

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/16/2015**

Amendment to: HB 1357

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The bill adds a new section to Chapter 49-10.1 to prohibit a railroad from operating a train or light engine without a crew of two. Bill also provides graduated civil penalties for willful violations. No fiscal impact.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The main focus of the bill is to place a mandate on railroads. The PSC is impacted only to enforce violations. Any penalties assessed would be deposited into the general fund. There is no way to estimate fiscal impact because there is no way to anticipate if there will be any violations or what type of violations there might be.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The only revenue generated would be from assessing civil penalties. Any penalties assessed would be deposited into the general fund. There is no way to anticipate if there will be any violations or what type of violations there might be, so no fiscal impact on revenues can be estimated.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The only expenditures would relate to enforcing violations. There is no way to anticipate if there will be any violations or what type of violations there might be, so no fiscal impact on expenditures can be estimated.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

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**Name:** Illona Jeffcoat-Sacco

**Agency:** Public Service Commission

**Telephone:** 701-328-2407

**Date Prepared:** 01/20/2015

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**2015 HOUSE TRANSPORTATION**

**HB 1357**

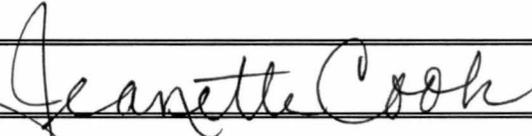
# 2015 HOUSE STANDING COMMITTEE MINUTES

Transportation Committee  
Fort Totten Room, State Capitol

HB 1357  
2/5/2015  
#23352

Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

A bill relating to the required railroad crew on a freight train: and to provide a penalty.

## Minutes:

Attachments #1-5

**Chairman Dan Ruby** opened the hearing on HB1357.

**Representative Trottier, District 19**, introduced HB1357.

**Representative Trottier:** The general public thinks that with a unit train of over 106 cars there would be 4-6 people on a crew for that train. I now find out that currently there are only two people on the train. This bill will address that. If at any time a railroad would decide to have one member on a crew, this would restrict that so there would always be two members on a crew. It seems to be common sense to have two. So, with this bill, even if Montana and Minnesota have only one person on a crew, when the train was in North Dakota it would be required to have two crew members.

**Representative Ben Hanson:** Are there currently any penalties for not having a certain number of workers on a the train?

**Representative Trottier:** I don't know for sure. Someone in following testimony will probably be able to tell you. The railroad currently has two crew members, but I think this has come about because of the accidents that have been in North Dakota. If there is only one person on the train; the railroad requires that they stay in the train at all times.

**Chairman Dan Ruby:** Do any other states in our region have these laws?

**Representative Trottier:** I don't know.

**Representative Mock, District 42**, stood to support HB1357. To answer the chairman's question, I believe that Washington, Arizona and Wisconsin have introduced legislation similar legislation.

**Representative Mock:** I am humbled to be on this legislation. It is an unfortunate coincidence that the very day that we were visiting with railroad personnel about railroad safety issues, January 5, 2015, that the accident in Larimore, North Dakota happened. A freight train collided with a school bus. It really put an exclamation mark on the importance of legislation similar to what we have in HB 1357. As we learn more of the details of the accident, it was the conductor of the train that came off the train and was able to break the train so that emergency personnel could get to the bus. Only by having two individuals on the train was that possible. The emergency personnel would have had to go around many miles if that had not been possible. I hope that the committee gives this bill a DO PASS recommendation.

**Representative Rick C. Becker:** What exactly did the conductor do at the accident?

**Representative Mock:** The train was long enough that it was blocking the road. One individual was able to go back on the train at the intersection, break the airlines, decouple the cars, and then the cars could be moved so the intersection was cleared for emergency personnel. It is not a simple process.

**Senator Gary Lee, District 22,** spoke in support of HB1357. I originally was hesitant to sign on to this bill because I don't often try to get in the way of business doing what they should do in terms of staffing. This does regard public safety and issues that I have been dealing with in my own area. (He explained the train safety issues in his area and how the trains have to be split by two people.) The train has gone off the track 7 times in 11 years in a stretch of about 7 miles near Casselton. One was in November 2014 and two years ago in December when an oil train exploded after colliding with a train with beans that had gone off the track. A tremendous explosion ensued. Part of that train was still good. It took the courage of the conductor with the firemen, to go back and separate the train so the good part could be moved away. If there had only been one person on that train; that wouldn't have been allowed, and there would have been a lot more damage to the cars that happened to be there. It is a matter of public safety that this gets discussed, if the railroad is intending to have a single person on a train.

**Brian Kalk, Public Service Commissioner,** spoke to support HB1357. He stated for the record that he is speaking on behalf of Brian Kalk not the entire Public Service Commission. The facts he wants to talk about speak to public safety. The Public Service Commission has varying degrees of jurisdiction on railroads. One of the areas that is clear is the mainline rail road. If the mainline railroad wants to request that the whistle is not blown at a private crossing, we go out and hold a hearing to decide that. Prior to the last two years, we had ten different railroad crossings in Crary, Erie, (inaudible), Page, Williston, Hebron, Mandan, Fraine Barracks in Bismarck, and a couple in Manvel. One of the decision factors that I use to allow the railroads NOT to blow the whistle at the crossings is that there are at least two people in the cab, and they could always blow the whistle. If it was reduced to one person in the cab, I would have to go back in my role for public safety in the commission and look at the hearings again to determine if we would make the same decision if there were only one person in the cab. I just wanted you to know that factor that having two people in the cab played in making those decisions for public safety.

**Representative Marvin Nelson:** How are the numbers of crew members on a train reported to the Public Service Commission?

**Brian Kalk:** We don't get daily reports. I am focusing on the time during the hearings, and the facts that are presented at the hearing that **we use** to make a decision for public safety.

**Representative Marvin Nelson:** I am just trying to figure out how you are going to know if someone breaks this law if there is no reporting.

**Brian Kalk:** If it became my knowledge that the railroad has made the decision to go back to one conductor, I would bring it up with my colleagues to see if we need to go back and look at those hearings again. If so, we would look to see if we would make the same decision if there were only one person in the cab. That is the way that I would deal with it.

**Vice Chairman Lisa Meier:** Do you know who would be in charge of imposing the penalty if it was violated?

**Brian Kalk:** I do not.

**Chairman Dan Ruby:** What is the reason behind this bill? Has the railroad already had discussion about only having one crew member on a train?

**Brian Kalk:** I do not know. We just looked at the bills coming up to see if there are any that we should weigh in on. I just wanted to share my experiences as they may help to make a decision one way or the other on this bill.

**Jim Chase, SMART-Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation,** spoke in support of HB1357. He provided written testimony and a report entitled, "North Dakota Crew - Two-Person Question Series". See attachments # 1-2.

(28:00)

**Representative Rick C. Becker:** I don't have first-hand knowledge of the accidents in North Dakota. In Larimore how many cars were on either side of the decoupling?

**Jim Chase:** I'm not sure of the exact number, but I know that she had to walk back quite a ways, it is my understanding the train was about 6,500 feet in length, and she had to walk back 1/4<sup>th</sup> of that or more.

