

**DEPARTMENT OF TRANSPORTATION  
FEDERAL RAILROAD ADMINISTRATION**

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**DOCKET NO. FRA-2022-0019  
CERTIFICATION OF DISPATCHERS  
NOTICE OF PROPOSED RULEMAKING**

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**COMMENT SUBMITTED BY  
THE ASSOCIATION OF AMERICAN RAILROADS AND  
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) (jointly the Associations), on behalf of themselves and their member railroads, submit the following comments in response to the Federal Railroad Administration's (FRA's) May 31, 2023, Notice of Proposed Rulemaking (NPRM) proposing to amend Federal Railroad Safety regulations by adding a new requirement that railroads develop and implement programs for the certification of dispatchers.

**Statement of Interest**

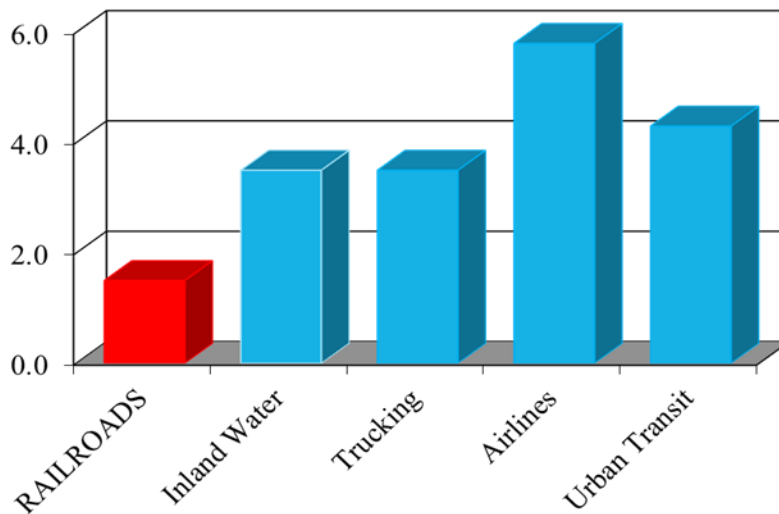
AAR is a non-profit trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a non-profit trade association representing the approximately 600 owners and operators of short line and regional freight railroads throughout North America. The members of the Associations will be directly affected by the proposed changes because they will be required to develop and implement new programs for the certification of dispatchers if the NPRM is finalized.

### **There Is Not a Safety Justification for the Rulemaking.**

There is simply not a safety justification for the proposed rulemaking. The last decade was the safest on record for railroads. Mainline accidents per million mainline train-miles have dropped 43% since 2000 and 5% since 2021. Train collisions per million train-miles have dropped 48% since 2000 and 17% since 2013. In 2022, there were 0.17 train collisions per million train-miles.

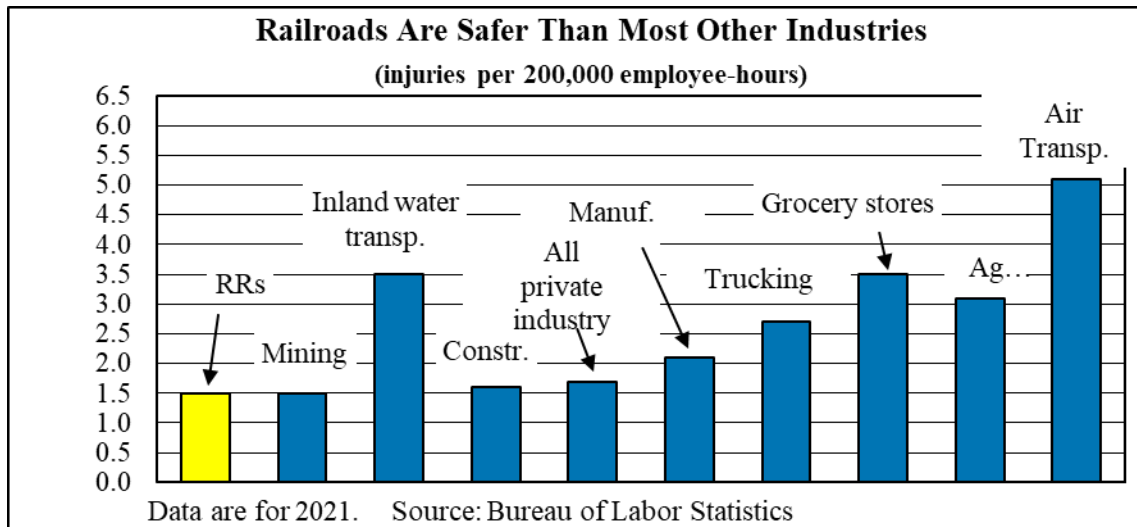
Railroads have reduced employee casualty rates by 47% since 2000 and 9% since 2010. The safety record for railroads compares favorably with other transportation modes and industries. According to the Bureau of Labor Statistics, railroads have lower employee injury rates than other modes of transportation.

#### **Lost Workday Injuries & Illnesses per 100 Full Time Employees, 2021**



Source: [https://www.bls.gov/iif/oshwc/osh/os/summ1\\_00\\_2021.xlsx](https://www.bls.gov/iif/oshwc/osh/os/summ1_00_2021.xlsx)

Data from the Bureau of Labor Statistics also demonstrates that railroad employee safety is amongst the lowest across a broad swath of industries.



This safety record is the result of railroads investing in numerous effective technological improvements and company-wide safety programs that have driven safety improvements. Class I railroads have invested billions of dollars in positive train control (PTC) systems, which are designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zones, and movements of trains through switches left in the wrong position. PTC is now operational on operation on approximately 58,000 freight and passenger railroad route miles.<sup>1</sup> Railroads also have developed and implemented sophisticated programs related to training, qualification, and oversight; system safety; risk reduction; and fatigue risk management both voluntarily and in response to new FRA regulations. Further, short line railroads participate in the Short Line Safety Institute’s safety culture assessments and hazardous material instructor and leadership development programs. In short, railroads have implemented strong training programs and robust safety management systems and programs that contribute to the overall safety improvements in the railroad industry.

