

BEFORE THE  
FEDERAL RAILROAD ADMINISTRATION

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DOCKET NO. FRA-2022-0020:  
CERTIFICATION OF SIGNAL EMPLOYEES

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COMMENTS OF  
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION  
AND  
THE NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE ASSOCIATION

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The American Short Line and Regional Railroad Association (“ASLRRA”), on behalf itself and its member railroads, and the National Railroad Construction and Maintenance Association (“NRC”), on behalf of itself and its contractor members, (jointly, “the Associations”) submit the following comments in response to Federal Railroad Administration (“FRA”)’s Notice of Proposed Rulemaking (NPRM) in Docket No. FRA-2022-0020: *Certification of Signal Employees*.<sup>1</sup>

ASLRRA is a small non-profit trade association representing approximately 500 short line and regional railroad (“short line”) members and 500 railroad supply, contractor, and service company members in legislative and regulatory matters. Short lines operate about 50,000 miles of track, or approximately 30% of the national freight network, employing approximately 18,000 people, and connect manufacturers, businesses and farmers in rural communities and small towns to larger markets, urban centers, and ports. The majority of short line railroads are considered

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<sup>1</sup> 88 Fed. Reg. 35,632 (May 31, 2023). The Associations note that, although the Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions listed this rule, RIN 2130-AC92, as “Other Significant,” the NPRM was published as not a significant regulatory action “within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review.” *Id.* at 35,661. This complete change in administrative policy is not addressed in the NPRM or Docket.

small businesses.<sup>2</sup> The NRC is a non-profit trade association representing businesses from across the nation in the rail construction and maintenance field. The NRC's nearly 200 contractor member companies range in size from small family businesses to the largest companies in the industry. NRC members perform work for transit, commuter, intercity passenger, industrial, and freight rail. The Associations incorporate by reference the comments filed jointly in this Docket by ASLRRRA and the Association of American Railroads ("AAR").

FRA proposes to require railroads to develop programs for the certification of signal employees and to submit those written certification programs to FRA for approval prior to implementation. Under this proposed rule, railroads would be required to verify and document that each signal employee has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related signal employee duties mandated by Federal laws and regulations, prior to certification. In addition, railroads would be required to have formal processes for revoking certification (either temporarily or permanently) for signal employees who violate specified minimum requirements.<sup>3</sup> This NPRM proposes a significant change to existing railroad operations, as there are currently no FRA regulations mandating that railroads develop and execute a certification program for signal employees. Additionally, FRA fails to adhere to the requirements of the Regulatory Flexibility Act and places an undue burden on small business railroads in requiring them to certify contract employees.

#### The NPRM Fails to Adhere to the Regulatory Flexibility Act

The NPRM fails to assess how such a transformative change, the creation of a new and very costly program for all railroads, would significantly impact a substantial number of short

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<sup>2</sup> See 13 C.F.R. § 121.201 and North American Industry Classification System code 482112, "Short Line Railroad."

<sup>3</sup> 88 Fed. Reg. at 35,632 (hereinafter, "NPRM").

line railroads in accordance with the Regulatory Flexibility Act (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) – and it also declines to provide regulatory relief or consider less burdensome alternatives for small businesses.<sup>4</sup>

In the NPRM, FRA declines to determine whether the proposed rule would have a significant impact on a substantial number of small entities.<sup>5</sup> The Associations emphatically state that the NPRM would have a significant impact on a substantial number of small entities – not only is this a proposal for a comprehensive new program, pursuant to proposed § 246.3, the rule would apply to all railroads, except those that do not have a signal system, those that operate on track that is not part of the general railroad system of transportation, or touristic, scenic, historic or excursion operations. FRA estimates approximately 490 Class III railroads would be impacted by the proposed rule, which would absolutely constitute a substantial number of small entities by both the FRA and the Small Business Administration.<sup>6</sup> Further, while the NPRM excludes Class III railroads from annual oversight responsibilities, these small businesses are nevertheless required to comply with all the substantive and costly requirements of the program.<sup>7</sup>

Additionally, FRA states that the baseline alternative (no action) would “not ensure that signal employees are being properly trained.”<sup>8</sup> This statement fails to recognize existing FRA regulations at 49 C.F.R. Part 243, *Training, Qualification, and Oversight for Safety-Related Railroad Employees*. It is incomprehensible for FRA to claim that, absent a rule on certification, that the agency cannot ensure that signal employees are being properly trained when the agency already has ***an entire rule dedicated to training***. Further, FRA does not describe at all how the

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<sup>4</sup> 5 U.S.C. 601 et seq.

<sup>5</sup> NPRM at 35,662.

<sup>6</sup> 13 C.F.R. § 121.201 and North American Industry Classification System code 482112, “Short Line Railroad” and Appendix C to 49 C.F.R. Part 209.

<sup>7</sup> See the comments from AAR and ASLRRRA describing the upside-down cost-benefit analysis in this rulemaking.

<sup>8</sup> NPRM at 35,663.

other alternative considered, “certifying only the training program,” would be any different than the current requirements in Part 243.

#### Small Business Railroads Should Not Certify Contractors

In the NPRM, FRA states that railroads should be responsible for the certification of their contractors because the railroad “are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations.”<sup>9</sup> The Associations point out the difference between the actions of an individual performing functions required by the federal safety regulations and the determination of whether an individual has the “requisite knowledge, skills, safety record, and abilities” to perform a particular task. While many of FRA’s regulations ultimately hold a railroad responsible for the actions of an individual performing tasks in accordance with the railroad safety regulations, no other part requires the railroad to determine whether a non-employee has stated qualifications to perform the task – this function is left to the discretion of his/her employer.<sup>10</sup>

Many short line railroads use contractors extensively for signal work. 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 manage signal maintenance. Often, a contractor will provide signal maintenance 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. Further, there is no discussion or guidance provided on if or how a small business railroad would be required to coordinate with other railroads if a particular individual is

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<sup>9</sup> Id. at 35,637.

<sup>10</sup> E.g., 49 C.F.R. Part 243 places the responsibility of having and implementing a program on the employer, specifically mentioning that the employer can be a “contractor of a railroad.”

decertified on its railroad, but not on the dozens of other railroads where he or she also works because his or her employer performs contract signal maintenance for those railroads.

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 they are expected to have a high-level of knowledge pertaining to FRA's signal and grade crossing signal regulations. Contractors also have an expertise in the equipment that they install and maintain, so they are well-situated to develop a training program that addresses particular safety issues that may arise in the course of their work.

Without adherence to the RFA, and without considering the illogical outcomes of requiring small business railroads to certify the employees of other companies, in conjunction with all of the other shortcomings raised in the joint comments submitted by ASLRRA and AAR in this proceeding, the Associations urge FRA to abandon this effort.

Respectfully submitted,



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