

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

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Submitted via regulations.gov

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

**Re: Comment On Proposed Rules Requiring The Certification
Of Dispatchers (Docket Number FRA-2022-0019; RIN
2130-AC91) And Signal Employees (Docket Number FRA-
2022-0020; RIN 2130-AC92)**

Dear Administrator Bose:

Washington Legal Foundation submits this comment responding to the Federal Railroad Administration's Proposed Rules about the certification of dispatchers and signal employees.¹ This comment focuses on why proper cost-benefit analysis shows that the Proposed Rules should be withdrawn. To begin, the FRA is continuing a concerning trend of proposing regulations with net costs. Second, the FRA is not legally required to promulgate the Proposed Rules. Third, the FRA concedes that the Proposed Rules' costs exceed their benefits. Fourth, the benefits are far less substantial than presented. Finally, the costs are higher than the conservative estimates used. Therefore, the FRA should withdraw the Proposed Rules.

I. WLF's Interests

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF's Litigation Division submits amicus briefs and regulatory comments encouraging proper use of

¹ See Certification of Dispatchers, 88 Fed. Reg. 35,574 (May 31, 2023); Certification of Signal Employees, 88 Fed. Reg. 35,632 (May 31, 2023).

cost-benefit analysis.² Similarly, WLF's Legal Studies Division publishes papers by outside experts on cost-benefit analysis.³

II. The Proposed Rules Continue A Concerning Trend Of The FRA Proposing Regulations With Significant Net Costs.

The Proposed Rules only continue this year's troubling trend of notices of proposed rulemaking with significant net costs. In March, the FRA revived an unpromulgated proposed rule from 2010, which would require that railroads provide each train crew member with an emergency escape breathing apparatus (EEBA) for use if a toxic substance is released.⁴ The adjusted cost-benefit analysis shows that, depending on the adopted action, the costs outweigh the benefits between 1,676:1 and 526:1.⁵ The likely reason it moved forward now is because the current administration does whatever unions tell it to do, even if it means implementing a rule when the realized benefits are exponentially smaller than those estimated a decade earlier.

During President Obama's Administration, the FRA had exercised extreme caution with the original proposed rule. But now, the FRA takes no issue with rushing to pass something with an enormous net cost. The East Palestine, Ohio derailment earlier this year has allowed the FRA to propose regulations that cater to railroad unions at the expense of the public. The FRA can get back on track and halt its irresponsible trend of issuing detrimental regulations. That should start here by withdrawing the Proposed Rules.

² See, e.g., *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018); WLF Comment, *In re Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking* (July 20, 2018).

³ See, e.g., Crain P. Wilson & Robert A. Lawton, *Entergy Corp. v. Riverkeeper: What Impact on the Future of Cost-Benefit in Rulemaking?*, WLF LEGAL BACKGROUNDER (June 19, 2019).

⁴ See *Emergency Escape Breathing Apparatus Standards*, 75 Fed. Reg. 61,386, 61,386 (proposed Oct. 5, 2010) (never codified); *Emergency Escape Breathing Apparatus Standards*, 88 Fed. Reg. 17,302, 17,302 (proposed Mar. 22, 2023) (to be codified at 49 C.F.R. pt. 227).

⁵ See *Emergency Escape Breathing Apparatus Standards*, 75 Fed. Reg. at 61,398; *Emergency Escape Breathing Apparatus Standards*, 88 Fed. Reg. at 17,304.

III. Absent A Statutory Mandate, The FRA Should Exercise Its Discretion By Not Promulgating Regulations Unless They Yield Net Benefits.

Sometimes Congress forces agencies to promulgate rules with net costs.⁶ Even then, however, agencies must do everything possible to minimize the costs. The 2010 Proposed Rule about EEBA provides an excellent example. The proposal's cost-benefit analysis suggested that the costs outweighed the benefits either 5.47:1 or 6.07:1.⁷ Between 2010 and 2016, the FRA proposed a regulation, took comments, and carefully weighed the issue. In December 2016, the FRA ultimately suggested railroads set up their own EEBA protocols,⁸ reluctant to pose such a massive net cost on the industry. The FRA showed appropriate caution before issuing regulations that had significant net costs, even with an arguable mandate to do so.