<sup>1</sup> <https://railroads.dot.gov/research-development/program-areas/train-control/ptc/positive-train-control-ptc#>.

FRA has not identified any gaps in safety that justify imposing a new rule that would require railroads to implement costly certification programs that will not improve safety. Indeed, FRA's own analysis suggests that there is no reason to think that this rulemaking would prevent future incidents if implemented. FRA conducted a review of railroad accidents over the past 10 years and does not point to a single incident where it is more likely than not that the proposed dispatcher certification rule would have prevented the incident. Instead, FRA groups accidents into two separate categories, one where it estimates that there is a 30% likelihood that a certification program would have prevented the accident and a separate group of accidents where FRA estimates that there is only a 10% percent likelihood that a dispatcher certification program would have prevented any particular accident. While the Associations contend that FRA overstates the likelihood that a dispatcher certification program will have any impact on safety and note that FRA overcounts the accident/incident history, it is clear that FRA's analysis does not support finalizing this rule.

**The Rail Safety Improvement Act of 2008 Does Not Support the Issuance  
of Dispatcher Certification Regulations.**

FRA relies on section 402 of the Rail Safety Improvement Act (RSIA) of 2008 in issuing the proposed rule.<sup>2</sup> Section 402 required the Secretary of Transportation (Secretary or DOT) to publish regulations establishing a program for the certification of conductors, but Congress did not establish a similar mandate for dispatchers. Instead, the RSIA directed DOT to submit a report to Congress "about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and

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<sup>2</sup> The Secretary has delegated to FRA the authority to carry out the functions and exercise the authority of the Secretary for the RSIA as well as other statutory provisions, including 49 USC Subtitle V, Part A (Safety, chapter 201, *et seq.*). 49 CFR 1.89.

rate of accidents and incidents or to improve railroad safety.”<sup>3</sup> Further, DOT is authorized—not mandated—to regulate only if the Secretary determines in the report to Congress that the regulations are “necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.”

On November 4, 2015, Secretary Anthony R. Foxx submitted DOT’s report to Congress in the form of a letter detailing FRA’s “preliminary research.” The letter report from Secretary Foxx does not make determination that dispatcher certification regulations are “necessary to reduce the number and rate of accidents and incidents or to improve railroad safety,” which is the essential first step in implementing new certification regulations for dispatchers. The letter merely states that “dispatching and signal-repair employees are potentially the most viable candidates for certification.” It is clear from this language that the Secretary has not determined that regulations are necessary. The letter, at most, suggests that a certification program for dispatchers may warrant additional research based on the implementation of PTC technology or to assess how dispatchers or dispatching tasks might benefit from a certification program. Indeed, if Secretary Foxx had made a determination of necessity, FRA would have pursued dispatcher certification regulations in 2015, rather than waiting until 2023.<sup>4</sup>

FRA seems to recognize this legal deficiency and states in the preamble to the NPRM that “the Federal Railroad Administrator has determined that it is necessary to require the

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<sup>3</sup> Section 402(c) identifies the following crafts or classes of employees for consideration: (1) car repair and maintenance employees; (2) onboard service workers; (3) rail welders; (4) dispatchers; (5) signal repair and maintenance employees; and (6) any other craft or class of employees that the Secretary determines appropriate.

<sup>4</sup> The Associations recognize that FRA’s Rail Safety Advisory Committee (RSAC) voted to accept a task in April 2019 entitled “Certification of Train Dispatchers,” but FRA quickly withdrew the task from consideration in December 2019 at the request of the American Train Dispatchers Association, BRS, and the International Brotherhood of Electrical Workers. The withdrawal request came after FRA provided the Working Group with a list of scenarios, and the labor unions did not point to a single scenario that would be mitigated by certification. As a result, FRA’s initiation of the RSAC process does not support a claim that certification programs are necessary for safety.

certification of railroad dispatchers to improve railroad safety.” 88 Fed. Reg. 35574, 35576. However, this is insufficient to cure the statutory defect because DOT has not made that decision pursuant to a report that has been submitted to Congress, which is a necessary precondition to pursuing a rulemaking. The Associations note that this step is not purely procedural, as the reporting process gives Congress the opportunity to weigh in on the determination before FRA initiates the rulemaking process. The Associations also note that the Administrator’s recent determination—15 years after the RSIA was enacted, 8 years after issuing a report to Congress, and nearly 4 years after withdrawing the issue from RSAC consideration—does not demonstrate that a dispatcher certification program “is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.” This is because FRA simply does not present any data to support such a conclusion.

DOT’s general authority to issue safety regulations under 49 USC 20103 does not exempt FRA from the requirement to comply with section 402 of the RSIA. Congress was clearly aware of this provision when it passed the RSIA. If Congress intended for DOT to rely solely on its general authority to issue rail safety regulations in addressing the potential certification of certain classes and crafts of railroad employees, it would not have included the requirement for DOT to report to Congress on the necessity of such certification procedures before issuing regulations. It is impermissible to skip over the requirements in section 402 just because Congress has previously delegated a general authority to regulate railroad safety to DOT.

**The Cost-Benefit Analysis Does Not Support Finalizing the Proposed Rule.**

This proposed rule adds to FRA’s recent history of disregarding the economic impacts of proposed rulemaking actions. *See* Emergency Escape Breathing Apparatus Supplemental Notice of Proposed Rulemaking, 88 Fed. Reg. 17302 (March 22, 2023), and Signal Employee

Certification Notice of Proposed Rulemaking, 88 Fed. Reg. 35632 (May 31, 2023). FRA’s Regulatory Impact Analysis (RIA) for Dispatcher Certification estimates the 10-year cost of the proposed rule to be more than \$5.35 million (7% discount rate), while the quantified benefits are estimated to be about \$0.79 million (7% discount rate). In other words, the quantified costs exceed the quantified benefits by almost 7 to 1. The RIA points to various unquantified benefits but there is no suggestion that these unquantified benefits would offset the overwhelming difference between estimated costs and benefits.

