than meeting necessary standards for rulemaking or meeting the goal of improving and ensuring safety. The NPRM is not required by law, is not necessary to interpret law, and fails to address a compelling public need.<sup>59</sup> While multiple FRA regulations are the result of Congressional directives, Congress has chosen not to mandate a minimum crew size standard. The NPRM will reduce railroad incentives to invest in new innovative technology, which causes negative consequences for modal

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<sup>52</sup> *Id.* at 35578-45579.

<sup>53</sup> American Short Line Railroad Association, Prepared for the Small Business Roundtable on FRA's Proposed Train Crew Safety Requirements Rule, *FRA's Train Crew Staffing NPRM Fails to Account for the Cost to Small Entities as Required by the Regulatory Flexibility Act* (December 12, 2022) [hereinafter "ASLRRRA"].

<sup>54</sup> NPRM at 45582-86.

<sup>55</sup> ASLRRRA at 5.

<sup>56</sup> NPRM at 45603.

<sup>57</sup> Graham.

<sup>58</sup> Frank N. Wilner, *Biden Promise Fueled FRA NPRM*, RAILWAY AGE, (Aug. 2, 2022), available at <https://www.railwayage.com/regulatory/biden-promise-fueled-fra-nprm/>.

<sup>59</sup> *Supra* note 20 at Section 1(a).

efficiency and safety.<sup>60</sup> In fact, the proposed rule may introduce new hazards as resources are diverted away from demonstrated safety needs and solutions to comply with this misguided regulation.<sup>61</sup>

The FRA must follow the reasoning and findings of its earlier judgement and immediately withdraw this proposed rule.<sup>62</sup> If Congress directs action, or a legitimate safety concern arises, FRA should then proceed with a more deliberative, proper, and inclusive process to ensure it correctly achieves its safety objectives.

Sincerely,



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Eric A. "Rick" Crawford  
Ranking Member  
Subcommittee on Railroads,  
Pipelines, and Hazardous Materials

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<sup>60</sup>Graham.

<sup>61</sup> Heidi King, *Regulating Without Purpose*, THE REGULATORY STUDIES CENTER, GEORGE WASHINGTON UNIV., (Nov. 1, 2022) [hereinafter "King"], available at [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-11/rail\\_crew\\_size\\_commentary\\_hking\\_11-01-2022\\_final.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-11/rail_crew_size_commentary_hking_11-01-2022_final.pdf).

<sup>62</sup> Train Crew Staffing, 84 Fed. Reg. 24735 (May 29, 2019).