**Representative Rick C. Becker:** How long does it take to go through the process of decoupling, cutting the brake line, and getting the engine going and clear?

**Jim Chase:** It depends on where you will make the separation in the train and the landscape that you have to walk back. Using an average train on a blocked crossing, my best guess is 15-20 minutes to go through the process. He explained the process.

**Representative Rick C. Becker:** Is it your contention that to move the entire train forward or back, takes longer than 15-20 minutes?

**Jim Chase:** No, but there are many situations where we cannot pull the whole train past the crossing because of limitations on authority, signals, and obstructions in the track. We may be able to pull ahead a car or two to separate the crossing, but to pull the whole train up a lot of times is not practical.

**Representative Rick C. Becker:** In the crash on December 30, 2013 what did Mr. Anderson, the crew member, do as far as the emergency actions that prevented the dangerous chain of explosions?

**Jim Chase:** He was on the second train that derailed that caused the oil train to run into it and derail. After they determined that the oil train was on fire, Mr. Anderson contacted the rural fire department and got fire gear to put on (previous fire training). He went as close as he dared and made the cut on that train. They pulled the train back from the rear. Those cars were saved.

**Representative Rick C. Becker:** It was actually a coincidence that he was a fireman. If he hadn't been a fireman, would he not have been able to decouple the train as a second crew member?

**Jim Chase:** He could have gone back and made the cut, but wouldn't have been able to get as near as close.

**Representative Chris Olson:** Do you have any statistics on how many times this process takes place on trains in North Dakota in a year's time?

**Jim Chase:** I don't have any actual numbers because we don't keep track of that. It happens frequently. They are not all related to accidents. Some are mechanical breakdowns or we have to go into sidings that have crossings and meet multiple trains. In those situations we are required to cut the crossing.

**Chairman Dan Ruby:** Is there a set distance that is required to maintain support to a train, or are there times that it would take outside support a long time to get to the train?

**Jim Chase:** There is not any specification.

**Chairman Dan Ruby:** Are there any other states that have laws that require two people minimum on a train?

**Jim Chase:** Yes, there are three states that had it, and one was challenged. I believe it was West Virginia. It was challenged and overturned. Wisconsin and Arizona have current legislation that requires a minimum of two people on a train. There aren't a lot of others, but because of the signaling of BNSF that they were making a formal attempt to go to one person crews on certain routes it has just opened the floodgates, so to speak. This was the first formal signaling of the railroad that they want to do this.

**Chairman Dan Ruby:** You don't think that the unions would have the leverage to stop that?

**Jim Chase:** Certainly the two things are intertwined. One of the things that we don't talk about in collective bargaining is public safety. We would argue, and our vote was to vote that down because we feel that the safest place for that person is in the cab, not possibly 200 miles away at the business's discretion.

**Chairman Dan Ruby:** It does seem like there would be a lot of risk when having only having one person on such a long unit train. On the other hand, some us remember the discussion of cutting down from three to two. It certainly is not a new battle between personnel and business.

**Jim Chase:** I think that there is line here that is being crossed, and that line is public safety that will be impacted by this. We are not asking for more people, we are just asking to maintain the two.

**Rep. Mark Owens:** Has your union been advised that this is a possibility in the near future?

**Jim Chase:** Yes, the negotiations continue. They could come out tomorrow; offer a lot of money, and the protected employees may decide to take that. We could be running this shortly. Just as an added point; they were only going to do this on the positive train control routes, which are the major routes in North Dakota. They didn't say where the people would be stationed, but it could be up to 200 miles away. That is why we have an issue with this.

(39:00)

**Mike Muscha**, retired engineer and railroad worker for 42 years, spoke to support HB1357. He provided written testimony. See attachment #3.

(47:00)

**Ron Huff**, Brotherhood of Locomotive Engineers for Trains, spoke to support HB 1357. He provided written testimony. See attachment #4. "A Guide to the Court Ruling on the Requiring Two-person Crew, from the United States Court of Appeals Seven Circuits". Portions of the law were highlighted and discussed.

**Ron Huff:** The FRA is considering to make is so there has to be a two-man crew on a train, but it would be a hazardous material train. If you listen to the accidents, it wasn't the hazardous material trains that were the problem, except the one in Canada.

(53:07)

**Chairman Dan Ruby:** To clarify what you were talking about, is the law that was passed that requires two men on a crew, is that just for hazardous wasted trains? We heard earlier that there was language similar to this that is being proposed in Wisconsin. Is that for all trains?

**Ron Huff:** No, sir. The law in Wisconsin requires two members on a train (all trains). That law was passed in 1997. In 1999 the railroads took it all the way to the Seventh Circuit

Court of Appeals. That court upheld that portion of law which requires two people on a train. The last that I heard, this law is pending in nine different states.

**Ron Huff** finished his testimony.

**Representative Chris Olson:** This bill is restricting the operation of trains when it is moving freight. Is there ever a time when an engine is carrying a smaller amount of freight where it may be safe enough to use a single crew member? Would we be unduly restricting the railroad in a case where it could be safe to have just one individual?

**Ron Huff:** Is there a possibility of that happening? There is always a POSSIBILITY. But the question you should be asking is, "Whose life do you want to put on the line?"

**Representative Chris Olson:** According to the federal register there are cases where there are single men. According to this law as well, we would only be forcing them to have two men in the case of a freight scenario. So, you could have a train traveling for other reasons with only one person. So, a person hit by one of those trains would be equally dead. Should we be requiring two men to be on an engine whenever it is running? Should the bill be amended?

**Ron Huff:** Let's talk about a hostler and helper. A hostler is someone who is restricted to a movement within a maintenance (round house) facility. The helper engineer is one that is on the back of the train that is pushing the train. The engineer and conductor in the front control the train. If you are running a single engine with one person, **maybe** it would safe. If you are running two engines, in my mind, it would become questionable.

**Chairman Dan Ruby:** If you see people moving cars around and getting them ready for pick-up. Would this apply to those?

**Ron Huff:** That would be a private industry track and they would be responsible for the activities that go on there. The elevators own those tracks, and some may own their own engines. The bill itself says, "... a **railroad** may operate."

**Vice Chairman Lisa Meier:** What is the maximum number of hours that a crew member may operate a train?

**Ron Huff:** It is twelve hours.  
1:05:49

**Mike Link,** Department of Emergency Services, spoke on behalf of Greg Wills, Director of the Homeland Security Site, who wanted to testify on HB 1357. Mike is relaying their support for this bill. Greg has analyzed the train wrecks around the county that are related to oil, and the train wrecks that we have had in the state. He feels that having two people on the train, as stated in previous testimony, has been very beneficial in preventing loss of life or loss of property.

There was no further support for HB 1357.  
1:07:20

**John Olson, lobbyist for BNSF Railway - #148**, spoke in opposition to HB1357. He provided written testimony. See attachment # 5.

1:14:00

View Rule- page 3 of testimony.