Executive Order 12866 states that “agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.” 58 Fed. Reg. 51735 (Oct. 4, 1993). The proposed rule unambiguously results in negative net benefits. There is no statutory requirement for FRA to implement dispatcher certification regulations, which means that the agency alternatives include not issuing a final rule. In this instance, the no action alternative does more to maximize societal benefits than the proposed rule. Therefore, FRA should select that approach and withdraw the rulemaking or revise the proposed rule to ensure the benefits exceed the costs.

**The Cost-Benefit Analysis Overstates Benefits and Understates Costs.**

FRA’s accident data does not support the benefits analysis in the RIA. The Associations attempted to conduct a full review of all accidents/incidents that FRA relies upon in the RIA. For some accidents/incidents there was too little information to make an assessment. However, the Associations’ review of accidents for which additional information was available from the reporting railroads indicates that most of the accidents that FRA claimed dispatchers may have

contributed to either had no dispatcher involvement or were not caused by dispatcher error.<sup>5</sup> In fact, 98% of the estimated benefits from such accidents came from irrelevant accidents. (*See* Appendix A for Association review findings.) By its own admission, FRA also double counted an accident in its benefit pool. Correcting this error and removing those accidents that are not relevant from the pool of accidents that FRA relies on for its benefits will reduce the benefits assessment by 21% to \$0.6 million (discounted at 7%).

FRA also understates the costs of implementing a new dispatcher certification program. It does not account for the apparent efforts in the proposed requirement to cover employees who are currently outside the scope of the statutory definition of dispatching service employee at 49 USC 21101(2). FRA also underestimates wage-related costs because the 2020 railroad wage rates do not take into account the 24% wage increase that railroad employees received as part of the 2022 collective bargaining process or the 10.7% increase in Federal government employee pay rates. With respect to railroad employee wages, the pay increases were effective retroactively and cover the period 2020 through 2024.

FRA's estimates for developing certification programs, employee monitoring, and FRA's review of plans are too low, as well. Class I railroads estimate that it will take each railroad 2-3 years to build out the entire certification program, which includes creating a new technology platform, bringing on additional personnel resources, and at least 600 person-hours per Class I railroad to develop a new certification program. ASLRRA estimates that it will take 550 person-hours to develop a template for Class II and Class III railroad members to use as a basis to develop a plan and an additional 19 hours for an individual railroad to develop a plan from the

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<sup>5</sup> See Table 2, Supplemental Data to the Regulatory Impact Analysis, July 2023; <https://www.regulations.gov/document/FRA-2022-0019-0022>.



template.<sup>6</sup> A short line or small railroad that is not an ASLRRA member would not have access to the template and would have to spend hundreds of hours developing a plan from scratch. For monitoring employee performance, proposed § 245.123 requires “at least one unannounced railroad and Federal rules, territorial and dispatch systems compliance test each calendar year.” FRA assumes each supervisor will spend a total of 2 hours annually on 10 employees to accomplish this task. This translates to 12 minutes per employee being monitored (10 minutes spent monitoring and 2 minutes recording the test results). Given breadth of testing required by proposed § 245.123 and the variability in dispatcher activities, this is insufficient time to adequately evaluate the employee’s performance as it would only allow for a cursory performance evaluation with minimal impact.<sup>7</sup> The time necessary to adequately evaluate the employee’s performance can depend on several factors, including the needs of or responsiveness by workers on track, conditions and circumstances involving train operations, and variability of traffic within the workday. Dispatchers may need to wait for personnel to be ready, or dispatchers may need to prioritize multiple requests for their attention. Considering the range of these kinds of factors by time and circumstance, the Associations estimate that the average annual performance monitoring for each employee to comply with certification requirements would be approximately four hours per employee, which would be a total of 10,920 person-hours (or 40 hours per supervisor) per year. This does not include an estimate of the feasibility or time to monitor contractors. Moreover, at least five minutes would be needed to adequately document the event in a system. Unfavorable assessments would take even longer, as those would require

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<sup>6</sup> ASLRRA bases this estimate upon its recent experience the creation and FRA approval of its Part 271 Risk Reduction Program template that can be used by member railroads. The actual number of hours to develop a plan will vary greatly by railroad.

<sup>7</sup> An individual observation for a particular task depends on a variety factors, but typically ranges from 30-60 minutes.

additional documentation and comments on the insufficiencies. The Associations do not attempt to estimate the time needed for FRA to conduct its own reviews related to approval. However, it is simply not practicable to suggest that FRA can complete the reviews in 20 hours. Indeed, FRA builds its own buffer because it anticipates that its staff will not be able complete its reviews of individual railroads within 90 days.

FRA's cost analysis for dispute resolution hearings also underestimates the burdens of such proceedings. Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person. This additional consultation and representation cost should be included in the overall cost assessment of hearings. The costs for the parties would be expected to be comparable to FRA's cost for general oversight and program review as well as petitions and hearings. FRA estimates that its own costs for these activities will total 1.2 million (7% discount rate), which amounts to 22% of the total estimated costs of the proposed rule.

**There is No Evidence to Support the Claim that “New” Dispatcher Duties Necessitate Creating a Certification Program.**

FRA contends that “over the past 5 to 10 years, the job of a railroad dispatcher has become more complex and demanding” and cites a litany of dispatcher responsibilities to support than proposition. 88 Fed. Reg. at 35576. However, this contention does not stand up to examination because the responsibilities that FRA points to have existed for almost two decades.