Meanwhile, no statute mandates the certification of dispatchers and signal employees. The Rail Safety Improvement Act of 2008 requires the Secretary of Transportation to evaluate whether the certification of various crafts or classes of employees is crucial to safer railroads.⁹ This does not mean that the Secretary should promulgate rules requiring such certification if the rules' costs exceed their benefits.

Congress simply required that the FRA include railway safety in its cost-benefit analyses. It did not tell the FRA to abandon the practice of issuing regulations only when the benefits exceed the costs. Yet after considering only the benefits—and not the net costs—the FRA decided “it is necessary to require the certification of” dispatchers and signal employees “to improve railroad safety.”¹⁰ It is rarely reasonable to regulate at a disproportionate expense only

⁶ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 2 (2016), <https://tinyurl.com/247mkcan> (describing trends of the net benefits of major Federal regulations).

⁷ See Emergency Escape Breathing Apparatus Standards, 75 Fed. Reg. at 61,398.

⁸ See, e.g., Emergency Escape Breathing Apparatus Standards, 88 Fed. Reg. at 17,303.

⁹ See Certification of Dispatchers, 88 Fed. Reg. 35,574, 35,576 (May 31, 2023).

¹⁰ *Id.*

because such a rule would “reduce the number and rate of accidents and incidents or . . . improve railroad safety.”¹¹ For example, one way to “improve railroad safety” is to set a nationwide railroad speed limit of two miles per hour. Although it would increase rail safety, such a regulation would appropriately cause public outrage given the resulting economic harm. Thus, the FRA must properly weigh the Proposed Rules’ costs and benefits. Doing so shows that the FRA should withdraw the Proposed Rules.

IV. The FRA’s Own Cost-Benefit Analyses And Regulatory Impact Analyses Show That The Proposed Rules Should Be Withdrawn.

Since the 1980s, the Office of Management and Budget and executive orders have emphasized the need to promulgate net beneficial regulations.¹² This is because “[t]he only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs.”¹³ Thus, cost-benefit analysis can be used to “redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.”¹⁴

Presidents have urged agencies to enact regulations that “maximize net benefits” and “impose the least burden on society.”¹⁵ Current executive action still supports Executive Orders 12,866 and 13,563,¹⁶ both of which emphasize

¹¹ *Id.*

¹² See Paul Noe, *Smarter Regulation: Doing More Good Than Harm*, PAPNEWS (June 12, 2018), <https://tinyurl.com/3pawydvs>.

¹³ OFF. OF INFO. & REGUL. AFFAIRS, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997), <https://tinyurl.com/zfnfsv27>.

¹⁴ *Id.*

¹⁵ See Maeve P. Carey, CONG. RSCH. SERV., IF 12058, COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING 2 (2022), <https://tinyurl.com/37k5u9by>.

¹⁶ See Exec. Order No. 14,094, 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023), <https://tinyurl.com/2dh22p5y>.

maximizing benefits and promulgating a rule “only upon a reasoned determination that the benefits of the intended regulation justify its costs.”¹⁷

Unfortunately, these Proposed Rules show that the FRA has strayed from consistent bipartisan directions to regulate only if the benefits justify the costs. The costs of certifying dispatchers outweigh the quantitative benefits between 6.80:1 and 6.69:1.¹⁸ Similarly, the costs of certifying signal employees outweigh the quantitative benefits between 2.84:1 and 2.81:1.¹⁹

True, regulations can have non-quantifiable benefits. But the Proposed Rules do not adequately explain why the non-quantifiable benefits are significant enough to justify their costs. When non-quantifiable benefits are important factors in issuing a regulation, the regulatory impact analysis should include “a ‘threshold’ analysis to evaluate their significance.”²⁰ This type of analysis “answers the question, ‘How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?’”²¹ This analysis must also be accompanied, if possible, by a description of “which non-quantified effects are most important and why.”²²

Here, the FRA supplements its quantifiable benefits by listing several non-quantifiable benefits, including potentially avoiding property damage, environmental destruction, and injuries caused by accidents.²³ But the FRA fails to include a “threshold” analysis explaining how these benefits will cause

¹⁷ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993), <https://tinyurl.com/ysub22sv>.