**John Olson:** My point is that there is an argument to be made because they have taken jurisdiction at this point, preemption is already applying. It certainly will apply when the rule takes full effect. The rule will be published in April. There will be a comment period until June, and I anticipate that the rule will be in effect before this bill would take effect if it is passed.

**Chairman Dan Ruby:** Do you know what the railroad's position is in relation to the number of crew members required?

**John Olson:** I don't know that for a fact. You could probably track that on the website.

**Representative Gary Paur:** Amtrak is a publically funded railroad. Would we have any jurisdiction over that?

**John Olson:** I don't know the answer to that.

**Representative Ben Hanson:** If BSNF's opposition is based on the idea that a federal rule will be coming out this year, why would they be opposed to this which would automatically be superseded by the federal rule? Why should we trust that the federal government will accomplish this in a timely manner?

**John Olson:** I think it is bad law to pass provisions that will be preempted by the federal government. There is no doubt in my shop that this law will be adopted.

**Representative Ben Hanson:** Does BSNF have a stance on the federal legislation?

**John Olson:** I think it is really in the rule that is being talked about, even though the rule has not been published. I think that the rulemaking would permit the railroad to submit information under those circumstances where it believes that less than a two-man crew could be required. I don't know if they have a stance on the federal rule making.

**Representative Chris Olson:** You say that the bill is unnecessary because they are already required to do so by the two-man contracts. Is there currently some negotiations going on about changing the contracts?

**John Olson:** It is my understanding that those contracts were already negotiated. It was something that was pitched by BNSF at the time. I don't know about that.

**Chairman Dan Ruby:** When you say that BNSF isn't running two-man crews, do you mean in North Dakota or in their whole system.

**John Olson:** I can only speak for North Dakota, but I can say this: they are running two man crews ALL the time with oil or hazmat materials.

**Representative Lois Delmore:** Are there any penalties for the railroad if they would violate the federal rule?

**John Olson:** I don't know what the penalties are at that level. The feds usually get pretty tough in making sure that the railroads comply.

There was no further testimony in opposition to HB 1357.

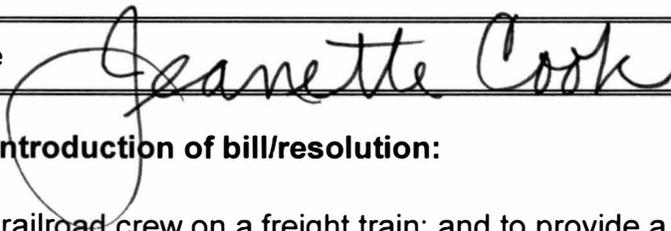
# 2015 HOUSE STANDING COMMITTEE MINUTES

**Transportation Committee**  
Fort Totten Room, State Capitol

HB1357  
2/19/2015  
#24151

Subcommittee  
Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

A bill relating to the required railroad crew on a freight train: and to provide a penalty.

## Minutes:

Attachment #1

**Chairman Dan Ruby** brought HB 1357 back before the committee and reviewed the bill. **Vice Chairman Lisa Meier** and I went to Legislative Council last night and found out that you can't convert a bill to a Concurrent Resolution. You can only do a Study Resolution. It seems like no one knows what the real rules are. So much of it is up in the air right now. We have a couple of options with this:

- If we pass this and put it in our law, I would like to remove the reference to "light engine" removed.
- If we do that, it may get preempted.
- If the rules are consistent with our law, it wouldn't get preempted.
- If we don't pass this, and they write it; it won't really matter. Except in that case we aren't really making the state's position on this known.

**Representative Gary Paur** tried to get some answers as well. He didn't find out very much either. **Vice Chairman Lisa Meier** found out something about the penalties. They would be enforced by the Public Service Commission.

**Representative Robin Weisz:** I struggle with this bill. The number one complaint I get from constituents is trains blocking the crossing. So, if there is a one man crew, the railroad will not have the ability to split the train to clear a crossing. It is an issue that we need to be aware of. It is a legitimate concern.

**Chairman Dan Ruby:** We accept that there are new technologies that in some instances may help. The feds may or may not accept it. We don't know what the ruling will be.

**Representative Robin Weisz** repeated his concerns about crossings.

**Representative Chris Olson:** If that is one of the biggest concerns (splitting the trains at the crossing), then I think that this bill goes far beyond addressing that specific concern. It

seems like that could be handled in law requiring certain types of management of these crossings. I would expect that the railroad would provide adequate personnel to comply with any rulings or regulations that might be made regarding NOT blocking crossings.

**Representative Gary Paur:** When I signed on to this bill, I contacted a neighbor who was a track engineer regionally and nationally. He is extremely informed on railroads. He talked to me for over an hour, giving reason after reason why having a one person crew on a train is a DUMB idea. I came away 110% convinced that a one person crew is not a good idea.

**Representative Chris Olson:** I do have information that states that single engine crews are not new in North America. Amtrak has a single conductor in the train. There are also regional freight railroads that use single person crews. The QS&L in Canada also operate a large number of trains with single person crews. Internationally, single person crews for trains are widespread in Europe and Australia. There is a wide range of information that we are not privy to, which might give us reasons why we would or would not want to pass this bill.

**Representative Rick C. Becker:** It seems like this is preemptive. They are going to be working things out. I don't like passing bills in which the industry or the federal government is going to come out with something that preempts us. We are going more and more to less staffing and/or employees, as we talked about with autonomous vehicles hauling freight. It is in the best interest for the railroads to do what works best for them with the greatest amount of safety. I would like them to come up with their final recommendations before we get involved.

**Representative Gary Sukut:** In my mind having two people on a train is common sense. But, as we look further into this, some of the studies that we were provided showed that with modern technology some of these one person trains are just as safe as or safer than having a two person crew. Another thing that concerns me is that we are issuing a mandate requiring the railroad industry to have two people on every train. That may be good, but I am not real excited about mandates and telling industry how to run their business. Going forward, technology continues to improve and improve. I worry that we are strapping them with a mandate that they have two employees, and going forward who know what will happen. Some of these issues may be handled through technology. This is a difficult decision.

**Representative Lois Delmore:** I understand the mandate part and concerns that have been brought up, but I think we try to error on the side of public safety. We are dealing with trains that are 10,000 feet long. They cover two miles. Regardless of technology, if something goes wrong without two persons so they can decouple, it could mean someone's life. I would error on that side, rather than on the efficiency and things that we count on for on trains.

**Representative Lois Delmore moved an amendment, to remove "or light engine".**  
**Vice Chairman Lisa Meier seconded the motion.**  
**A voice vote was taken. The motion carried.**

**Representative Chris Olson:** In the bill we are basically prohibiting the use of single person crews because we in this committee think it is unsafe. It should be noted that Canadian legislation permits the use of single person crews as long as certain parameters are met and certain determinations have been made. Single person crews are being used throughout the world. The question is: when is it appropriate and when is it not? In many cases it may be common sense to have two people on board. But, for us to say that there is never ever an instance in which the railroad will never be allowed to use a single person, might be short sighted and overbearing on our part.

