

# *Viewpoint: When Elected Officials Fail to Govern*

## **Train crew size legislation should be a safety measure, not a partisan issue.**

**By Matt Parker and Jason Doering**

In March 2016, the Federal Railroad Administration (FRA) issued a Notice of Proposed Rulemaking (NPRM) to adopt a regulation requiring crews of at least two persons on freight trains. Fueling this NPRM were safety concerns regarding several high-profile train accidents, including the disastrous crude oil train derailments in Lac Magantic, Quebec, and Casselton, North Dakota.

The proposed rulemaking was sent to the Office of Management and Budget (OMB) in December 2016. With a change of administrations the following month, OMB sent the proposal back to the FRA, where no further action on the matter was expected.

On May 29, 2019, as state-level legislation regarding train crew size was moving forward in several states, then-Administrator of the FRA, Ron Batory, issued an agency order withdrawing the NPRM regarding train crew size.

The order went steps further by declaring that the agency's action represented a determination that no action was warranted on the issue of train crew size, and state laws regarding the matter were therefore unenforceable, an assertion known as "negative preemption."

On July 16, 2019, labor organizations supporting train crew size legislation petitioned the 9th Circuit Court of Appeals for review of the FRA's action, asserting that the agency's action in the matter was arbitrary, capricious and violated the Administrative Procedures Act. Joining in this action as aggrieved parties were the states of Nevada, California and Washington, all of which have passed laws establishing minimum train crew size.

On Feb. 23 of this year, the 9th Circuit Court rendered its decision on the matter. While dismissing the labor organizations as petitioners due to lack of appropriate jurisdiction, the court concurred with the remaining petitioners, determining that the

FRA's order was, in fact, arbitrary and capricious, while also in violation of the Administrative Procedures Act. The court subsequently determined that state laws regarding train crew size are not preempted and vacated the FRA's May 2019 order.

Looking further into the court's decision, there are two opinions offered regarding the FRA's 2019 action attempting to block laws regulating train crew size that should not be overlooked:

1) That the FRA placed the pecuniary concerns of certain parties ahead of its responsibility to protect public safety; and 2) That the FRA ignored its own data on the subject in taking this action.

While these opinions of the court may be disconcerting, what should not be overlooked is that legislators at the state and federal level, who are opposing safety mandates regarding train crew size, are following the same erroneous rationale that the former FRA administrator did in withdrawing the NPRM.

By opposing two-person crew legislation, they are putting rail carriers' economic interests ahead of operational measures that have long protected the safety of the public and railroad workers, while at the same time ignoring research that demonstrates that multi-person train crews enhance safety.

Hopefully, by calling this to the attention of those officials, as well as the public that will bear a risk as the result of the transportation of freight by rail, it will move those in elected office who are making this misstep to avoid such errors in judgment in the future – because when some in our government treat safety as a partisan issue, the people who elect them potentially become the losers.

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