



December 21, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Amit Bose
Administrator, Federal Railroad Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590
Electronic Address: <http://www.regulations.gov> (Docket No. FRA-2021-0032; RIN 2130–AC88)

Re: Comments on FRA’s Proposed Train Crew Size Safety Requirements Rule

Dear Administrator Bose:

The U.S. Small Business Administration (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Railroad Administration’s (FRA) *Proposed Train Crew Size Safety Requirements* that was published in the Federal Register on July 28, 2022.¹ The proposed rule would establish minimum requirements for the size of train crews depending on the type of operation, including a minimum requirement of two crewmembers (i.e., a certified locomotive engineer and a certified conductor) for all railroad operations, with exceptions for those operations that do not pose significant safety risks to railroad employees, the public, or the environment. The proposed rule would also establish minimum requirements for the location of crewmembers on a moving train and permit special approval procedures to allow railroads to petition FRA to continue “legacy operations” with one-person train crews and allow railroads to petition FRA for approval to “initiate a new train operation” with fewer than two crewmembers.² The proposed rule has a long procedural history going back several years where the rule has been proposed, withdrawn, and now re-proposed following judicial remand.³

¹ 87 Fed. Reg. 45564 (July 28, 2022). (See, [2022-15540.pdf \(govinfo.gov\)](#) and [2022-23418.pdf \(govinfo.gov\)](#) and correction at [2022-24117.pdf \(govinfo.gov\)](#)).

² 87 Fed. Reg. 45564.

³ 87 Fed. Reg. 45568.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁶ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁷

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁸

B. Background

In response to the publication of FRA's proposed rule, Advocacy hosted a small business regulatory roundtable on December 12, 2022, to discuss the proposed rule and obtain small business input on it. Staff from FRA, American Short Line and Regional Railroad Association (ASLRRRA), other trade associations, and a number of small railroads from the regulated industry participated in the roundtable. Both FRA and ASLRRRA provided background briefings on the proposed rule. In addition, Advocacy attended the FRA's public hearing on the proposed rule on December 14, 2022, to better understand small business concerns with the proposed rule. The following comments are focused primarily on FRA's Initial Regulatory Flexibility Analysis (IRFA)⁹ for the proposed rule and are reflective of small business concerns raised during the roundtable and public hearing.

⁴ 5 U.S.C. §601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁶ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁷ *Id.*

⁸ *Id.*

⁹ 87 Fed. Reg. 45606.

According to information presented by ASLRRA at the roundtable and public hearing, there are some 696 short line freight railroads (Class II and III) in the United States, and all meet the SBA definition of a small business.¹⁰ On average, these short line railroads employ fewer than 30 people, run an average of 79 miles, and have \$7.7 million or less in revenue. As such, they differ dramatically – both operationally and financially – from the seven large Class I railroads that operate in the U.S. There are currently no specific FRA regulations on crew size, but all Class I and many Class II and III railroads operate with a two-person crew. However, many short line railroads operate with one person in the locomotive cab and another in a truck or utility vehicle performing switching and other business and operational tasks, and who may be assigned to multiple trains. FRA has repeatedly acknowledged that it lacks safety data to determine whether one-person crews are less safe than multi-person crews.¹¹ FRA’s proposed rule would require a minimum two-person crew for most railroad operations with both crewmembers located on the train. While there are several exceptions for small railroads, these are limited in scope. FRA also proposes to allow petitions for special approvals for one-person crew legacy operations (existing for more than two years) or to initiate a new train operation with fewer than two crewmembers, although these petitions require the submission of detailed risk assessments and analyses that a number of small businesses at the roundtable and public hearing said cannot in reality ever be satisfied.

II. Advocacy’s Small Business Concerns

A. FRA appears to have significantly understated the cost and number of small businesses that would be impacted by the proposed rule.

FRA states in its IRFA that there are only seven short line (Class III) railroads that currently operate with a one-person in the locomotive crew and that these railroads would be eligible to apply for a special approval to operate with fewer than two crewmembers under either the legacy train operations provision or the special approval to initiate new train operations with fewer than two crewmembers provision.¹² FRA estimates that these special approval petitions would take 40 hours to complete at a cost \$27,657 per petition for legacy operations and 40 hours to complete at a cost of \$5,531 per petition to initiate new one-crew operations. However, according to a new survey of ASLRRA members presented at the roundtable and public hearing, these estimates appear to significantly understate the number of affected small entities (and therefore the total cost of the proposed rule) by several orders of magnitude.