**Representative Mike Schatz:** Is there any evidence that there are more accidents when there is a one crew train than a two crew train?

**Chairman Dan Ruby:** I don't think that there was anything provided about **more** accidents. There was more information about the increased safety with a two man crew when there was an accident.

**Representative Gary Paur:** Two weeks after the accident in Quebec, it is no longer legal to have single person trains in Canada. They changed it to require two. Yesterday, I stopped at the Attorney General's Office to ask the effect of us passing this bill as far as if the feds passed something, if it was acceptable, or what the implications would be. I was referred to Commissioner Julie Fedorchak. She sent me an e-mail that says that the Federal Rail Administration does not support reducing the crews to one engineer. See attachment #1.

**Representative Ben Hanson:** Do we know which other states have passed these requirements?

**Vice Chairman Lisa Meier:** I have in my notes that Wisconsin, Washington, and Arizona have introduced legislation. Law is pending in 10 states.

**Representative Gary Paur moved a DO PASS as amended on HB 1357.  
Representative Ben Hanson seconded the motion.**

**A roll call vote was taken: Aye 7 Nay 6 Absent 1  
The motion carried.  
Representative Kathy Hawken will carry HB 1357.**

**Representative Mike Schatz:** I would like to reverse my vote.

**Chairman Dan Ruby:** We would need a motion to reconsider.

**Representative Mike Schatz moved to reconsider the vote.  
Representative Rick C. Becker seconded the motion.**

**A roll call vote was taken on the reconsideration of the DO PASS on HB 1357:  
Aye 7 Nay 6 Absent 1 The motion carried**

**Representative Chris Olson moved a DO NOT PASS as amended on HB 1357.**

**Representative Rick C. Becker seconded the motion.**

**Representative Marvin Nelson:** I will resist the DO NOT PASS. When we look at flying, there are two pilots up there. The autopilot can fly and land a plane, yet we still require two pilots. These trains may have some situations when someone is moving something and two are not required. But, these are two mile long trains, and we have already seen in this state incidences where the second person was very valuable. (Casselton and Larimore) In West Virginia, recently, they broke the train and saved some of the train from damage. It seems to me that when we are hauling these long trains, many with hazardous materials, that it is a basic public safety requirement that there should be a two man crew in the train.

**Chairman Dan Ruby:** I understand your point of view, and I have really been torn on this issue. It makes sense. I have talked to people with the railroad and others. What concerns me that in every instance, no matter what comes down in the future, we will have this locked in. If they address this issue on a federal level this year, they might deem this is what will be enforced (two man crew). I have been torn and have not been exactly sure how I was going to vote until now. It does make sense, and common sense is what we legislate a lot. On this situation, for me, it finally came down to that fact that it is too cut and dried and too rigid for every situation that could come up.

**Representative Chris Olson:** The airlines are regulated by the federal authorities, and I would hope they would never come to North Dakota to ask us to regulate them. We do not have the expertise and knowledge to do that. I think this topic definitely deserves study. There is federal rule making going on to deal with this now. I am hoping that the industry and federal regulators will continue to work on this issue and come up with an appropriate solution for everyone in the country rather than a patchwork of incompatible laws.

**Vice Chairman Lisa Meier:** There is the concern of what the federal government is going to do. We were unable to change this to a resolution, and that is why I voted the way I did today. I do have concerns about the huge trains that carry hazardous materials. I feel this is a good bill to vote for.

**Representative Robin Weisz:** This isn't locked in; the legislature will meet again in two years. Generally, I thought that we have always believed in **state rights**, and that the **states** should be setting policy instead of the federal government.

**Representative Kathy Hawken:** I would like to echo what Representative Robin Weisz said. We have spent hours saying that the states are in charge, and now we are saying *not this time??* I agree that you hate to tell someone else what they have to do, but there have been SO many problems in the last three months. It seems like it makes sense to have two people there. (in a train) We don't want to mandate, but we don't want to lose lives either.

**Representative Chris Olson:** Right now there aren't any one man crews in North Dakota. People smarter than us are fighting and figuring it out. I don't feel that we have all of the information necessary to make the best decision.

**Chairman Dan Ruby:** I could have easily argued both sides of this issue.

**Representative Lois Delmore:** My concern is with the engineer who cannot leave his engine and go back to decouple. We have had two tragic situations. I think that is a wake-up call. The trains have changed; they are two miles long, and we don't think that we want to have any assurance that emergency vehicles can get to an accident? I also see it as a protection for the railroad companies. I heard just this week that there is someone going after the railroad company itself for being lax and not having a two man crew in a tragic accident. I don't understand why we pay so much attention to some things, when this is also a very important public safety issue. I understand mandates and don't really like them, but we mandate things all of the time, such as seatbelts.

**Chairman Dan Ruby:** We have had this discussion before when we dealt with the remote trains in the yards. The concern was having feet on the ground and eyes out there. We did allow that change.

**Rep. Mark Owens:** I am going back and forth just like many of you. I was reviewing the Wisconsin case. I was trying to understand what the district court did in that case. I voted no because in the final analysis in the history of what FRA had done in relationship to two man crews. They were allowing one man crews for one railroad because of the ability of remote control. The remote control was their second crew member. It did seem strange. But, then it also said that two man crews did not mean a pilot / copilot. It meant a conductor and someone else on the train. That was okay because there were still two people on the train. I may still struggle with it, even after we go upstairs. If FRA is saying across the nation they feel comfortable letting the second person be remote controlled, that finally flipped me.

**The roll call vote was taken on for a DO NOT PASS on HB 1357 as amended:  
Aye 7 Nay 6 Absent 1 The motion carried.**

**Representative Rick C. Becker will carry HB 1357.**

15.0661.02001  
Title.03000

Adopted by the Transportation Committee

*AD*  
*2-19-15*

February 19, 2015

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1357

Page 1, line 7, remove "or light engine"

Renumber accordingly

2/19/15

Date: Click here to enter a date.  
Roll Call Vote #: "Enter Vote #" /

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. "Enter Bill/Resolution No." HB1357

House Transportation Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

- Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Delmore Seconded By Meier

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby			Rep. Lois Delmore		
Vice Chair. Lisa Meier			Ben Hanson		
Rick C. Becker			Marvin E. Nelson		
Robert Frantsvog					
Kathy Hawken					
Christopher D. Olson					
Mark S. Owens					
Gary Paur					
Mike Schatz					
Gary R. Sukat					
Robin Weisz					

*Roll  
Vote -  
Motion  
Carried*

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

*Remove "or light engine."*

2-19-15

Date: Click here to enter a date.  
Roll Call Vote #: "Enter Vote #" 2

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. "Enter Bill/Resolution No." HB1357

House Transportation Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Paur Seconded By Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby		X	Rep. Lois Delmore	X	
Vice Chair. Lisa Meier	X		Ben Hanson	X	
Rick C. Becker		X	Marvin E. Nelson	X	
Robert Frantsvog	A				
Kathy Hawken	X				
Christopher D. Olson		X			
Mark S. Owens		X			
Gary Paur	X				
Mike Schatz	X				
Gary R. Sukat		X			
Robin Weisz		X			

