

DEPARTMENT OF TRANSPORTATION  
FEDERAL RAILROAD ADMINISTRATION

---

DOCKET NO. FRA–2015-0122  
FATIGUE RISK MANAGEMENT PROGRAMS (FRMP) FOR CERTAIN PASSENGER AND FREIGHT  
RAILROADS

---

COMMENTS OF  
THE ASSOCIATION OF AMERICAN RAILROADS  
AND THE  
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

---

The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”), on behalf of themselves and their member railroads, submit the following comments in response to the Federal Railroad Administration’s December 22, 2020, notice of proposed rulemaking to revise 49 C.F.R. Parts 270 and 271.<sup>1</sup> AAR and ASLRRA (jointly, “the railroads”) support FRA’s action to implement the fatigue management plan requirement at Section 103(a) of the Rail Safety Improvement Act of 2008 (Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (“RSIA”) (codified at 49 U.S.C. § 20156(f)). The NPRM proposals are consistent with the rule text developed by railroad industry stakeholders during

---

<sup>1</sup> AAR is a trade association whose membership includes freight railroads that operate approximately 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 interests of approximately 500 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate 50,000 miles of track in 49 states, touching in origination or termination one out of every four cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network. 85 Fed. Reg. 83,484 (Dec. 22, 2020).

FRA’s Railroad Safety Advisory Committee (Fatigue Management Plans Working Group) (“Working Group”) process, and for which consensus was initially reached in June 2013.<sup>2</sup>

The NPRM acknowledges the variety of fatigue-related factors Congress specified railroads must consider in developing their individual fatigue management plans, as well as the differing conditions and circumstances on different parts of the railroad system.<sup>3</sup> The proposed rule text will permit railroads to develop fatigue management plans appropriate to their unique operations and systems. This customized approach is important given the significant differences in operations between passenger and freight railroads, and between railroads of varying sizes and in different geographic areas and with different operating models and scheduling practices. The NPRM also leaves sufficient opportunity for railroads to incorporate future innovations in fatigue mitigation measures that may increase safety in decades to come.

Comments on four specific aspects of the NPRM proposals follow below. At the outset, however, we supplement the record as to FRA’s unsupported statement that “if railroads continue to address their fatigue risks as they have in the past, FRA expects that safety would continue to be negatively impacted because the fatigue risks are not adequately addressed currently.”<sup>4</sup> Over the last 40 years, many operating, technological, and other advancements in the railroad industry have led to unprecedented safety improvements. Such measures include advances in fatigue-related awareness, training, and mitigation strategies, updates to scheduling practices, implementation of advanced systems to provide employees information

---

<sup>2</sup> 85 Fed. Reg. at 83,487.

<sup>3</sup> 49 U.S.C. § 20156(f).

<sup>4</sup> 85 Fed. Reg. at 83,503.