FRA almost exclusively relies on a 2006 Foster-Miller Report that FRA commissioned to identify the responsibilities of dispatchers.<sup>8</sup> The Foster-Miller Report attempts to assess the task load for dispatchers. The report identifies 67 dispatcher tasks that are organized into 6 different categories:

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<sup>8</sup> [https://railroads.dot.gov/sites/fra.dot.gov/files/fra\\_net/1662/HFES\\_dispatcher.pdf](https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1662/HFES_dispatcher.pdf).

1. Actuation of signals, switches, blocking devices, and bridge controls via centralized traffic control (CTC) or computer-aided dispatching (CAD) systems;
2. Issuance and cancellation of dispatcher-authorized mandatory directives;
3. Granting of other track-related permissions, protections, and clearances (non-mandatory directives);
4. Carrying out non-movement authority or non-permission/protection/clearance communications;
5. Performance of general recordkeeping tasks; and
6. Review of reference materials.

Given that the report is 17 years old, it simply cannot be used to support FRA's contention that recent changes dispatcher responsibilities over the last 5-10 years necessitate requiring a new certification program for dispatchers. Virtually every "new" duty or responsibility highlighted by FRA in support of the rule can be traced back to a duty that existed as of 2006 according to the Foster-Miller Report. As an example, the Foster-Miller Report notes that dispatchers are required to look at multiple screens, which matches one of FRA's current assertions that is intended to support the rule. Likewise, the Foster-Miller report discusses how technology has resulted in a reduction in field operations personnel, such as tower operators, that supported dispatchers, which matches another of FRA's supposed reasons for proposing this rule. Simply put, these types of duties or responsibilities were not new in 2015 when Secretary Foxx issued his report to Congress, and they are not new in 2023 just because FRA points to them as a purported justification for the proposed rule.

The only current task or technology that FRA points to that is not encompassed in the Foster-Miller Report relates to PTC, and how dispatchers must interface between the computer-aided dispatching (CAD) system and PTC. However, FRA provides no data or analysis to demonstrate that the adoption of PTC systems, as mandated by Congress, has made dispatching more complex. In fact, the opposite is true. PTC implementation has not increased the complexity of the work for dispatchers because it acts as a safety back-up, preventing human-

factor incursions into occupied territory in locations that are PTC-equipped and operational. Additionally, PTC allows railroads leverage information from microprocessors to identify problems and recommend solutions through back-office operations, which enhances and simplifies the decision-making process for dispatchers. Through complementary technologies, with streamlined communication exchanges and data validations that have reduced human-factor incidents, PTC has improved operational safety.

Lastly, FRA speculates that the role of a dispatcher could increase as one-person crew operations increase. This argument is as unfounded as it is remarkable given that FRA has proposed crew-size rule that would mandate a two-person crew minimum for any train operation unless there is a specific, limited exception that is identified in the text of the regulation. 87 FR 45564 (Jul 28, 2023). In practice, the proposed crew size rule would exclude any new one-person crew train operations because the exceptions are so onerous that no railroad could possibly meet any of them and also would require the vast majority of current one-person operations to revert back to two-person crews even though the data shows that one-person crews do not negatively impact safety. However, setting this issue aside, FRA appears to overlook the fact that there is no Federal requirement to have a dispatcher and many short line railroads do not use them. In fact, approximately 55 short line railroads currently operate single person crew operations without a dispatcher.<sup>9</sup> FRA presents no evidence or data to support its contention that crew size will impact a dispatcher's duties, and it is clear that FRA did no outreach to railroads with existing one-person crew operations, as railroads currently operating one-person crews report that the dispatcher's duties remain the same regardless of the number of crew members on the train.

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<sup>9</sup> ASLRRRA provided extensive comments on this issue in Docket No. FRA-2021-0032: Train Crew Size Safety Requirements. See FRA-2021-0032-13033.

## **FRA Fails to Understand that the Proposed Rule Will Alter Existing Collective Bargaining Agreements.**

Class I and other railroads incorporate their testing programs into their CBAs. Therefore, any changes required pursuant to the new regulation will necessarily result in altering existing CBAs. However, FRA states in proposed § 245.5 that it does not intend to change the terms, conditions, or interpretation of existing CBAs by used of the term “dispatcher.”

### **There is No Evidence that Certification Requirements Would Minimize Job Hopping.**

FRA makes the argument that certification will reduce the risk of “job hopping” by dispatchers who have their certifications revoked, particularly as it relates to dispatchers with substance abuse problems. However, FRA presents no evidence that dispatchers switch jobs more frequently than other crafts, including those that are subject to certification requirements.

Dispatchers are responsible for directing the safe movement of trains throughout a specific territory. As a result, they become “experts in all of the factors that can affect safe and efficient train operation, including the type of operating territory and geographic, weather and local restrictions in that area.”<sup>10</sup> Because changing jobs would require the dispatcher to develop a new expertise on a new territory, there is strong incentive for dispatchers to continue working a specific territory rather than hopping from job-to-job, constantly having to learn new territory.

FRA’s citation to historical positivity rates for dispatchers, signal employees and train and engine (T&E) employees does not support a different result.<sup>11</sup> First, the positive test rates for these employees during pre-employment testing are of no relevance to justifying a certification program because positive tests would result in railroads screening out the people before they become dispatchers (or signal employees or T&E employees). Second, the

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<sup>10</sup> <https://www.up.com/customers/track-record/tr030921-how-does-train-dispatching-work.htm>

<sup>11</sup> FRA effectively updated the preamble language by posting a “Clarification and Record of Public Contact” in the docket. <https://www.regulations.gov/document/FRA-2022-0019-0031>.