Total (Yes) 7 No 6

Absent 1

Floor Assignment Hawken

If the vote is on an amendment, briefly indicate intent:

Date: 2/19/15  
 Roll Call Vote #: 3

**2015 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. "Enter Bill/Resolution No."**

House Transportation Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar

Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Shatz    Seconded By Becker

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby	X		Rep. Lois Delmore		X
Vice Chair. Lisa Meier		X	Ben Hanson		X
Rick C. Becker	X		Marvin E. Nelson		X
Robert Frantsvog	A				
Kathy Hawken		X			
Christopher D. Olson	X				
Mark S. Owens	X				
Gary Paur		X			
Mike Schatz	X				
Gary R. Sukat	X				
Robin Weisz	X				

Total (Yes) 7    No 6

Absent 1

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

**2015 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. "Enter Bill/Resolution No." 1357**

House Transportation Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Olson Seconded By Becker

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby	X		Rep. Lois Delmore		X
Vice Chair. Lisa Meier		X	Ben Hanson		X
Rick C. Becker	X		Marvin E. Nelson		X
Robert Frantsvog	A				
Kathy Hawken	/	X			
Christopher D. Olson	X				
Mark S. Owens	X				
Gary Paur		X			
Mike Schatz	X				
Gary R. Sukat	X				
Robin Weisz	X				

Total (Yes) 7 No 6

Absent 1

Floor Assignment Becker.

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1357: Transportation Committee (Rep. Ruby, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO NOT PASS (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1357 was placed on the Sixth order on the calendar.**

Page 1, line 7, remove "or light engine"

Renumber accordingly

**2015 TESTIMONY**

**HB 1357**

HB 1357  
2-5-15



1 of 4

#1

**Testimony of Jim Chase  
Before the House Transportation Committee  
In Support of HB 1357  
February 5, 2015**

Mr. Chairman and members of the committee, my name is Jim Chase. I represent SMART-Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation employees. SMART is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters; I am a locomotive engineer for BNSF Railway.

On its face, this bill might appear to be a labor versus railroad dispute, but in reality this is a common sense public safety bill. To give you some history, the federal government has mandated Positive Train Control (PTC) as part of the Railroad Safety Improvement Act (RSIA) of 2008. PTC is a set of highly advanced technologies designed to automatically stop or slow a train before certain types of accidents occur. As mandated by Congress in the RSIA, positive train control must be designed to prevent:

- Train-to-train collisions.
- Derailments caused by excessive speed.
- Unauthorized incursions by trains onto sections of track where maintenance activities are taking place.
- Movement of a train through a track switch left in the wrong position.

Currently two persons are required to be on all freight trains in North Dakota by agreement; however, early in 2014 BNSF Railway negotiated an agreement to staff trains with an Engineer only. The agreement would have created the position of Master Conductor. This position would have been staffed along Positive Train Control routes of up to 200 miles apart at the discretion of the company. The Master Conductor would be responsible for assisting trains that are experiencing mechanical difficulty, may be involved in an accident, or need to "cut" a railroad crossing to allow vehicles to cross the tracks.

Despite the offers of increased wages and job protection that could last decades for all employees, the agreement was voted down by a large margin. The vast majority of our members are concerned that operating a train alone is inherently unsafe.

To demonstrate the enhanced public safety provided by a two-person crew, here are three examples of recent accidents involving freight trains and the public:

On January 5, 2015, a school bus failed to yield at a railroad crossing with stop signs and collided with an empty freight train in Larimore, killing the bus driver and a 17-year-old student and injuring 12 other people. Fortunately, the second crew member, Paula Randall, was free to leave the train engine cab, while remaining in radio contact with the engineer of the train. Paula walked back to the scene of the accident to assist the many victims and cut the rail cars to clear the crossing for emergency responders.

On December 30, 2013, a westbound BNSF train carrying soybeans derailed near Casselton. An adjacent eastbound BNSF train carrying Bakken crude oil struck wreckage from the derailed train. The collision ignited the crude oil and set off a series of large explosions, which were heard and felt for miles around. On the grain train was Geoff Anderson, a crew member who had the training to perform emergency actions which prevented the dangerous chain of explosions from spreading farther. With only an engineer on that train, such actions, that limited the amount of destruction, would not have been possible.

On July 6, 2013, a runaway train operated by short-line carrier Montreal, Maine and Atlantic Railway derailed in Lac-Megantic, Quebec. The resulting explosions and fires killed 47 people, leveled the center of the town, and caused hundreds of millions of dollars in environmental damage. The nearly mile-long train, carrying 72 tank cars of Bakken crude oil, was left standing unattended on a steep grade several miles outside the town due to it being the only stretch of track that could accommodate the entire train without blocking any highway grade crossings.

The train could have been secured and left unattended on flat terrain much closer to the town after having been separated, or "cut," to keep the crossing open, but that task cannot be accomplished safely with a single person attempting to both secure the train with hand brakes and test the securement by releasing the air brakes, as safe operating standards dictate. This tragic incident occurred just months after the railroad had begun operating with a single-person crew.

Under current regulations, whenever a train is involved in an incident like a collision, a mechanical failure, or blocking a crossing because of dispatcher's orders, the engineer must remain in the cab of the locomotive to monitor and prevent undesired movement of the train and relay radio transmissions to the dispatcher in Fort Worth, Texas.

In the event of an accident, it is the second crew member who can leave the cab to assist emergency personnel, cut the train apart to allow access to the accident scene, and radio the engineer regarding the train's status; however, the radio used must be portable and does not have the range to reach the radio tower to communicate with the dispatcher like the fixed radio in the locomotive cab. In the event of a mechanical failure, the second crew member leaves the cab, troubleshoots the failure, and repairs it, if possible. If it is not possible to make a repair in a timely fashion, he or she will separate the train to allow vehicular traffic to use the crossing.

Aside from the difficulty in responding quickly to accidents and incidents with only one person on a train who is unable to leave the cab, concerns are being raised in a number of towns and cities nationwide about the blocking of crossings for extended periods of time. These communities are concerned for the safety of their citizens who may be blocked from receiving timely ambulance and fire services as well as generally inconvenienced by lengthy crossing blockages.

In North Dakota, the towns of Enderlin, Berthold, and New Salem have all been pursuing legal action against the railroads for blocking rail crossings for extended periods of time. With the implementation of a single crew member on freight trains, it is likely there would be an increase in these complaints as a lone operator would have to wait for assistance to come from perhaps many miles away in order to cut a rail crossing.

By now you may be wondering, "How does the general public stand on this issue?" This January the North Dakota Legislative Boards of SMART-Transportation Division and the Brotherhood of Locomotive Engineers and Trainmen jointly sponsored a survey on rail issues in our state to take the pulse of the general public. Here are a few key points from the survey results. The final report is included in full at the back of my testimony.

When North Dakotans were asked if they supported legislation requiring all freight trains to operate with a crew of at least two people, ninety-two percent were in support (Q21). Ninety percent of those surveyed believe that one operator cannot be as safe as two (Q18). Given the opportunity to vote on the issue, 88 percent of those surveyed would vote "Yes" (Q24).

