

**Before the
OFFICE OF THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590**

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In the Matter of)	
)	Docket No. OST-2025-0026
Ensuring Lawful Regulation; Reducing)	
Regulation and Controlling Regulatory)	90 Fed. Reg. 14,593
Costs)	
)	

COMMENTS OF REASON FOUNDATION

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Introduction

On behalf of Reason Foundation, I respectfully submit these comments in response to the Office of the Secretary's ("OST") request for information ("RFI") on Ensuring Lawful Regulation; Reducing Regulation and Controlling Regulatory Costs.¹

By way of background, I am a senior transportation policy analyst at Reason Foundation and focus on federal transportation policy, including regulation. Reason Foundation is a national 501(c)(3) public policy research and education organization with expertise across a range of policy areas, including transportation.²

Our comment letter focuses on the following regulatory topics, on which Reason Foundation has significant expertise:

1. Federal Railroad Administration: Train Crew Size;
2. Federal Railroad Administration: Inspection Regulations; and
3. Office of the Secretary: Aviation Consumer Protection.

1. Federal Railroad Administration: Train Crew Size

In 2016, when FRA first proposed a minimum crew-size regulation, it conceded that "FRA cannot provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations."³

Despite the absence of evidence, FRA continued forward on the proposed crew-size rule until it was withdrawn in 2019. In its withdrawal notice, the agency concluded, "FRA's statement in the [proposed rule] that it 'cannot provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations' still holds true today."⁴

In the years that followed, FRA was unable to furnish any evidence to support a safety basis for regulating train crew size. Like the 2016 NPRM, FRA conceded in the 2022 NPRM on Train Crew Size Safety Requirements that it does not possess "any meaningful

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1. Ensuring Lawful Regulation; Reducing Regulation and Controlling Regulatory Costs, *Request for Information*, Office of the Secretary of Transportation, Docket No. OST-2025-0026, 90 Fed. Reg. 14,593 (Apr. 3, 2025) [hereinafter RFI].
 2. See About Reason Foundation, <https://reason.org/about-reason-foundation/> (last visited Apr. 29, 2025).
 3. Train Crew Staffing, *Notice of Proposed Rulemaking*, Federal Railroad Administration, Docket No. FRA-2014-0033, 81 Fed. Reg. 13,917 (Mar. 15, 2016) at 13,919.
 4. Train Crew Staffing, *Notice of Proposed Rulemaking; Withdrawal*, Federal Railroad Administration, Docket No. FRA-2014-0033, 84 Fed. Reg. 24,735 (May 29, 2019) at 24,737.

data” to support the conclusion that two-person train crews are safer or that one-person crews are less safe.⁵ And like the 2016 NPRM, the 2022 NPRM appeals to the same two decade-old anecdotes from Quebec and North Dakota that fail to provide a reasonable basis for the proposed rule.

Indeed, in the case of the 2013 Casselton, North Dakota, accident, FRA’s own recounting of the incident in this NPRM—“the conductor admitted that he had never been in a situation where a collision was imminent, did not know what to do, and therefore might not have gotten down on the floor and braced himself, as the locomotive engineer instructed”⁶—works against the supposed safety basis of this proposed rule because one-person crew operations would have eliminated the on-board conductor, who was put in harm’s way in Casselton due to his own inexperience with proper safety protocols.

In Western European countries, the vast majority of freight and passenger trains are operated by a single crewmember and have been for decades. In the NPRM, FRA states that “train operations in developed countries, other than Canada, are not comparable for the most part due to differences in train lengths, territory, and infrastructure.”⁷

In 2021, Oliver Wyman conducted a comparative analysis of U.S. and European crew-related characteristics and operational issues that casts doubt on FRA’s claims.⁸ Relevant findings include:

- “In the US environment, the train crew generally cannot directly observe more than the first 40 cars, which is about the average length of European freight trains. Beyond that distance, the train crew relies on wayside equipment detectors, telemetry from end-of-train devices and distributed power locomotives, in-cab brake pipe pressure gauges, and train handling characteristics (such as sudden changes in train speed, higher throttle settings needed to maintain speed, changes in ride quality, etc.) to monitor train integrity.”⁹
- “But the shorter average length of European freight trains actually creates significantly more operating complexity. Shorter block sizes and more

5. Train Crew Size Safety Requirements, *Notice of Proposed Rulemaking*, Federal Railroad Administration, Docket No. FRA-2021-0032, 87 Fed. Reg. 45,564 (July 28, 2022) at 45,571.