Associations question the accuracy of FRA's random drug testing data. FRA is relying on data from the letter report from Secretary Foxx which cites to positive test rates as part of its preliminary research identifying dispatchers as being potentially viable candidates for certification. Specifically, the Foxx letter cites to positive test rates for signal employees and T&E employees for 2012 and 2012-2013. However, for dispatchers, the Foxx letter only cites to positive test rates for dispatchers for 2012-2013. There are wild, unexplained swings in the positive test rates for signal employees and T&E employees that would suggest that at least some of the data cited is highly unlikely to be accurate.<sup>12</sup> FRA does not explain in the preamble why the Foxx letter does not provide 2012 positive test rate data for dispatchers; however, the apparent inconsistencies in the data cited for signal employees and T&E employees would suggest that there is a high potential for error in the positive test rates cited for dispatchers in 2012-2013.

Setting aside the apparent errors in FRA's analysis, FRA has not demonstrated that the proposed rule will decrease the likelihood that dispatchers, particularly those with substance abuse problems, job hop between railroads. FRA does not point to a single example where someone was hired as a dispatcher, but would not have been if a certification program was in place. Such a scenario is highly unlikely because prospective dispatchers undergo pre-employment drug and alcohol testing. They also receive rigorous training that can last 12-18 months, before they are given their own territory.<sup>13</sup> Once on the job, dispatchers are continuously monitored. Moreover, once they are hired, they are subject to random and reasonable basis testing (as well as post -accident/incident testing). Given this environment,

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<sup>12</sup> The Associations note two points: 1) the number of tests conducted would be in the thousands per year, which should serve to minimize wide swings based on sample size, and 2) these are two-year averages, so the 2012-2013 positive test rate would include the rate cited for 2012 as well as the 2013, which FRA does not provide.

<sup>13</sup> <https://careers.cpr.ca/job/Minneapolis-Train-Dispatcher-MN-55402/572005117>

railroads are well-positioned to identify dispatchers with substance abuse problems, and FRA's proposed certification program does not improve the railroads' ability to address such issues, whether with existing employees or new employees.

**Railroads Are Not Properly Situated to Implement Certification Programs for Contractors and Subcontractors.**

FRA states that it proposes to make railroads responsible for the certification of its contractors because the railroads "are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations." While FRA's statement about who is held responsible may be true, it does not support making railroads responsible for certification of contractors. Railroads are equally incentivized to ensure safety of its dispatcher operations no matter which party is responsible for implementing and managing the dispatcher certification program.

Many short line railroads use contractors extensively for dispatching. In most cases, the short line railroad utilizes a contractor for this purpose because the railroad does not have the in-house expertise to otherwise dispatch trains. Often, a contractor will provide dispatching service for dozens of short lines at the same time. Not only would it be infeasible for short lines to certify employees of contractors, given the lack of in-house expertise, but it also creates an inefficient waste of resources for dozens of railroads to certify the same individual in any given period.

If FRA is going to require contractors to be certified, then FRA should authorize contractors and subcontractors to certify their own employees. The contractor company is in the best position to implement, track, and manage the certification of its own employees. As FRA acknowledges, contractors perform highly specialized work, and the contractors performing dispatching work are expected to have a high-level of knowledge pertaining to FRA's

regulations pertaining to dispatching (49 CFR part 241); operating rules (part 217), operating practices (part 218), and roadway worker safety (part 214, subpart C). Further, parts 219 and 243 allow contractors to have their own programs and provide their own training.

**The Proposal Is Duplicative of Parts 243, 270, and 271 and Harmful to Safety.**

FRA contends that the proposed dispatcher certification program requirements would fill gaps associated with the training, qualification, and oversight regulations in part 243 as well as the system safety/risk reduction program (SSP/RRP) in parts 270 and 271.<sup>14</sup> However, the gaps that FRA cites to are either non-existent or immaterial. These are wide-ranging comprehensive programs that FRA is responsible for reviewing and approving after ensuring that those programs meet the minimum safety standards of the applicable laws.<sup>15</sup> There is no safety basis for layering new certification requirements on top of these existing requirements and the proposed rule would reduce safety by causing confusion and diverting resources from higher priority safety risks.

FRA created part 243 in response to a mandate in the RSIA of 2008. Part 243 requires railroads and contractors to ensure that safety-related railroad employees are trained and qualified for the work they are performing. Despite FRA's claims, there is significant overlap between the proposed rule and part 243. For example, FRA claims in the preamble that "part 243 does not require employees to undergo a performance skill evaluation conducted by a qualified instructor to verify adequate knowledge transfer." 88 Fed. Reg. at 35579. This statement is wrong. Performance skill evaluations are a component of part 243's requirements concerning on-the-job training (OJT) in dispatcher-related and regulated tasks. This is evidenced

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<sup>14</sup> The Associations include Fatigue Risk Management Programs (FMRPs) with SSP/RRP for the purpose of this discussion.

<sup>15</sup> See 49 USC 20156 and 49 USC 20162.



by the requirement in § 243.201(c)(2), which states that an employee must “demonstrate, to the satisfaction of a designated instructor, OJT proficiency by successfully completing the safety-related tasks necessary to become a qualified member of the occupational category or subcategory.”<sup>16</sup> While this requirement pertains to OJT for new employees, railroads make extensive use of OJT in training dispatchers. Indeed, Union Pacific’s dispatcher training program includes requires extensive OJT training prior to becoming a dispatcher.<sup>17</sup> Moreover, experienced employees receive recurrent training to ensure that they are “qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.” 49 CFR § 243.201(e)(1) and (2).

Parts 270 and 271 were also mandated by the RSIA of 2008. The regulations require railroads to implement safety management systems to identify hazards and establish policies to prioritize and minimize those risks. Railroads are required to submit their SSP/RRPs for review and approval by FRA. However, the proposed rule would cast aside the carefully considered risk analysis conducted through the SSP/RRP in favor of an approach that would have railroads potentially focus on lower priority risks associated with dispatchers, not because it is an effective safety management tool, but solely because this rulemaking would require it.