Fifty-one percent of those surveyed believed there are three or more persons on a freight train crew (Q17). When initially asked how worried they were about a train derailling in their communities, 62 percent of respondents were "Not That Worried" (Q16). Once they learned that most crews consist of only two persons, the number of those "Not That Worried" fell from 62 to 25 percent (Q19).

The railroads passing through our state are in the business of making money for their owners and stockholders and that is their fiduciary duty; they are not required to consider the public's safety and well-being when making business decisions. It is the duty and an obligation of our elected representatives to act in the public's best interests by creating rules and regulations which protect citizens, communities, and the environment.

It is crystal clear that North Dakotans expect there to be at least two persons on every freight train passing through our state. When an accident or derailment occurs, there should be enough crew members on board a train to at least be capable of responding immediately to an accident and, if necessary, move the train to clear the area. The recent rail accidents in North Dakota support this common sense requirement. I urge this committee to vote "Do Pass" on HB 1357.



1 of 25

#2 HB1357  
2-5-15

**January  
2015**

# North Dakota

## Two-Person Crew Question Series



**DFM Research**

Dean Mitchell, Consultant  
Saint Paul, MN 55102  
[www.dfmresearch.com](http://www.dfmresearch.com)

## **Executive Summary:**

Residents of North Dakota strongly support the creation of state legislation which would require a crew of two individuals to operate any freight train in the state. North Dakotans, when presented with balanced arguments both for and against requiring a two-person crew, favor passage by a more than ten-to-one margin (88 to 6 percent). It should be noted that the survey was commissioned prior to House Bill 1357 being introduced in the North Dakota Legislature. The survey consisted of 400 random respondents using both landline and cell phones and was conducted between January 17-26.

Respondents were asked about train derailment concerns, support levels for reintroducing legislation, and message testing of commonly used arguments by rail labor and rail management regarding their positions on two-person crew legislation. Key findings include:

- Initially, 62 percent indicate they are ‘not that worried’ about a train derailment in their community; this level drops to 25 percent ‘not that worried’ (a 37 percentage point decline) when informed that freight trains operating in North Dakota use a crew of two, and that some railroads would like to reduce crews to one-person on some trains. **(Questions 16 and 19)**
- When asked what size crew operates a freight train traveling through North Dakota, 51 percent of respondents believe either three, four, or more crew members – another 13 percent said ‘Don’t Know’. **(Question 17)**
- Respondents were next informed that in 2013 a bill to require freight trains to operate with a crew of two was introduced in Congress, but no action was taken. When asked if they would like to see The Safe Freight Act introduced in North Dakota, 92 percent indicated support. High support levels exist amongst all demographic groupings, including 88 percent of Republicans and 86 percent of those with a favorable view of the Tea Party. **(Question 20)**

After the initial test for support levels of two-person crew legislation, respondents were then presented statements often used for and against two-person crew legislation and asked if they found the position ‘convincing’ or ‘not that convincing’. Each respondent was tested with three statements for passage of The Safe Freight Act and three statements to reject The Safe Freight Act. Key findings include:

- Over nine-in-ten (93 percent) found ‘convincing’ the argument that having two crew members on a train allows each person to supervise and communicate with the other to help avoid mistakes that may contribute to an accident. This is the most convincing argument for supporting two-person crew legislation. **(Question 22c)**
- Only eight percent found ‘convincing’ the argument that two or more crew members in an engine may be a distraction to the engineer, causing a loss of focus. **(Question 23d)**
- Statements against passage of The Safe Freight Act are from a 2013 American Association of Railroads (AAR) letter sent to members of Congress. All of AAR positions fall flat with the public; even their strongest statement, “commuter rail operates thousands of trains a day with one person in the locomotive, and the data going back to the 1970s shows an excellent safety record” was only found ‘convincing’ by 26 percent of respondents. **(Question 23b)**

The January 2015 survey is a snap-shot of North Dakotans regarding their views on two-person crew legislation. Based on the results of the survey, and combined with past surveys from North Dakota and around the country, it is clear that no matter who you are, where you live, or what your partisan inclinations, North Dakotans overwhelmingly support two-person crew legislation.

## Methodology

The survey results presented in this report are based on a stratified random sample of 400 North Dakotans; the sample was stratified by five distinct regions to ensure a representative sample of the North Dakota public. The percentage allocated for each region was based on the most recent Census Bureau state population estimates.

- 26% - Eastern Cities (Fargo, West Fargo, Grand Forks)
- 20% - Western Cities (Bismarck, Mandan, Minot)
- 18% - Eastern North Dakota
- 19% - Central North Dakota
- 17% - Western North Dakota

After the numbers were stratified into the appropriate region, telephone numbers were then selected by random using a skip pattern to guarantee that the interviews were distributed throughout the region. Each number in the stratified sample had the same non-zero chance of being selected for an interview.

Telephone interviews were conducted by trained staff of Stone Research Services of Indianapolis, Indiana, using a computer-assisted telephone interview (CATI) system for landline phones. Cell phone interviews are dialed manually to comply with the Telemarketing Consumer Protection Act of 1991. To ensure everyone in the household would have an equal chance of being selected, callers would ask to interview the resident over the age of 18 who had the most recent birthday.

Final results are weighted based on gender, age, and education to conform to the approximate voting population based on U.S. Census Bureau demographic data.

<u>Gender</u>		<u>Age</u>		<u>Education</u>	
Male	49%	18-39	40%	High School/Less	36%
Female	51%	40-64	41%	Some College/AA	37%
		65+	19%	Bachelor/Graduate	27%

The final results presented are subject to sampling error, which is the difference between results obtained from the survey and those that would be obtained if everyone in the target population were interviewed. The sampling error, commonly known as the margin of error, is  $\pm 4.9$  percentage points with a 95 percent confidence level; meaning that in 19 out of 20 times, the individual responses would be within the margin of error (confidence interval). If final results of a question resulted in a tabulated answer of 50 percent, the confidence interval would be between 45.1 to 54.9 percent. Where appropriate, question and answer choices are randomized to reduce order bias; due to rounding, numbers may not equal 100 percent.

Project management and final analysis of the data was completed by Dean Mitchell of DFM Research based in Saint Paul, Minnesota. In addition to his 22 years of political experience, Dean has completed course work in survey techniques and statistics as part of his Master in Public Policy (MPP) degree from the University of Minnesota's Humphrey School of Public Affairs.

**Topline Results:**

**Interviews:** 400 residents over the age 18 that reside in North Dakota  
**Margin of Error:** ±4.9 percentage points  
**Interview Dates:** January 17-26, 2015  
**Sample:** Landline and cell phone sample. Random digit numbers provided by Survey Sample International (SSI) of Fairfield, CT. SSI provided Stone Research with 4,000 residential random phone numbers from a pool of listed and unlisted numbers in the boundary area, and 1,700 cell phone numbers; which then were stratified into five distinct geographical regions.  
**Survey Sponsors:** SMART Transportation Division's North Dakota Legislative Board and BLET's North Dakota Legislative Board

**Q1:** Generally speaking, do you think the country is moving in the right direction, or is the country off on the wrong track?