6. *Id.* at 45,570.

7. *Id.* at 45,580.

8. “Crew-Related Safety and Characteristic Comparison of European and US Railways,” Oliver Wyman (Apr. 5, 2021), *available at* <https://raillaborfacts.org/wp-content/uploads/2022/09/Carriers-Exhibit-11-Report-of-Oliver-Wyman-Comparison-of-European-and-US-Railways.pdf> (last visited Apr. 29, 2025).

9. *Id.* at 12.

interlockings, due to more double track and the density of trackage, create far more signals per route-kilometer.”¹⁰

- “High complexity and train density mean that train crews in Europe face as many – if not more – decisions and work events every day than do US train crews, yet they do not experience task overload; in addition, the technology deployed is not significantly different than that used in the United States.”¹¹
- “In Eastern Europe, where countries vary more in their policy regarding crew size, it is possible to more directly compare concurrent experience with one-person and two-person crews across a range of accident types. In the case of significant accidents, analysis yielded no evidence that two-person crews provide any safety advantages over one-person crews. The European data also shows that the economic impact of accidents is not alleviated by having a second person in the cab.”¹²
- “Looking at readily available and current data on European and US accident rates, it is difficult to see why two-person crews should be the presumptive standard for the United States, when one-person crews have been the longstanding presumptive standard on the far busier European network.”¹³

In the Regulatory Impact Analysis (“RIA”) accompanying the 2024 final rule, FRA was unable to quantify any benefits of its crew-size mandate.¹⁴ It estimated 10-year costs of the final rule to be \$6.6 million at a 7% discount rate.¹⁵ However, the RIA’s cost estimate did not include either direct labor costs (paying the cost of a second crew member) or indirect labor costs (lost revenue arising from a modal shift from rail to trucks over time). These costs omitted in the RIA could be substantial. For instance, Oliver Wyman in 2015 estimated that reducing train crew-sizes from two to one could save U.S. railroads up to \$2.5 billion per year after a 10-year phase-in period.¹⁶

FRA’s final crew-size rule violates the principles of Executive Order (“E.O.”) 14219 because it “implicates matters of social, political, or economic significance that [is] not

10. *Id.* at 16.

11. *Id.* at 36.

12. *Id.* at 67.

13. *Id.*

14. Train Crew Size Safety Requirements, *Final Rule*, Federal Railroad Administration, Docket No. FRA-2021-0032, 89 Fed. Reg. 25,052 (Apr. 9, 2024) at 25,097.

15. *Id.*

16. “Analysis of North American Freight Rail Single-Person Crews: Safety and Economics,” Oliver Wyman (3 Feb. 2015) at 48.
<https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=1014> (last visited Apr. 29, 2025).

authorized by clear statutory authority,” “impose[s] significant costs upon private parties that are not outweighed by public benefits,” and “harm[s] the national interest by significantly and unjustifiably impeding technology innovation.”¹⁷ As such, the 2024 crew-size amendments to 49 C.F.R. Part 218 should be rescinded.

2. Federal Railroad Administration: Inspection Regulations

FRA’s regulations governing inspections for track (49 C.F.R. Part 213 Subpart F), locomotives (49 C.F.R. Part 229 Subpart B), and railcars (49 C.F.R. §§ 215.9–215.15) are highly prescriptive and incorporate standards developed decades ago. These outdated and inflexible rules are inhibiting safety innovation that could be realized through modern technologies and practices.

One simple example of the problem of overly prescriptive rail safety regulations is related to automated track inspection (“ATI”). The benefits of ATI include more reliable defect detection, more robust maintenance data analysis and planning, redeployment of visual inspectors to higher-need areas and for infrastructure that cannot be inspected by ATI equipment, reduced human exposure to safety hazards in the field, and reduced delays to trains in revenue service.