FRA is correct that not every railroad operates under an SSP/RRP, but that distinction is immaterial. All Class I railroads have submitted RRP and received approval from FRA.

Likewise, it is the Association’s understanding that those railroads with passenger rail operations

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<sup>16</sup> *Designated instructor* means a person designated as such by an employer, training organization, or learning institution, who has demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training of the subject matter. 49 CFR 243.5.

<sup>17</sup> <https://www.up.com/customers/track-record/tr030921-how-does-train-dispatching-work.htm>.

that operate intercity or commuter service have submitted SSPs and received approval by FRA as well. This would mean that the RRP/SSP requirements currently cover more than 83% of the line-haul mileage and 95% of the workers in the rail industry. Further, FRA staff worked extensively with ASLRRA to create a template program for the use of short line railroads who will comply with part 271 either as a volunteer or as a railroad that FRA has deemed to have inadequate safety performance. This template, coupled with the cooperative agency guidance provided by FRA, has set up for success any short line that will comply with part 271 in 2023 and beyond.

**The Knowledge Testing Requirements Do Not Fit Daily Activities.**

Proposed § 245.121(b)(6) states that knowledge testing must be “[c]onducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.” The railroads understand that this provision is consistent with part 240 and 242 but recommend an alternative approach. FRA’s proposed approach is anachronistic because it encourages guessing rather than inquiring, investigating, and reviewing. Railroads currently train, teach, and encourage their employees to use reference materials in their daily activities. Railroad safety would be better served if FRA adopted the same approach for knowledge testing.

**The Definition of Dispatch Should Not Apply to Bridge Tenders, Tower Operators, Yardmasters or Other Employees.**

FRA proposes in § 245.7 to define “dispatch” by relying on the existing definition in 49 CFR 241.5. The definition part 241 is tied to the definition of “dispatching service employee,” which is defined in the Federal hours of service laws as an “operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.” 49 USC

21101(2). FRA should clarify that it only intends to cover those employees who are covered by the statutory definition. Efforts to expand the definition of dispatcher for certification purposes do not benefit safety and would create an expensive, unworkable administrative mess.

FRA states that the definition is intended to be based on the function being performed. In the preamble, FRA uses the example of a yardmaster, and states that the yardmaster would only be covered by the certification requirement for the time that the yardmaster is performing the functions of a dispatcher. This does not make sense because under FRA's formulation the yardmaster would need to be certified even though the yardmaster's regular duties do not include dispatching. This is true for other positions as well that perform de minimis functions that FRA might consider dispatching. Positions such as bridge tenders, tower operators, control operators and yardmasters have not traditionally been treated as or otherwise considered to be dispatchers. They are traditionally treated as engineering or transportation employees. Indeed, in some cases, the people performing these functions are not even railroad employees. For example, the Port of New Orleans owns three railroad bridges, and the bridge tenders are employees of the Port, not the railroad.<sup>18</sup> Similarly, FRA seems to broadly sweep in certain roadway workers without providing any safety justification, merely stating "[a]nother type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations." Roadway workers-in-charge are required to establish their own on-track safety, and are, as such, in charge of controlling their own, or others' (including trains) movements within their exclusive limits, but there is no support for requiring such employees to be certified as dispatchers for this limited safety purpose.

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<sup>18</sup> The Port of New Orleans owns the Almonaster Avenue Bridge, Florida Avenue Bridge, and the Seabrook Railroad Bridge. <https://portnola.com/business/cargo/bridge-status>.

FRA's interpretation would require railroads to alter the terms, conditions, or interpretation of existing collective bargaining agreements for those employees subject to the CBA. FRA has not made a safety case for why these types of employees should be considered dispatchers for certification purposes. As such, FRA should clarify in the preamble and regulatory text, if finalized, that it only intends to require certification for employees that are covered by 49 USC 21101(2) and that it does not consider positions that perform de minimis "dispatching" to be subsumed into the definition dispatch and dispatcher in part 245.

**Back-office Personnel Are Not Dispatchers.**

Back-office employees do not meet the definition of dispatching service employee in 49 USC 21101(2), and they are not subject to the alcohol and drug testing program requirements under 40 CFR part 219. While FRA does not explicitly call out these employees in its definition of dispatchers, the Associations want to be clear that there is no basis for FRA expanding the definition of dispatching service employee to capture back-office employees.

Railroads employ back-office employees who manage and analyze a variety of data. Some back-office data is synthesized for use by dispatchers, which, as noted above in the PTC context, acts as a safety back-up by preventing human-factor incursions into occupied territory in locations that are PTC-equipped. Back-office systems can also be used to improve safety by automating certain responsibilities so that dispatchers can focus on other responsibilities. For example, railroads can set up back-office systems to allow a roadway worker employee-in-charge (EIC's) to electronically request Exclusive Track Occupancy (ETO) to protect the working limits on controlled track. The request can then be handled through the EIC to the back-office segment, which performs system validations, and subsequently returns an "approval" and "protection" in line with the EIC's request. In such cases, railroads have protected the ETO

through a technology driven process, and it would make no sense to require certification in such a context.