¹⁸ See Certification of Dispatchers, 88 Fed. Reg. 35,574, 35,575–76 (May 31, 2023).

¹⁹ See Certification of Signal Employees, 88 Fed. Reg. 35,632, 35,633–34 (May 31, 2023).

²⁰ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 2 (2003), <https://tinyurl.com/26hju4pt>. This is the version of Circular A-4 currently in effect.

²¹ *Id.*

²² See *id.*

²³ See Certification of Dispatchers, 88 Fed. Reg. at 35,601; Certification of Signal Employees, 88 Fed. Reg. at 35,634.

the regulation to yield a net benefit. For the Proposed Rule covering signal employees, the FRA did not estimate the likelihood of a high impact event resulting from signal employee error and did not explain the omission.²⁴ Without a “reasoned determination that the benefits of the intended regulation justify its costs,”²⁵ the FRA’s actions are arbitrary and capricious.

Even more problematic is the FRA’s lack of consideration of the costs and benefits of the Proposed Rules’ alternatives. Executive Order 12,866 requires that “[i]n deciding whether and how to regulate, agencies should assess *all* costs and benefits of available regulatory alternatives, including the alternative of not regulating.”²⁶

Agencies must follow executive orders; not doing so subjects regulatory action to judicial review, especially when such regulations affect the rights of private parties.²⁷ In the signal employee NPRM, the FRA mentions only one downside to not regulating—a safety risk caused by improperly trained signal employees.²⁸ There is no discussion of the benefits that would flow from allowing railroads to choose how to spend money to increase rail safety.

As for certifying training programs—not individual signal employees—the FRA discusses only one pro and one con. This alternative “would reduce the burden on industry but would not fully address all safety concerns posed by poorly trained signal employees.”²⁹ There is no discussion, however, of why certifying training programs could not achieve the same safety results as certifying individual employees. Although the agency asserts that a railroad

²⁴ See Certification of Signal Employees, 88 Fed. Reg. at 35,634.

²⁵ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993), <https://tinyurl.com/ysub22sv>.

²⁶ *Id.* at 51,735 (emphasis added).

²⁷ See Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L. REV. 285, 351–53, <https://tinyurl.com/mve2723e>.

²⁸ See FED. R.R. ADMIN., OFF. OF RSCH., DATA & INNOVATION, CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS 49–50 (2023) [CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS].

²⁹ See *id.*

without individual certification “would be likely to focus more on the entire program instead of individual signal employees,” it provides no concrete reasons for why a railroad’s focus on the program would not adequately address safety concerns.³⁰ This is a fatal flaw.

The dispatcher NPRM gives essentially the same superficial options and explanations.³¹ This does not comply with Executive Order 12,866, under which the FRA should explain *all* costs and benefits for these alternative options.

V. The Benefits Of The Proposed Rules Are Neither Convincing Nor Accurate.

The analysis above understates how bad the Proposed Rules are because the Proposed Rules’ purported benefits are minimal at best. Railroads are already incentivized to avoid costly accidents, as the Proposed Rules show. Thus, railroads reduce the risk of accidents by sufficiently screening and training their employees. The benefits listed in the Proposed Rules are already captured by many current industry initiatives, suggesting that the proposals’ net costs are even higher than they first appear.

One railroad safety concern is hazardous chemical spills. But trucking is responsible for a disproportionately higher percentage of hazardous material spills, injuries, and evacuations.³² Although trucks currently haul about twice the amount of hazardous materials that trains do, trucks were responsible for 22,372 hazardous material incidents in 2021, while trains accounted for only 378.³³ The ratio is not much better for fatalities, with trucking causing over 16 times more deaths than trains over the last half century: 380 for trucks and 23

³⁰ *See id.*

³¹ *See* FED. R.R. ADMIN., OFF. OF RSCH., DATA & INNOVATION, CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS 42 (2023) [CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS].

³² *See* Michael Gorman, *Train derailments get more headlines, but truck crashes involving hazardous chemicals are more frequent and deadly in US*, THE CONVERSATION (Feb. 21, 2023, 8:24 AM), <https://tinyurl.com/4zedktsn>.