While it has long acknowledged the benefits of ATI,¹⁸ FRA in 2021 reversed course and began denying multiple ATI waiver requests. In March 2022, FRA denied BNSF’s request to expand an existing ATI waiver.¹⁹ BNSF challenged FRA’s decision in federal court, which ruled in March 2023 that regulators violated the Administrative Procedure Act’s prohibition on “arbitrary and capricious” acts and ordered FRA to reconsider its decision.²⁰ In June 2023, FRA again denied BNSF’s ATI petition.²¹ BNSF challenged this second denial in the same federal court, which in June 2024 again ruled against FRA and ordered the agency to grant BNSF’s ATI waiver petition.²² This regulatory uncertainty has delayed the realization of ATI’s safety benefits for years.

17. RFI, *supra* note 1, at 14,593.

18. *See, e.g.*, Letter of Concurrence - NS to Change from Phases 2 to 3 of the Automated Track Inspection Test Program, Federal Railroad Administration, Docket No. FRA-2019-0099 (Oct. 1, 2020), *available at* <https://www.regulations.gov/document/FRA-2019-0099-0005>.

19. Request to Expand Automated Track Inspection Program; Decision Letter, Federal Railroad Administration, Docket No. FRA-2020-0064 (Mar. 21, 2022), *available at* <https://www.regulations.gov/document/FRA-2020-0064-0020>.

20. *BNSF Railway Company v. Federal Railroad Administration et al.*, 62 F.4th 905 (5th Cir. 2023).

21. Request to Expand Automated Track Inspection Program; Decision Letter on Remand, Federal Railroad Administration (June 21, 2023), *available at* <https://www.regulations.gov/document/FRA-2020-0064-0025>.

22. *BNSF Railway Company v. Federal Railroad Administration et al.*, No. 22-60217 (5th Cir. 2024).

The existing inspection rules violate the principles of E.O. 14192 by “impos[ing] significant costs upon private parties that are not outweighed by public benefits” and “harming the national interest by significantly and unjustifiably impeding technological innovation.”²³ As such, they should be modernized to enable continuous safety innovation through performance-based means. Specifically, inspection matters could be incorporated into FRA’s Risk Reduction Program that was established in 2020.²⁴ This would help advance science-based inspection processes that can adapt to evolving technologies and practices.

3. Office of the Secretary: Aviation Consumer Protection

What is now known as the aviation consumer protection authority—the term the U.S. Department of Transportation uses for its statutory authority to police unfair or deceptive practices in the aviation industry—long predates the department itself.²⁵ The authority was created as Section 411 of the Civil Aeronautics Act of 1938 and modeled on the “unfair or deceptive acts or practices” language included months before in the Federal Trade Commission Act of 1938, which covered most other commercial contexts.²⁶ In 1958, Congress expanded Section 411 to cover not only air transportation itself but the sale of air transportation by ticket agents.²⁷

When Congress passed the Airline Deregulation Act in 1978, it eliminated most economic regulation in the aviation sector and wound down the Civil Aeronautics Board (“CAB”). When the CAB was terminated in 1985, Section 411 consumer protection authority was transferred to the Department of Transportation’s Office of the Secretary (“OST”). In 1994, Congress reorganized the Title 49 Transportation Code, and Section 411 was recodified as Section 41712.²⁸

While reorganizing the Transportation Code, Congress was also working to modernize authorities held by the Federal Trade Commission (“FTC”).²⁹ The FTC Act amendments of 1994, among other things, codified longstanding internal FTC policy in dealing with claims of unfair or deceptive acts or practices that were synthesized for Congress in the

23. RFI, *supra* note 1, at 14,593

24. 49 C.F.R. Part 271.

25. 49 U.S.C. § 41712.

26. Federal Trade Commission Act, Pub. L. 75–447, 52 Stat. 111 (Mar. 21, 1938).

27. Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731 (Aug. 23, 1958) at § 411.

28. An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, “Transportation”, and to make other technical improvements [H.R. 1758] in the Code, Pub. L. 103–272, 108 Stat. 745 (July 5, 1994).

29. Federal Trade Commission Act Amendments of 1994, Pub. L. 103–312, 108 Stat. 1691 (Aug. 26, 1994).

FTC’s December 1980 Policy Statement on Unfairness.³⁰ The FTC’s approach, as affirmed by Congress, requires that specific elements be met to prove unfairness allegations, one of which necessitates careful benefit/cost analysis.