**FRA’s 90-day “Goal” for Approval or Denial is Arbitrary and Capricious.**

FRA’s existing certification programs for locomotive engineers and conductors establish an approval process that considers the program approved and allows a railroad to implement its certification program 30 days after the program is filed with FRA unless the FRA Administrator notifies the railroad in writing that the program does not meet the criteria required under the regulations. 49 CFR 240.103(f) and 242.103(g).<sup>19</sup> FRA proposes scrapping the approach used in parts 240 and 242 in favor of a new process for dispatcher certification that would allow FRA to indefinitely withhold approval without any reasonable basis. Proposed § 245.103(f) establishes an “aspirational goal [for FRA] to decide on whether to approve a program within 90 days of the date that the program is submitted,” but FRA emphasizes that this is not a deadline that FRA must meet. Moreover, FRA does not establish any procedures to ensure that the decision-making process functions expeditiously, instead noting that it will not always be possible for it to meet the 90-day goal especially during the initial implementation period. If finalized, the approval process should be the same as in parts 240 and 242. This would allow railroads to begin implementing their programs unless FRA’s Administrator notifies the railroad in writing that the certification program has not been approved. However, FRA’s approach in the current rulemaking is to require that FRA issue a formal decision before a railroad can begin implementation. As a result, FRA establishes a process that allows it to arbitrarily hold railroads in limbo for an indefinite time period even if their programs are fully compliant with the requirements in the new part 245.

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<sup>19</sup> Sections 240.103(a) and 242.103(b) state that the railroad must submit the written certification program to FRA at least 60 days before commencing operations.

## **Requiring Union Approval on Program Submission Is Arbitrary and Capricious and Not Tied to Railroad Safety.**

The proposed approval process in § 245.103(d) is flawed and unworkable. It would add new a requirement that railroads not only share a copy of the program with the president of each labor organization that represents the railroad's dispatchers, but also would require that railroads get the approval of the labor union president and all of the railroad's dispatcher employees who would be subject to part 245. The proposed requirement would also apply to all material modifications of the certification program. This is a substantial change from §§ 240.103(b) and 242.103(c), which require consultation with, but not approval from, labor union leadership. FRA fails to explain why it is proposing this change. Railroads have worked closely with rail labor groups in developing and implementing certification programs for locomotive engineers and conductors. However, FRA's proposed requirement to obtain approval from the respective labor union president(s) is arbitrary and capricious. Labor unions are given the opportunity to comment in part 240 and 242, but FRA's proposed approach in this rulemaking would give labor unions multiple bites at the apple with no reasoning for the deviation. The proposed requirement would cede decision making responsibilities from the railroads, whom FRA will hold responsible for implementation and management of the program, to labor union presidents, who are outside the exercise of FRA's regulatory authority.

FRA does not explain its rationale for why it believes it is necessary to give a person who is not subject to FRA's regulatory authority responsibility for approval of dispatcher certification programs.<sup>20</sup> It cannot be because it is necessary for safety because it is not required in part 240

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<sup>20</sup> The preamble documents extensive outreach with various labor unions. FRA appears to have held numerous meetings over an extended period of time, including "several" virtual meetings between May 5 and June 30, 2021, and on March 22, 2022, with the American Train Dispatchers Association (ATDA), the International Brotherhood of Electrical Workers (IBEW), and the Brotherhood of Railroad Signalmen. This is contrasted with a single March 7, 2022, meeting with AAR and Norfolk Southern, and no meetings with the ASLRRRA.

and 242. Similarly, FRA does not even attempt to explain how such a requirement will result in improved safety, when the rule structure would establish mechanism where the labor union president could potentially hold up approval forcing railroads to miss deadlines. For example, proposed § 245.103(a)(1) would require railroads to submit programs to FRA within 8 months of the effective date of the final rule. This could put a railroad in a situation where it misses the deadline solely because it cannot get approval from a labor union president. The railroad would be subject to potential civil penalties, but the labor union president would not be subject to the same threat of civil penalty. Such a situation is untenable. Additionally, requiring the approval of the labor union president creates an inherent conflict of interest because FRA is putting the union president in the position of approving and exercising control over when and how a railroad uses contractors to perform certain dispatching responsibilities. Given these factors, the Associations recommend deleting this proposed requirement.

#### **Vision and Hearing Acuity Testing Should be Tailored to Dispatching Responsibilities**

FRA proposes to adopt vision and hearing acuity requirements that mirror those in parts 240 and 242. In proposing these requirements, FRA frames the discussion as whether the vision and hearing acuity requirements should be as stringent as those required for engineers and conductors. In doing so, FRA misframes the issue. The real issue is whether the requirements are tailored to the work performed by dispatchers. Dispatchers have different responsibilities, and they perform substantially different tasks than conductors and engineers in environments that are completely dissimilar to the engineer and conductor environment. Prior to implementing vision and hearing acuity requirements, FRA needs to analyze the components of a dispatcher's duties and address how particular vision and acuity requirements impact the ability of dispatchers to safely perform their work. Absent such an analysis, FRA has no basis for

plucking the vision and hearing acuity requirements from part 240 and 242 and applying them to dispatchers.

**FRA Should Not Allow Persons Nearing Retirement to Forego Full Certification Training.**

In proposed § 245.105(f)(1), FRA would allow a person who is within three years of retirement to forego the full certification process. This provision contradicts the safety rationale for the rule. It does not make logical sense for FRA to argue that this rulemaking is necessary for safety and then to suggest that someone within three years of retirement does not need the same safety training that other dispatchers would need to be certified. FRA suggests that such an approach is more efficient. However, FRA does not seem to account for the added administrative burden resulting from railroads having to track a special category of employees and establish special protocols for them. It would be more administratively efficient to have a single program for all dispatchers who require certification. Additionally, FRA does not seem to have thought through the issue of what happens if an employee decides not to retire within three years. It would appear that an employee nearing retirement age could game the system to forego the full certification process for up to six years.

**FRA Hamstrings the Railroads' Ability Quickly Learn of a Person's Conviction or Other State Action.**

In the preamble discussion, FRA states that proposed § 245.111(k)(2) would preclude railroads “from having a more restrictive company rule requiring certified dispatchers to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver’s license in less than 48 hours.” As a practical matter, railroads should be able to require notification more quickly than 48 hours as a matter of company policy if they determine it is in the safety interests of the railroad. There is no safety reason to prevent railroads from doing so. In fact,



one can easily envision a scenario where safety is decreased because an employee takes advantage of the 48-hour grace period after being convicted. FRA regulations are consistently treated as a floor, not a ceiling, and there is no reason for FRA to interpret this specific proposed regulation differently.