Right direction..... 30%  
 Wrong track ..... 55  
 (VOL) Unsure ..... 16

**Q2:** And generally speaking, do you think North Dakota is moving in the right direction, or is North Dakota off on the wrong track?

Right direction..... 74%  
 Wrong track ..... 17  
 (VOL) Unsure ..... 9

**Q3:** I'm now going to read you names of some public figures and organizations. For each one, please tell me if you have a favorable or unfavorable opinion, and if you never heard of them before, just let me know. (Questions 3b through 3j; N=308, MoE ±5.6%pts)

	<u>Favorable</u>	<u>Unfavorable</u>	<u>Neutral (VOL)</u>	<u>Never Heard Of</u>
<b>Q3a:</b> Barack Obama	33	61	6	0
<b>Q3b:</b> John Hoeven	79	9	9	3
<b>Q3c:</b> Heidi Heitkamp	65	23	10	2
<b>Q3d:</b> Kevin Cramer	51	27	15	7
<b>Q3e:</b> Jack Dalrymple	63	16	16	5
<b>Q3f:</b> North Dakota Legislature	61	19	19	1
<b>Q3g:</b> Your State Legislator	60	14	23	3
<b>Q3h:</b> Republican Party	51	33	16	0
<b>Q3i:</b> Democratic Party	39	45	16	0
<b>Q3j:</b> Tea Party Movement	28	46	20	5

**Q4:** One topic that has been discussed a lot is the Affordable Care Act of 2010, generally known as ObamaCare. Now that some time has passed since the law has been in effect, generally speaking do you now approve or disapprove of the Affordable Care Act?

Approve ..... 29%  
Disapprove ..... 59  
(VOL) Neutral / Unsure ..... 12

**Q5:** And which would you say best fits your current view of the Affordable Care Act?

The law should be repealed in its entirety ..... 33%  
The law should be scaled back, but portions kept ..... 28  
The law should stand as is ..... 10  
The law should be expanded to provide more coverage ..... 19  
(VOL) Unsure ..... 11

**Q10:** I'm now going to read you some additional names. For each one, please tell me if you have a favorable or unfavorable opinion, and if you never have heard of them before, just let me know.

	<u>Favorable</u>	<u>Unfavorable</u>	<u>(VOL) Neutral</u>	<u>Never Heard Of</u>
<b>Q10a:</b> Amtrak	72	12	14	2
<b>Q10b:</b> High Speed Rail	41	31	20	9
<b>Q10c:</b> North Dakota DOT	74	11	14	1
<b>Q10d:</b> BNSF Railroad	60	18	19	3
<b>Q10e:</b> Transporting Oil by Rail	54	37	9	0
<b>Q10f:</b> Labor Unions	46	37	15	1
<b>Q10g:</b> The NRA	55	25	15	5

**Q11:** How worried are you about a train derailing in your community?

Very Worried ..... 10%  
Fairly Worried ..... 9  
Just Somewhat Worried ..... 19  
Not that Worried ..... 62

**Q12:** Based on what you know, how many people do you think operate a freight train that travels through North Dakota?

One ..... 7%  
Two ..... 29  
Three ..... 18  
Four or more ..... 33  
Don't know ..... 13

**Currently most freight trains in North Dakota operate with a crew of two; but now there are efforts by some railroads to reduce the crew to just one person on some trains.**

**Q13:** When it comes to railroad safety and operations, do you think a train with a crew of one individual can be operated as safely as a train with a crew of two individuals?

Yes, one operator can be as safe as two .....	7%
No, one operator cannot be as safe .....	90
(VOL) Unsure .....	3

**Q14:** Now let's suppose freight trains in your area operated with only a crew of one; now how worried would you be about a train derailling in your community?

Very Worried .....	30%
Fairly Worried .....	19
Just Somewhat Worried .....	26
Not that Worried .....	25

**Federal legislation was introduced in 2013 which would require all freight trains to operate with a crew of at least two people; this bill was known as H.R. 3040, The Safe Freight Act. Congress took no action in 2014, and now some are looking to the states to take action.**

**Q15:** Now looking ahead to the 2015 North Dakota legislative session. Some legislators want to introduce a version of The Safe Freight Act and require all freight trains to operate with a crew of at least two people in North Dakota. Do you support or oppose the introduction of The Safe Freight Act?

Support .....	92%
Oppose .....	4
(VOL) Unsure .....	4

**Q16:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

**Q16a:** It takes two crew members to properly secure a train when that train is going to be left unattended.

Convincing .....	75%
Not that convincing .....	19
(VOL) Unsure .....	5

**Q16b:** Having two crew members on a train provides better monitoring of traffic at public road crossings.

Convincing .....	81%
Not that convincing .....	16
(VOL) Unsure .....	3

**Q16c:** Having two people on a train allows the crew members to supervise and communicate with each other to help avoid mistakes that may contribute to an accident.

Convincing .....	93%
Not that convincing .....	5
(VOL) Unsure .....	2

**Q16d:** The Federal Railroad Administration has stated its belief that multiple person crews enhance safety.

Convincing .....	85%
Not that convincing .....	8
(VOL) Unsure .....	6

**Q16e:** According to federal regulations, the engineer is not allowed to leave the locomotive cab while operating the train. A second crew member is necessary to investigate incidents such as derailment or a collision between a train and a motor vehicle at a crossing.

Convincing .....	84%
Not that convincing .....	11
(VOL) Unsure .....	5

**Q17:** I now want to read you a few reasons why some **DO NOT** want to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing reason to not pass the legislation: (Questions 23a through 23e; N=300, MoE  $\pm 5.5\%$ pts)

**Q17a:** Train crew size is addressed in the collective bargaining process between management and labor, and a law is not needed.

Convincing .....	13%
Not that convincing .....	78
(VOL) Unsure .....	9

**Q17b:** Commuter rail operates thousands of trains a day with one person in the locomotive, and the data going back to the 1970s shows an excellent safety record.

Convincing .....	26%
Not that convincing .....	69
(VOL) Unsure .....	5

**Q17c:** In 2009, the Federal Railroad Administration found no factual evidence to support the prohibition against one-person operation of trains.

Convincing .....	16%
Not that convincing .....	78
(VOL) Unsure .....	6

**Q17d:** The railroads say that two or more crew members in an engine may be a distraction to the engineer, causing loss of focus.

Convincing .....	8%
Not that convincing .....	88
(VOL) Unsure .....	4

**Q18:** Now considering everything you just heard about The Safe Freight Act; suppose you could vote on the bill. Would you vote YES to pass The Safe Freight Act or would you vote NO, and reject The Safe Freight Act?

Yes, pass .....	88%
No, reject .....	6
(VOL) Unsure .....	5

**Q19:** Generally speaking, when it comes to railroad safety, whom would you say you trust more to promote the right policies: railroad employees or railroad management?

