

Train Crew Size Mandates

By: Heather Poole, Associate Analyst

July 6, 2020 | 2020-R-0148

Issue

Provide information about train crew size mandates (i.e., staffing), including the following:

1. how the requirements are set,
2. a summary of the ongoing dispute over the Federal Railroad Administration's (FRA) decision to withdraw a proposed rule on train crew staffing and preempt related state laws, and
3. arguments in favor of and against requiring a minimum number of train crew members.

Summary

Train crew size has historically been set mainly through labor agreements, with a few states having crew size laws. In recent years, largely prompted by high-profile train accidents and rail industry changes, regulating crew size has been considered at both the state and federal level, specifically to mandate a two-person minimum crew in the locomotive cab (i.e., the current typical crew size).

Since 2016, at least five states (California, Colorado, Illinois, Nevada, and Washington) have passed two-person crew mandates, and many other states have considered similar legislation. Additionally, FRA, the federal agency responsible for railroad safety, proposed a rule in 2016 to mandate two-person crews on all trains, with some exceptions. FRA withdrew the proposed rule in 2019, saying it was unnecessary and, further, that related state laws are preempted by its decision not to regulate train crew size. Two railroad worker unions and three states are challenging this in federal court, asking the court to set aside FRA's decision. The case is currently pending, with oral arguments anticipated to occur during the fall of 2020.

Mandating two-person minimum crews is generally supported by railroad worker unions and opposed by railroads. The unions claim, among other things, that a train crew's duties are too demanding for one person and rail industry changes, such as implementing new technologies like Positive Train Control (PTC), have made the job more complex. Railroads primarily maintain that there is no data showing that two-person crews make operations safer, and mandates would stifle rail innovation and flexibility.

Setting Train Crew Size

Labor Agreements

Historically, train crew size requirements in the United States have been set primarily through collective bargaining between train crew unions and railroads. Over time, freight train crew sizes have been reduced from five members to the typical two: an engineer, who operates the locomotive, and a conductor, who supervises the entire operation. Many passenger trains currently operate with just an engineer in the locomotive cab but have a conductor and other crew members in the passenger cars.

As they implement PTC, which combines several technologies to prevent collisions and other accidents caused by human error, some railroads are considering reducing locomotive crews to only the engineer. For example, in [November 2019](#), the largest railroads (i.e., Class I) proposed during labor contract negotiations to redeploy conductors from the locomotive cab to ground-based positions in territories with PTC or equivalent technology, leaving only an engineer on board. And as automation technology advances, many in the industry predict increased use of unmanned trains.

State Laws

At least 13 states have train crew size laws. Premised on health and safety, seven states require at least two crew members: California, Colorado, Illinois, Nevada, Washington, West Virginia, and Wisconsin. Six states either regulate train crew staffing by having a "full-crew requirement" (i.e., requirements vary by operation type) or authorize a state agency to decide if a train operation has enough crew: Arizona, Ohio, Oregon, Massachusetts, New Jersey, and Washington (see *Transp. Div. of the Int'l Assc. of Sheet Metal, Air, Rail, and Transp. Workers v. FRA*, No. 19-71787 (9th Cir. filed July 16, 2019), [Amici Curiae Br.](#), ECF 35).

Five of the states with laws mandating two-person crews (California, Colorado, Illinois, Nevada, and Washington) passed their laws since 2016. And according to [Freight Waves](#), a freight industry publication, at least 20 states have considered similar legislation during the last two years, including [Massachusetts](#) and [New York](#).

Federal Regulation of Rail Crew Size

Rail Safety Advisory Committee Working Group

Following a major train accident in Lac-Mégantic, Quebec in 2013, FRA's Rail Safety Advisory Committee (RSAC) formed a working group to review train crew staffing and its role in rail safety. ([RSAC](#) helps FRA develop new regulatory standards; it includes representatives from the rail industry's major stakeholders (e.g., railroads, labor unions, manufacturers) and uses a consensus-based process to develop recommendations.)

The Lac-Mégantic accident involved a one-person crew that failed to properly secure a train at the end of duty. Due to this failure, unattended train cars with crude oil rolled down a grade and derailed, resulting in explosions and an estimated 47 fatalities. A train collision in Casselton, North Dakota, also occurring in 2013 but after the working group's formation, involved crude oil spills that caused fires and explosions, but no casualties. The Casselton train had a multiple-person crew, and some people argued that having the multiple-person crew prevented further damage.

FRA presented to the working group its position that some oversight of train crew size was needed to protect railroad employees and the public and asked the group to make recommendations on safe practices for two-person and less than two-person train operations. The working group could not reach consensus, thus FRA initiated formal rulemaking proceedings.

Proposed Rule

In March 2016, FRA issued a proposed rule establishing train crew size minimums, depending on the type of rail operation and associated safety risks ([Docket No. FRA-2014-0033, Notice No. 1](#)).

The proposed rule would have generally required passenger and freight trains to have at least two crewmembers. It exempted most existing one-member crews and low-risk operations, such as low speed travel and nonhazardous material transport, and allowed railroads to apply to FRA for approval to operate less than two-person crews in other situations.

According to the Federal Register notice, FRA was concerned that railroads implementing positive train control (PTC) and other technologies could expand the use of less than two-person crews without considering safety risks or necessary mitigation actions. FRA noted that it did not have conclusive statistics on the safety of one-person crews because it had not been specifically tracking such operations, but it cited studies showing the benefits of having a second crew member. It also discussed the evidence and suggestions from the RSAC working group deliberations.