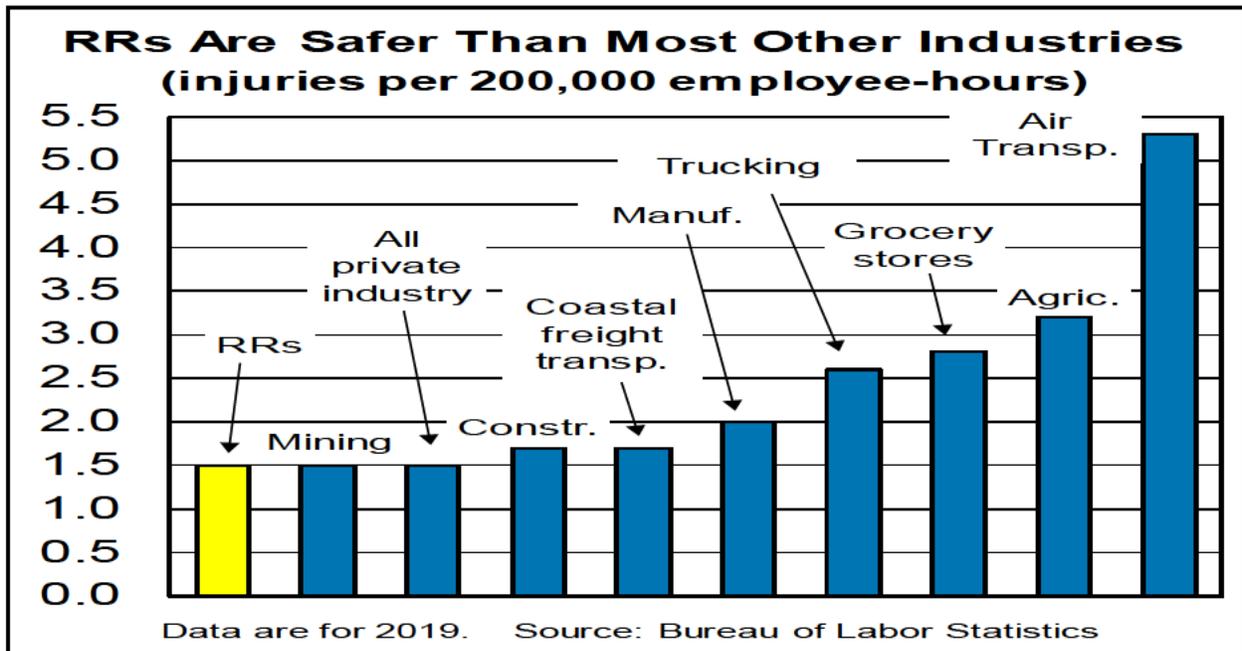
regarding next on-duty times, and changes to the federal hours-of-service laws. Other improvements include strengthened employee drug and alcohol testing requirements, technological advancements in track, equipment, and signal inspection and maintenance practices; the implementation of Positive Train Control systems; and a multitude of other holistic railroad safety improvements. Since 1981, FRA safety data reflects there has been an over 80% decrease in the rate of on-duty railroad employee injuries and an over 65% reduction in the rate of reportable train accidents, notwithstanding that railroads operated approximately the same number of train miles in 2019 (the last full year for which FRA data is available) as in 1981.<sup>5</sup>

Further, for the first eleven months of 2020 (the months in 2020 for which FRA safety data is presently available), the railroad industry is on pace to have the lowest railroad employee casualty rate on record.<sup>6</sup> The railroad industry employee casualty rates are significantly better than those in other industries: railroads are safer places to work than trucking, aviation, agriculture, or even grocery stores, as reflected in the chart below.

---

<sup>5</sup> See <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TenYearAccidentIncidentOverview.aspx>.

<sup>6</sup> *Id.*



This impressive safety record is due, in part, to tremendous efforts by railroads, their employees, DOT, and other industry stakeholders. The goal, however, is zero casualties and accidents. And for that reason, the railroads are invested in managing and mitigating risks related to fatigue.<sup>7</sup>

<sup>7</sup> In a final rule FRA should not presume the existence of fatigue for all safety-related employees and in referring to railroad safety incidents. For example, FRA’s proposed rule text for § 271.603(a) discusses the aim to reduce the risk of accidents where fatigue “is a contributing factor” (emphasis added). See also proposed §§ 270.403(b)-(c), 270.405(c), and 271.607(c). Not all safety-related railroad employees experience fatigue, and only a fraction of safety-related incidents may involve fatigue as a potential contributing factor.

**1. More Time is Required for Development and Submission of Fatigue Management Plans.**

FRA proposes to set a due date for submission of fatigue management plans six months after publication of a final rule.<sup>8</sup> By comparison, FRA’s Risk Reduction Program (RRP) final rule (into which, in part, the rule proposed here will ultimately be incorporated at existing 49 C.F.R. Part 271) provides freight railroads eighteen months to develop and submit an RRP plan to FRA.<sup>9</sup> The railroads urge FRA take a consistent approach in this rulemaking and allow railroads the necessary time to develop thoughtful and comprehensive fatigue management plans. Short line railroads in particular may not have the resources or ready access to expertise to draft the plans.