**FRA Should Not Artificially Limit Consideration Prior Safety Conduct.**

In proposed §§ 245.111 and 245.113, FRA proposes to prevent railroads from considering information about a person's prior driving record for incidents that occurred prior to the effective date of the final rule or that are more than three years old. A similar restriction applies to prior safety conduct with another railroad that occurred prior to the effective date of the final rule. FRA frames the issue as one of fairness, but it is actually an issue of safety. If FRA believes that dispatcher certification is necessary for safety, then it should allow railroads to consider a person's prior safety conduct from before the rule is effective as well as after. Likewise, a three-year limitation on driving records would make it difficult to establish a pattern of safety abuses. Railroads need to be able to consider someone's past actions when making hiring decisions, and there is no safety reason to prevent railroads from making determinations based on prior conduct that occurred prior to this rule becoming effective or limiting the review of driving record information to three years.

**FRA Should not Allow Decertified Dispatchers to Work in Another Craft if Certified in that Craft.**

Proposed § 245.213 would allow a person who has been decertified as a dispatcher for a reason not involving alcohol or drugs to still be able to work as a conductor or engineer if the person holds a certification in one of those crafts. The alternative would also be true in that an employee who has been decertified as a conductor or locomotive engineer may work as a dispatcher if that person holds certification in that craft. FRA asserts that the tasks are so

inherently different that it does not follow that a revocable event in one area makes it more likely that an employee will conduct a revocable event in another area.

In §§ 240.308(f) and 242.213(h), FRA does not allow a decertified conductor to shift into a locomotive engineer position or vice versa. FRA should adopt the same approach in part 245, if finalized. If a safety sensitive violation is committed this should be considered regardless of craft. For example, if a dispatcher grants permission for a train to foul the work limits of a roadway worker who has been granted exclusive track occupancy that conduct tends to show a disregard for process and there should not be an assumption that the employee's disregard is function or craft specific.

**The Period of Ineligibility Is Too Lenient for Persons with Multiple Revocations.**

Proposed § 245.305(b) would establish a tiered system for handling persons with one or more decertifying events within a 36-month period. AAR asks FRA to clarify that the 36-month period is on a rolling basis such that each new revocation has the potential to extend the 36-month clock. Otherwise, the clock would reset for an employee who continues to commit serious violations warranting revocation. Moreover, the Associations recommend that FRA revise paragraph (b)(4), if finalized, to state that a person can no longer hold certification after committing four violations within a 36-month period.

**FRA's Definition of Material Modification is Too Vague.**

FRA seeks comment on its proposed 245.103(g)(1), which defines the term "material modification." FRA's proposed definition would treat any change that "would affect the program's conformance with this part" as a material modification. The vagueness of the definition makes it difficult to comment with specificity. The Associations are concerned that the vagueness of the proposed definition will result in stifling innovations in safety systems.

FRA should allow railroads to use different delivery methods and to incorporate new technology without treating those changes as material modifications. Likewise, FRA should limit material modifications to significant content-based changes that are likely to impact safety and not treat edits to test questions, structure, and timelines as material modifications.

**A Dispatcher's Date of Birth is Irrelevant for Purposes of Certification.**

Proposed § 245.207 would require railroads to issue a certificate in electronic or paper form to each person who becomes a certified dispatcher. Paragraph (a)(3) states that the certificate must contain certain information, including the year of birth of the certified dispatcher. The Associations understand that a similar requirement is included in §§ 240.223 and 242.207, but the birth date of the person provides no relevant data. It is not a reliable indicator of knowledge, skill, or experience. For instance, you could have a 50-year-old dispatcher with no prior experience and 30-year-old dispatcher with 10 years of experience. Nor is it required to identify or track the person, as there are other reliable means of identification that do not require sharing of birth date information. Additionally, railroads are concerned about adding the year of birth to the dispatcher certificate because it is considered personally identifying information (PII) that railroads seek to avoid releasing unnecessarily. The Associations recommend deleting the year of birth requirement, but if FRA feels that additional information is necessary for tracking and identification purposes, then the Associations would suggest using hire date rather than year of birth.

**Minor Errors in Compliance Testing Do Not Undermine the Legitimacy of the Testing.**

Proposed §245.303(i) states that a compliance test will not be considered a legitimate skills or knowledge test for revocation purposes if the test does not comply with 49 CFR 217.9. If finalized, FRA should adopt a more balanced, safety-reinforcing approach that factors in the

type of error and the harm to the dispatcher. For instance, if there was a minor procedural error that did not substantially harm the dispatcher, then the railroad is getting valid and helpful information from the test and there would be no safety basis to preclude a railroad from relying on the test.

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Thank you for your consideration of these comments.

Respectfully submitted,



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**Appendix A**

<b>Accidents Determined NOT Relevant.</b>	
<b>FRA's Table 2: Accidents Where Dispatcher May Have Contributed</b>	
<b>Incident</b>	<b>Comment/Basis for Determination</b>
168419	The dispatcher was not involved. Crew error only.
125837	Dispatcher granted permissions for crew to place switch in manual position and align it. No further dispatcher involvement. Crew handled switch.
0418SA024	Power switch involved not controlled by dispatcher.
0818FW018	Not caused by dispatcher who merely received crew report of smoke from fire on the second unit of the train.
19011	No dispatcher involvement.
NEC934319A	Dispatcher did not have prior information or warning <u>before</u> the train struck the vehicle. The call to the dispatcher came in at the same time as the collision was called in.
0420LA008	No dispatcher involvement.
YR2020119	No dispatcher involvement.
941900241	No dispatcher involvement.