³³ *See id.*

for trains.³⁴ Trucks have also caused almost three times more property damage than trains.³⁵ When placed in proper context, the safety benefits of these Proposed Rules are insignificant and not worth the net cost they produce.

Furthermore, the Proposed Rules' quantitative benefits are influenced by eight rates estimating how often the regulations will prevent accidents. But the FRA fails to explain how the rates were obtained.³⁶ As literature on the rates is nonexistent, there is no indication of how the FRA's experts calculated those numbers. Not sharing this methodology makes the Proposed Rules arbitrary and capricious.

The Proposed Rules also fall well short of adequately addressing their non-quantified benefits. A recent case serves as a cautionary tale. There, the court declared a CFPB rule arbitrary and capricious.³⁷ It did so after comparing the disputed CFPB regulation and a prior version of the same regulation. The prior version helpfully included relevant, quantified data sets to contextualize the potential non-quantifiable harms.³⁸ The challenged version, however, lacked any meaningful discussion of this sort. The CFPB glossed over the harms, stating that it lacked adequate data to quantify the costs.³⁹

The FRA's discussion of these Proposed Rules' non-quantified benefits in both the NPRMs and regulatory impact analyses has similar problems. The FRA lists examples of accident costs not reported on FRA accident forms, including accident clean-up, third party property damage, environmental

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See* CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS, *supra* note 31, at 38–39; CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS, *supra* note 28, at 39–40, 42–43, 45.

³⁷ *See Nat'l Cmty. Reinvestment Coal. v. Consumer Fin. Prot. Bureau*, No. 20-2074, 2022 WL 4447293, *3, *21 (D.D.C. Sept. 23, 2022).

³⁸ *See id.*

³⁹ *See id.*

damage, and economic harm.⁴⁰ Still, the FRA gives no examples of the magnitude of these benefits. By resorting to the statement “FRA was not able to quantify these impacts; therefore, benefits may be higher than estimated,” the FRA does not adequately justify the Proposed Rules.⁴¹ Issuing these Proposed Rules without more detail in the explanation of such non-quantified benefits would be arbitrary and capricious.

VI. The Proposed Rules’ Cost Estimates Are Inaccurate And Understated.

The Proposed Rules and their regulatory impact analyses have severely underestimated the costs. One example is the cost of determining the certification programs’ success. In 2020, the Department of Transportation’s Office of the Inspector General reviewed the conductor certification program and found its procedures lacking.⁴² Additional funds were needed to review that certification program. Only briefly and vaguely did the FRA mention that there may be a cost for reviewing the program in the Conductor Certification final regulatory impact analysis.⁴³ The Proposed Rules for dispatchers and signal employees ignore these costs. The only costs mentioned are those for a railroad safety specialist and attorney to administer the programs.⁴⁴

The FRA also ignores other costs the Proposed Rules will trigger. It takes time and money to certify employees. Companies don’t want to

⁴⁰ See CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS, *supra* note 31, at 40; CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS, *supra* note 28, at 47–48.

⁴¹ See CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS, *supra* note 31, at 40 (2023); CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS, *supra* note 28, at 48.

⁴² See DEP’T OF TRANSP., OFF. OF INSPECTOR GEN., ST2020050, FRA LACKS SUFFICIENT OVERSIGHT CONTROLS TO CONSISTENTLY ASSESS CONDUCTOR CERTIFICATION COMPLIANCE 3–4 (2020), <https://tinyurl.com/y9cbv8zh> (discussing procedures necessary to analyze certification programs’ success).

⁴³ See FED. R.R. ADMIN., OFF. OF SAFETY ANALYSIS, CONDUCTOR CERTIFICATION, FINAL RULE, REGULATORY IMPACT ANALYSIS 39 (2011).

⁴⁴ See CERTIFICATION OF DISPATCHERS, REGULATORY IMPACT ANALYSIS, *supra* note 31, at 33–35; CERTIFICATION OF SIGNAL EMPLOYEES, REGULATORY IMPACT ANALYSIS, *supra* note 28, at 35–37.

continuously spend money on certifying employees only to see those employees leave for other opportunities shortly after being certified. That is one reason certification requirements increase employees' wages.⁴⁵ The certification requirements also explain why unions are pushing the Proposed Rules. Besides higher wages for their members, certification programs will make it less likely that railroads will replace underperforming workers. Although it may be beneficial for society to replace an underperforming worker, it may not be economically feasible for a railroad if the replacement must be certified.