The study and management of fatigue-related issues is a vast subject area, involving the study of “interactions among human physiology, work, and rest times”.<sup>10</sup> The NPRM proposes that fatigue plans include a litany of complex considerations, including scientific fatigue studies and literature, circadian rhythm information, and sleep disorders, among others. While railroads already evaluate and include some of these elements in fatigue-related actions today, developing and implementing a plan that would satisfy the significant administrative burdens and the complexity that will be required by a final rule in this proceeding will be a considerable task. The development of fatigue risk analyses and mitigation measures across varying parts of

---

<sup>8</sup> There appears to be an error in the proposed rule text in §§ 270.409(e)(3) and 271.609(e)(2). Those sections specify fatigue plans should be submitted to FRA by August 19, 2021. The rest of the NPRM indicates that FRA has proposed the submission deadline is six months after publication of a final rule.

<sup>9</sup> 85 Fed. Reg. 9,262 (Feb. 18, 2020). See 49 C.F.R. § 271.301.

<sup>10</sup> 85 Fed. Reg. at 83,492.

a railroad's system, involving different categories of railroad employees with varying work schedules, is a sprawling undertaking.

More specifically, fatigue-related risk considerations and mitigation strategies may be very different for a railroad's transportation employees than for its signal or other craft employees, due to significant differences in work schedules, work environments, and other factors. Differing circumstances across the various categories of safety-related railroad employees included in this rulemaking may be studied and accounted for by railroads as they develop fatigue-related strategies. For example, a railroad may utilize multiple methods to assess potential fatigue risk associated with employee work schedules and potential schedule changes. One method might involve use of a bio-mathematical model to evaluate work schedules that are relatively less predictable in nature, while a separate method of evaluating fatigue risks may involve use of a question series (or one of various other methods) when evaluating more predictable employee work schedules.

In sum, the requirements proposed in this NPRM are potentially far more complex and labor intensive than those required in FRA's 2020 RRP final rule. To ensure that the fatigue management plans submitted are well-researched, thorough, and thoughtfully designed, FRA should amend the final rule in this proceeding to allow railroads at least eighteen months to develop and submit the plans to FRA.

## 2. Workers Not Employed by Railroad Carriers Should Not Be Included.

FRA has proposed that employees of railroad contractors be included in railroad fatigue management plans. (See proposed §§ 270.401 and 271.601 definitions of covered safety-related railroad employees: “an employee of any person who utilizes or performs significant railroad safety-related services, as described in § 271.205(a)(3), if that employee performs a function identified in paragraphs (1) through (5) of this definition”). This proposal goes beyond the direction of Congress, which generally limited its definition of covered “safety-related railroad employees” to employees of railroad carriers. See 49 U.S.C. §§ 20102(3)-(4) and 20156.

The 49 U.S.C. § 20102(3) definition of a “railroad carrier” generally means “a person providing railroad transportation” and does not reference contractors who might perform services for railroads. Further, neither the fatigue management provision in RSIA, nor 49 U.S.C. § 20156 in its entirety, mention employees of contractors who perform services for railroads. Congress expressly addressed in other RSIA safety mandates whether employees of railroad contractors were to be included in subsequent FRA rulemakings.<sup>11</sup> Here, however, Congress made no such reference to contractors in § 20156.<sup>12</sup> Section 20156(a)(1) mandates only that each of the following types of railroads would have to comply with this proposed regulation: 1) Class I railroads; 2) freight railroads with inadequate safety performance; and 3) railroad carriers that provide intercity rail passenger or commuter rail passenger transportation.

---

<sup>11</sup> See, e.g., Sections 401 (codified at 49 U.S.C § 20162) & 412 of RSIA, addressing training standards and drug and alcohol testing for maintenance of way employees, respectively.