Withdrawal

Regulation Unnecessary. In May 2019, FRA withdrew the proposed rule, saying regulating train crew staffing was not necessary or appropriate at the time ([Docket No. FRA-2014-0033, Notice No. 4](#)). Among other things, FRA stated that:

1. there is no direct safety connection between train crew staffing and the Lac-Mégantic or Casselton accidents,
2. there is insufficient rail safety data to establish that one-person crews are less safe than multi-person crews and comments on the proposed rule did not provide conclusive data or another sufficient basis to support a train crew staffing requirement, and
3. a train crew staffing rule would unnecessarily impede future rail innovation and automation.

State Law Preemption. FRA states in its withdrawal that because the withdrawal covers the same subject matter as state crew size laws, the state laws are preempted. It refers to the Federal Railroad Safety Act (FRSA), which requires laws, regulations, and orders related to railroad safety to be nationally uniform and preempts state law when FRA has a regulation or an order covering the same subject matter.

Court Challenge

In July 2019, two unions representing railroad workers (i.e., the Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen), the California Public Utilities Commission, and the states of Washington and Nevada filed petitions with the U.S. Court of Appeals for the Ninth Circuit to review FRA's final action (i.e., withdrawing the proposed rule and preempting related state laws), which the court subsequently consolidated (*Transp. Div. of the Int'l Assc. of Sheet Metal, Air, Rail, and Transp. Workers v. FRA*, No. 19-71787 (9th Cir. filed July 16, 2019)).

Petitioners' Position

The petitioners maintain that FRA's final action is both procedurally and substantively defective, relying on three main arguments: (1) FRA failed to provide adequate notice and opportunity for comment related to its final action, (2) the final action is arbitrary and capricious, and (3) FRA does not have legal authority to preempt state laws without issuing a regulation (Pet'rs. Brs., ECF 25, 26, 27).

Notice and Opportunity for Comment. The petitioners maintain that FRA failed to provide the required notice and opportunity to comment on its intent to preempt state laws without issuing a regulation on the subject. In support, they state that FRA did not indicate that it was considering

whether a regulation was necessary, rather, that it was considering the contours of a rule on mandating a minimum crew size. Thus, there was no indication that it might later withdraw the proposed rule, declaring the action is the equivalent of a rule, and is intended to preempt state law.

Arbitrary and Capricious. Federal law requires courts to invalidate agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” (5 U.S.C. § 706(2)(A)). The petitioners say that FRA’s final action was arbitrary and capricious because it lacked supporting evidence and it was contrary to most evidence in the rulemaking record.

Petitioners contend, among other things, that the FRA ignored (1) voluminous safety data and other accidents supporting a train crew staffing rule and (2) important aspects of the problem (e.g., fatigue). They say that FRA instead prioritized non-safety issues like innovation and automation while failing to appropriately consider safety concerns, which it is required by law to prioritize. Petitioners also say that FRA failed to explain why scientific or analytical uncertainty justifies preempting state train crew laws.

Preemption. The petitioners argue that under the FRSA, FRA cannot preempt state law unless it has a regulation covering the same subject matter, and that FRA’s action of withdrawing the proposed rule should not be considered a regulation. Additionally, petitioners contend that, by preempting all state laws on train crew staffing, FRA’s final action infringes on states’ rights under the FRSA to pass laws more restrictive than the federal rule in order to address local safety hazards.

FRA’s Position

FRA asserts that it reasonably used its authority when it withdrew the proposed rule and preempted related state laws, citing to its authority in federal law for it to regulate rail safety. It notes that the FRSA requires laws, regulations, and orders on railroad safety to be nationally uniform to the extent practicable. In addition, FRA maintains that the states’ laws do not qualify for the FRSA’s exception to preemption for laws governing local conditions.

FRA disagrees that its withdrawal was arbitrary and capricious. Rather, the withdrawal represents a rational connection between the facts it found (i.e., no evidence that two-person crews are safer) and its refusal to adopt a rule generally imposing a two-person crew minimum. FRA also notes that it was reasonably concerned about preventing a patchwork of state laws in this area.

FRA also maintains that there was sufficient opportunity to comment on the proposed rule and the outcome was foreseeable. Specifically, it contends that (1) the proposed rule reflected that the agency was considering the matter, thus withdrawal was a possible outcome and (2) preemption

was a logical outgrowth of the proposed rule, meaning that it did not have to be specified as a potential outcome (Resp. Br., ECF 43).

Arguments for and Against Train Crew Size Requirements

In support of multiple person train crews, railroad employee unions provide the following arguments:

1. train crew duties are too demanding for one person;
2. although PTC helps prevent crashes, it cannot replace all tasks of additional crew members;
3. industry changes, such as using longer, heavier trains and new technologies, make rail transport jobs more complex;
4. fatigue is a greater factor for one-person crews;
5. a one-person crew eliminates a first responder and troubleshooter when accidents occur, thus placing a burden on local communities;
6. rail transport should be treated like air transport, which requires two pilots per plane despite having automation technology; and
7. a lack of data on the relationship between train crew size and safety means that more data is needed, not that train crew size should not be regulated (see comments submitted in [Docket No. FRA-2014-0033](#) and union representative [testimony](#) on Ohio HB 186 (2019-2020)).

The primary reasons railroads oppose minimum train crew size mandates include the following:

1. there is a lack of data showing two-person crews are safer than one-person crews;
2. mandates would deter innovation and limit the competitive viability of freight railroads;
3. railroads are committed to safety and the industry will fully implement PTC by the end of 2020, which will prevent certain accidents often caused by human error;
4. many commuter railroads, including Amtrak, currently operate with one person in the locomotive cab and have excellent safety records; and
5. rail staffing requirements should continue to be addressed through collective bargaining (See Policy Article: [Freight Rail and Crew Size Regulations](#), American Association of Railroads and [Statement Regarding Train Crew Size](#), Union Pacific Railroad).

HP:kl