The Proposed Rules' costs will ultimately be paid by consumers. To cover the costs associated with the programs, railroads will raise rates to ship food, energy, and chemicals. Those companies will compensate for their higher shipping costs by charging consumers more for their goods.

History shows how fewer regulations lead to lower shipping prices and fewer costs for consumers. In 1978, the Department of Transportation lamented that “[t]he current system of railroad regulation . . . is a hodgepodge of inconsistent and often anachronistic regulations that no longer correspond to the economic condition of the railroads, the nature of intermodal competition, or the often-conflicting needs of shippers, consumers, and taxpayers.”⁴⁶ With these costly regulations, railroads could not finance the maintenance of their tracks; more than 47,000 miles of track required reduced speeds due to poor track conditions.⁴⁷ Congress responded by passing the Staggers Rail Act in 1980, which significantly reduced railroad regulation. This caused a spike in productivity as well as a drop in shipping rates.⁴⁸ During a time of high inflation, it makes little sense for the FRA to propose regulations that will put even more financial pressure on consumers.

⁴⁵ See DEP'T OF TREAS., OFF. OF ECON. POLICY et al., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 62 (2015), <https://tinyurl.com/95b49k79>.

⁴⁶ DEP'T OF TRANSP., A PROSPECTUS FOR CHANGE IN THE FREIGHT RAIL INDUSTRY 114 (1978), <https://tinyurl.com/4mkzfu7h>.

⁴⁷ See *The 1970s: Railroads at the Brink: Hearing on the 35th Anniversary of the Staggers Rail Act: Railroad Deregulation Past, Present, and Future Before the Subcomm. on R.Rs., Pipelines and Hazardous Materials of the H. Comm. on Transp. and Infrastructure*, 114th Cong. 4 (2015), <https://tinyurl.com/bdear8za> (statement of Edward Hamberger, President and Chief Executive Officer, Association of American Railroads).

⁴⁸ See Joel Palley, FED. R.R. ADMIN., IMPACT OF THE STAGGERS RAIL ACT OF 1980 2 (2011), <https://tinyurl.com/bdchmxre>.

The increased costs of railroad shipping may also lead companies to choose other shipping methods with a larger carbon footprint. The FRA asserts that the Proposed Rules will benefit the environment. But it fails to weigh the negative environmental impact of deterring companies from shipping via rail. According to the Bureau of Transportation Statistics, rail's emissions per ton-mile of freight is 52 times lower than air, 9 times lower than truck, and 60% lower than boat.⁴⁹ Even a reasonable, minor shift from shipping by truck to shipping by rail would cause a 4.4% net reduction in greenhouse gas emissions.⁵⁰ Thus, the FRA acted arbitrarily by not considering that its Proposed Rules incentivize companies to use other freight methods with greater environmental costs.

* * *

In sum, the cost-benefit analyses show the FRA should withdraw the Proposed Rules. Despite no statutory mandate requiring them, the Proposed Rules continue an alarming trend of proposing costly regulations. The FRA's own analysis shows that the Proposed Rules' costs outweigh the benefits. Worse, the benefits are less significant and the costs are more substantial than presented. For these reasons, WLF urges the FRA to withdraw the Proposed Rules.

Respectfully submitted,

Kevin J. Kearns
LAW CLERK

John M. Masslon II
SENIOR LITIGATION COUNSEL

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION

⁴⁹ See Alexander Laska, *Freight Rail's Role in a Net-Zero Economy*, THIRD WAY (June 7, 2021), <https://tinyurl.com/3k425jts>.

⁵⁰ See Yan Zhou et al., ARGONNE NAT'L LAB'Y, AN EVALUATION OF THE POTENTIAL FOR SHIFTING OF FREIGHT FROM TRUCK TO RAIL AND ITS IMPACTS ON ENERGY USE AND GHG EMISSIONS 13-16 (2017), <https://tinyurl.com/nsdhu45n>.