<sup>12</sup> While early fatigue-related proposals mentioned employees of contractors subject to hours-of-service laws, Congress did not include such in RSIA as enacted. See H.R. Rep. 110-336 (Sept. 19, 2007).

Correspondingly, in the NPRM, FRA only describes those three categories of railroads as being within the scope of the statute.<sup>13</sup>

As both a legal and practical matter, the railroads are not in a position to study and evaluate medical and health-related conditions and conduct required fatigue risk analyses for persons that are not employed by railroads. Railroads also do not control the work schedules, time off duty, or other similar factors for persons not in their employ. The railroads would be unable to implement mandatory fatigue mitigation strategies for persons who do not work for them. Railroads also generally do not have the opportunity to consult with, educate, or otherwise make demands of the employees of other non-railroad companies that do not fall within the scope of this NPRM. Short line railroads in particular do not have the resources to manage contractor programs relating to fatigue mitigation. FRA should delete the portion of the definition of a “safety-related railroad employee” that attempts to sweep in persons that are not employed by railroads.

### **3. FRA’s Statement Regarding Widespread Napping Policies.**

FRA states that “a large number of Class I railroads already have policies supporting napping.”<sup>14</sup> Several Class I railroads do not presently have policies allowing employees to nap while on-duty. RSIA was enacted in 2008, and railroad alertness strategies have evolved. While some railroads do retain policies permitting napping while on duty, individual railroads will

---

<sup>13</sup> 85 Fed. Reg. at 83,485.

<sup>14</sup> 85 Fed. Reg. at 83,501.

address the various alertness strategies they have adopted to mitigate employee fatigue in their required submissions to FRA.

#### **4. More Time Is Required to Develop and Conduct Fatigue Plans and Training.**

FRA asserts “each Class I railroad will write one FRMP plan, which will require 90 labor hours of consultation and preparation.”<sup>15</sup> FRA has significantly underestimated the time required to develop and implement fatigue plans and associated employee training.

As explained above, development of a fatigue management plan addressing the multitude of safety-related railroad employees working across an entire system, and the variety of fatigue-related factors specified by RSIA (including consultation and evaluation of relevant scientific studies), is a huge effort. It will easily entail thousands of hours of development time. Furthermore, FRA has estimated a range of only 8 to 32 hours of time for freight railroads to develop fatigue management training programs for their employees.<sup>16</sup> This is an unrealistic estimate for the development of training programs that are intended to cover fatigue education and strategies across multiple crafts. If the training programs are to be worthwhile, the development process will likely entail at least hundreds of hours of a railroad’s time. With respect to the fatigue training strategy costs, FRA should revise its estimate to include costs

---

<sup>15</sup> See FRA’s Fatigue Risk Management Programs NPRM Regulatory Impact Analysis (RIA), Document No. FRA-2015-0122-0002; available online at [www.regulations.gov](http://www.regulations.gov). See section IV.1.A. of the RIA.

<sup>16</sup> *Id.* at section IV.2.A.

associated with recordkeeping, indoctrinating trainers, and approximately 800 labor hours for training development per railroad.<sup>17</sup>

The railroads support FRA's action to implement the fatigue management plan requirement and appreciate the agency's consideration of these comments.

Respectfully submitted,



Kathryn D. Kirmayer  
General Counsel  
Association of American Railroads  
425 3<sup>rd</sup> Street, SW, Suite 1000  
Washington, DC 20024  
(202) 639-2100



Sarah Grimmer Yurasko  
General Counsel  
American Short Line and Regional Railroad  
Association  
50 F. Street, NW, Suite 500  
Washington, DC 20001-1597  
(202) 585-3448

February 22, 2021

---

<sup>17</sup> The eight hours FRA estimated to develop fatigue training programs is based on the agency's analysis for smaller entities that will customize model training programs under 49 C.F.R. Part 243. However, the proposal in this rulemaking is more comparable to that required to modify a Class I railroad training program, which FRA estimated under Part 243 as requiring 432 hours of labor (and which the railroads estimated at 800 hours).