

Regulating without Purpose

By: Heidi King | November 1, 2022

In brief...

Twenty-nine years after Executive Order 12866 specified that agencies shall identify the problem they intend to address, the Federal Railroad Administration proposes a rule without a purpose.

Safety Regulations Should Guard Against Unintentional Harm.

How do we measure success if we don't know what we're trying to accomplish? If we don't know why we are spurred to action, how do we distinguish progress from harm?

The Federal Railroad Administration (FRA) proposed [regulations](#) to require that railroads do what they are already doing, that is to operate with a minimum of two crewmembers. FRA proposes this new set of requirements because it is concerned that sometime in the future some rail operators might replace staff with safety technologies that FRA mandates them to install. FRA contends that the proposed requirements would, if finalized, provide for "safe operation" and "geographic consistency" but does not clearly identify any particular safety risk that would be mitigated by the new requirement.

Railroad safety is important and effective measures would be welcome, but the proposed action to address possible future risks is likely to distract both operators and regulators from safety measures needed in the transportation system today. The opportunities to improve safety are substantial: FRA reports that 753 people were killed in 2021 in railroad accidents. FRA [tells us](#) that 94% of railroad fatalities and injuries occur at railroad crossings or when individuals or vehicles trespass onto rail tracks, and that such trespasses along railroad rights-of-way represent the leading cause of rail-related deaths in America.

Measures to improve railroad safety—especially at rail crossings—deserve careful consideration, and emerging technologies such as sensors and cameras might provide cost effective solutions for adoption by rail operators. But the measures proposed by FRA fail to address the types of railroad-related deaths and injuries that FRA reports across the U.S., and the measures do not specify what other safety problem the solution is meant to address.

Not only do the proposed measures fail to address known safety risks, FRA fails to recognize that the potential requirements could result in additional new safety hazards both in implementation and as resources—both public and private—are diverted away from demonstrated safety needs and solutions to comply with the regulation without purpose.

Regulation Without Purpose Invites Unintended Consequences

In the U.S. using current technology, railroad operators already employ at least two crew members. “Train crews consisting of two people, one a locomotive engineer and the other a conductor, are universally the norm because that crewmember configuration provides the railroad with the necessary flexibility to assign the crew where operations have more complexity than a one-person crew can be expected to perform alone” FRA [confirms](#). FRA proposes to regulate crew sizes out of concern that railroads will reduce crew size in the future after implementing federally mandated [positive train control](#) and other safety technologies, such as systems included in FRA’s [encouragement to increase automation](#) in freight rail operations.

Railroad operators’ business model is to provide safe transportation of goods and services from one place to another, and that basic function is not served when they suffer needless crashes or losses. Railroads’ ability to address safety risks, including those that might emerge in the future, requires that they have the authority to determine where and how to deploy their staff as effectively and efficiently as possible to address local conditions and safety needs. FRA’s proposal would reduce that flexibility to adapt to on-the-ground safety conditions and impose paperwork requirements.

Poorly designed regulatory requirements could worsen safety. Research into the behavior of drivers, pilots, and other vehicle operators has demonstrated that [distraction and fatigue](#) each present a risk to the alert, attentive operation of any vehicle. Administrative burden will discourage operators from seeking approval for appropriate reductions of crew size during low-risk operations. During periods of [tight rail operation labor markets](#) such as during the recent pandemic, the risk of rail operator fatigue could be exacerbated if operators lose the flexibility to employ single-crew operations safely and instead were constrained by regulation to meet a minimum staffing requirement that results in longer work hours or fewer rest periods. Furthermore, increased distraction could result from requiring additional, unnecessary crew members in the engineer’s compartment. The Department of Transportation’s own [research](#) demonstrates the importance of engaging a human operator with adequately challenging tasks to keep the mind engaged in the safe vehicle operation task while also avoiding operator fatigue or exhaustion.

First, Identify a Problem

Instead of finalizing regulatory requirements to address a concern that future railroad operators might reduce future crew size against their own best safety interests, FRA should instead address the urgent safety needs on U.S. railroad thoroughfares today. FRA should first examine its own data collection to prioritize the types of accidents and incidents that cause harm today and consider various measures that could address the risks around railroads today. FRA could follow the model established by its sister agencies at the Department of Transportation and, applying the insights of data-driven research and

understanding of human factors, work with railroads to assess whether there are measures that could effectively improve safety without causing unintentional harm.

Only after identifying specific safety risks and conditions will FRA be able to consider whether there is a need for action, and what actions might be the most appropriate and effective for public safety and wellbeing. Regulatory requirements are only one of many alternatives that should be considered.

Conclusion

President Clinton states in his [Executive Order 12866](#):

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

We can have such a regulatory system. The first step is to identify the highest priority needs of the people—health, safety, environment, well-being and economic—prior to performing an assessment of how the needs can best be addressed. If there are failures of markets and of existing policies, a regulatory agency should seek to understand the reasons for those failures and address them prior to considering any further options, particularly where new regulatory burden could increase safety risk.

Safety is too important to jeopardize through actions that could cause unintentional harm.