ASLRRA’s survey data indicates that there are actually some 420 railroads operating with one crew in the locomotive train operations. If several hundred petitions for special approval would have to be filed, this could dramatically increase the cost to both small entities and the agency to process these petitions. Further, ASLRRA reports that a significant number of small businesses

¹⁰ For RFA purposed, FRA defines a small railroad as a Class III railroad (see, 87 Fed. Reg. 45606).

¹¹ See discussion at 87 Fed. Reg. 45570 - 45572.

¹² 87 Fed. Reg. 45607.

would be ineligible to petition for special approvals because they haul hazardous materials above designated threshold levels.

A number of small businesses who spoke at the roundtable and public hearing stated that they have been conducting one-person crew operations for long periods of time with few if any safety incidents. They said that small railroad operate at very small margins and that any increase in costs could lead customers to switch to trucks (i.e., modal shift) that are less safe. They also stated that technological innovations such as Positive Train Control have greatly enhanced safety and that multiple crew members in the locomotive can be distracting (such as non-operational conversation).

These small business representatives said that the risk analyses and assessments required by the proposed petition process would be challenging and they questioned whether any petitions for special approval would ever qualify. Several of these speakers noted that FRA's cost estimates of the rule do not include many costs that would be incurred if the rule went into effect, such as the cost of recruiting, hiring, and training new employees in order to meet the crew size requirements, the labor costs of additional crew members, or the various costs related to operational changes (e.g., deploying alerters, radios, dispatchers, etc.) that would be needed to qualify for an exception. Further, according to affected small businesses, short line railroad operations generate lower revenues and margins relative to Class I railroads, and the rates they can charge are often contractually set with their customers, making additional compliance costs very difficult to absorb.

B. FRA should revise and republish its Initial Regulatory Flexibility Analysis (or a Supplemental IRFA), including a further consideration of significant regulatory alternatives, for additional public comment before proceeding.

Based on information provided at the roundtable and public hearing, it appears that FRA has significantly understated the cost to and the number of small businesses that would be impacted by the proposed rule. For this reason, Advocacy recommends that FRA revise and republish for additional public comment its IRFA (or a Supplemental IRFA) before proceeding with this rulemaking.

Further, the RFA requires that federal agencies consider significant regulatory alternatives to the proposed rule that achieve its stated objectives, are feasible, and minimize the costs to small entities.¹³ These regulatory alternatives might include establishing different compliance and reporting requirements or timetables for small entities, the clarification, consolidation, or simplification of compliance and reporting requirements for small entities, the use of performance rather than design standards, or an exemption from all or part of the rule for small entities.¹⁴ It was very clear from the roundtable and public hearing that large Class I railroads are very different – both operationally and financially – from their Class II and III counterparts. While FRA does consider several regulatory alternatives in the proposed rule, the alternatives do

¹³ 5 USC 603(c)

¹⁴ Id.

not distinguish between large and small railroads or recognize the diverse and distinctive environments that short line railroads face both operationally and financially. Some additional alternatives Advocacy recommends FRA consider would be to provide more clarity and a streamlined (i.e., less burdensome) petition process with more certain positive regulatory outcomes, providing small railroads with more time to comply (no compliance date is provided) to allow for proper planning, operational changes, and hiring/training of new staff (if they can be found), a performance-based standard focused on clearly established safety metrics (rather than the proposed special approval petition) that allows presumptive approvals based on risk, or exempting some or all short line (Class II and III) railroads from the rule.

III. Conclusion

Because the FRA appears to have understated both the number of small entities affected by the rule and the economic impact on small entities, Advocacy recommends that FRA revise and republish its IRFA. The revised IRFA should fully count the number of small entities that would be subject to the proposed rule and the economic impact it would have on them, and should consider alternative approaches that would achieve the rule's statutory objectives while minimizing the costs to small entities.

Thank you for the opportunity to comment on FRA's *Proposed Train Crew Size Safety Requirements*. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. To that end, Advocacy hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov if you have any questions or require additional information.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Bruce E. Lundegren
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator
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