Specifically, the FTC Act amendments added three standards of proof to the FTC’s broad statutory prohibition on unfair business practices. For conduct to qualify as legally unfair, it must be (1) “likely to cause substantial injury to consumers,” (2) not “reasonably avoidable by consumers themselves,” and (3) “not outweighed by countervailing benefits to consumers or to competition.”³¹ It is worth noting that these reforms earned bipartisan support. Similar language was also included in the Dodd-Frank Act of 2010, covering the enforcement responsibilities of the Consumer Financial Protection Bureau.³²

While bipartisan recognition of the problem of ill-defined “unfairness” exists in virtually every other federal consumer protection context, Congress has so far not moved to reform the Department of Transportation’s similar Section 41712 aviation consumer protection authority. This failure to act has enabled regulators in recent years to engage in a variety of re-regulatory activities, including new restrictions on airfare advertising that prohibit government taxes and fees from being “displayed prominently,”³³ outlawing true nonrefundable ticketing, which puts upward price pressure on airfares due to the forced risk transfer from consumers to air carriers,³⁴ and an inflexible tarmac delay rule suspected of increasing flight cancellations—particularly at smaller and more-rural airports.³⁵ Each of these regulations has been criticized as perversely harming consumers, but without the FTC-style standards of proof, the scales have been tipped in favor of the regulators.

Despite congressional inaction, there has been some official interest in modernizing the Department of Transportation’s Section 41712 powers. In December 2020, OST published a final rule to update policies and procedures for its aviation consumer protection authority.³⁶

30. “FTC Policy Statement on Unfairness,” Federal Trade Commission (Dec. 17, 1980), *available at* <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> (last visited Apr. 29, 2025).

31. 15 U.S.C. § 45(n).

32. 12 U.S.C. § 5531(c).

33. 14 C.F.R. § 399.84(a).

34. 14 C.F.R. § 259.5(b)(4).

35. 14 C.F.R. § 259.4. *See also* Hideki Fukui and Koki Nagata, “Flight cancellation as a reaction to the tarmac delay rule: An unintended consequence of enhanced passenger protection,” *Economics of Transportation* 3 (Mar. 2014) at 29–44; and Susan Fleming, “Airline Passenger Protections: More Data and Analysis Needed to Understand Effects of Flight Delays,” Government Accountability Office, GAO-11-733 (Sep. 7, 2011), *available at* <https://www.gao.gov/assets/gao-11-733.pdf> (last visited Apr. 29, 2025).

36. Defining Unfair or Deceptive Practices, *Final Rule*, Office of the Secretary of Transportation, Docket No. DOT-OST-2019-0182, 85 Fed. Reg. 78,707 (Dec. 7, 2020).

This rule added FTC-style standards of proof to Section 41712 enforcement and rulemaking procedures while also codifying internal agency practices for allowing alleged violators to present evidence defending themselves against possible enforcement or rulemaking activity derived from the aviation consumer protection authority. While this would have improved airline and ticket agents' defensive positions, it also would have required the Department of Transportation to clearly explain itself along the way and give consumers better insight into how decisions that affect them are made. In this way, the FTC-style standards of proof in unfairness claims are best understood as promoting regulatory quality and consistency in enforcement.

Following the transition between administrations, the Biden administration quickly moved to reverse these reforms. In his July 2021 E.O. 14036, President Biden ordered the Department of Transportation to amend the new FTC-style definitions of "unfair" and "deceptive" for Section 41712.³⁷ In August 2022, OST published a guidance document suggesting it will again take an expansive view of how its Section 41712 powers are defined and limited.³⁸ This change in policy reopened the door for future discretionary rulemaking guided more by political whims than careful empirical analysis.

OST's current Section 41712 guidance document violates the principles of E.O. 14219 by "implicat[ing] matters of social, political, or economic significance that are not authorized by clear statutory authority" and enabling the "impos[ition of] significant costs upon private parties that are not outweighed by public benefits."³⁹ As such, OST's 2022 guidance document should be withdrawn and the 2020 final rule restored.

Conclusion

Thank you for the opportunity to provide comments in response to the regulatory reform RFI and we look forward to further participation.

Respectfully submitted,

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37. Exec. Order No. 14036 (July 9, 2021).

38. Guidance Regarding Interpretation of Unfair and Deceptive Practices, *Guidance Document*, Office of the Secretary of Transportation, Docket No. DOT-OST-2019-0182, 87 Fed. Reg. 52,677 (Aug. 29, 2022).

39. RFI, *supra* note 1, at 14,593