Railroad Employees .....	72%
Railroad Management .....	19
(VOL) Unsure / Both / Neither .....	9

**Q20:** Rail labor unions are in support of The Safe Freight Act requiring a crew of two on all trains; which do you believe is their motive: to protect members' jobs, protect rail safety for the general public and members, or both jobs and public safety?

Members' jobs .....	12%
Rail safety for public and members .....	11
Both .....	73
(VOL) Unsure .....	4

**Now just a few final questions for demographic purposes:**

**Q95:** When it comes to political parties, do you consider yourself a:

Democrat .....	23%
an Independent .....	43
Republican .....	34

**Q96:** When it comes to your political philosophy, do you consider yourself a:

Liberal .....	14%
Moderate .....	42
Conservative .....	40
Tea Party .....	4

**Highlighted Crosstabs:**

**Q11: How worried are you about a train derailing in your community?**

Very Worried .....	<b>10%</b>
Fairly Worried .....	<b>9</b>
Just Somewhat Worried .....	<b>19</b>
Not that Worried .....	<b>62</b>

<u>Gender</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Men	7%	6	17	69
Women	12	12	20	56

<u>Age</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
18-39	10	4	17	70
40-64	10	15	19	56
65 plus	9	9	22	61

<u>Education</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
High School/Less	9	7	17	67
Some College/AA Degree	12	8	18	62
Bachelor/Graduate Degree	7	13	22	57

<u>Region</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
East City	15	11	23	51
West City	7	11	20	61
East Rural	12	8	12	67
Central Rural	2	5	16	77
West Rural	9	7	19	65

<u>Party Identification</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Democrat	15	12	19	54
Independent	9	8	19	63
Republican	7	8	18	67

<u>Ideology</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Liberal	15	11	11	63
Moderate	11	10	28	51
Conservative	8	8	13	72
Tea Party (Favorable)	3	9	13	75

**Q12:** Based on what you know, how many people do you think operate a freight train that travels through North Dakota?

One .....	7%
Two .....	29
Three .....	18
Four or more .....	33
Don't know .....	13

<u>Gender</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
Men	9%	31	20	31	8
Women	5	27	17	34	18

<u>Age</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
18-39	10	27	25	28	10
40-64	6	31	14	36	12
65 plus	3	29	14	33	21

<u>Education</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
High School/Less	7	24	16	34	17
Some College/AA Degree	7	27	18	34	15
Bachelor/Graduate Degree	6	37	22	28	6

<u>Region</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
East City	5	35	16	31	12
West City	9	24	24	26	18
East Rural	5	35	11	41	8
Central Rural	4	25	20	35	16
West Rural	10	22	22	33	12

<u>Party Identification</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
Democrat	8	32	14	36	10
Independent	6	31	22	29	12
Republican	7	24	18	34	18

<u>Ideology</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four+</u>	<u>DK</u>
Liberal	4	21	16	44	15
Moderate	6	32	22	31	10
Conservative	9	29	16	31	16
Tea Party (Favorable)	4	25	20	35	16

**Q13:** When it comes to railroad safety and operations, do you think a train with a crew of one individual can be operated as safely as a train with a crew of two individuals?

Yes, one operator can be as safe as two ..... 7%  
 No, one operator cannot be as safe ..... 90  
 (VOL) Unsure ..... 3

<u>Gender</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Men	12%	84	4
Women	2	95	3

<u>Age</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
18-39	11	85	5
40-64	7	91	2
65 plus	1	96	2

<u>Education</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
High School/Less	7	91	3
Some College/AA Degree	8	89	3
Bachelor/Graduate Degree	6	90	4

<u>Region</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
East City	7	89	4
West City	9	90	1
East Rural	5	90	4
Central Rural	2	93	4
West Rural	10	87	3

<u>Party Identification</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Democrat	4	93	3
Independent	5	93	2
Republican	3	92	5

<u>Ideology</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Liberal	4	95	1
Moderate	8	88	4
Conservative	7	89	4
Tea Party (Favorable)	10	86	4

**Q14:** Now let's suppose freight trains in your area operated with only a crew of one, now how worried would you be about a train derailling in your community?

Very Worried .....	<b>30%</b>
Fairly Worried .....	<b>19</b>
Just Somewhat Worried .....	<b>26</b>
Not that Worried .....	<b>25</b>

<u>Gender</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Men	23%	17	24	36
Women	37	21	28	14

<u>Age</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
18-39	23	14	33	29
40-64	34	23	23	20
65 plus	36	21	18	25

<u>Education</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
High School/Less	38	15	22	25
Some College/AA Degree	27	19	31	24
Bachelor/Graduate Degree	24	26	25	25

<u>Region</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
East City	38	21	21	20
West City	28	22	27	24
East Rural	28	12	31	29
Central Rural	24	23	24	29
West Rural	28	18	30	24

<u>Party Identification</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Democrat	44	14	27	14
Independent	28	23	19	30
Republican	23	18	34	25

<u>Ideology</u>	<u>Very</u>	<u>Fairly</u>	<u>Smwht</u>	<u>Not</u>
Liberal	37	9	27	26
Moderate	35	25	24	16
Conservative	23	18	27	31
Tea Party (Favorable)	20	21	30	28

**Q15:** Now looking ahead to the 2015 North Dakota Legislative session. Some legislators want to introduce a version of the Safe Freight Act and require all freight trains to operate with a crew of at least two people in North Dakota? Do you support or oppose the introduction of The Safe Freight Act?

Support .....	92%
Oppose .....	4
(VOL) Unsure .....	4

<u>Gender</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
Men	87%	7	6
Women	96	1	3

<u>Age</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
18-39	91	4	5
40-64	92	5	4
65 plus	92	3	5

<u>Education</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
High School/Less	92	3	5
Some College/AA Degree	92	4	4
Bachelor/Graduate Degree	91	4	5

<u>Region</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
East City	93	3	5
West City	86	5	9
East Rural	90	3	7
Central Rural	95	5	0
West Rural	94	4	1

<u>Party Identification</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
Democrat	96	0	4
Independent	92	5	2
Republican	88	5	7

<u>Ideology</u>	<u>Support</u>	<u>Oppose</u>	<u>Unsure</u>
Liberal	96	0	4
Moderate	97	1	2
Conservative	85	8	7
Tea Party (Favorable)	86	6	7

**Q16a:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

It takes two crew members to properly secure a train when that train is going to be left unattended.

Convincing ..... 75%  
 Not that convincing ..... 19  
 (VOL) Unsure ..... 5

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	63%	32	5
Women	87	7	6

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	77	20	4
40-64	75	19	6
65 plus	74	18	8

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	82	13	5
Some College/AA Degree	74	23	3
Bachelor/Graduate Degree	68	23	9

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	74	22	4
West City	66	28	7
East Rural	76	19	5
Central Rural	70	19	11
West Rural	95	5	0

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	79	18	4
Independent	75	18	8
Republican	74	22	4

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	80	12	8
Moderate	80	15	5
Conservative	65	29	5
Tea Party (Favorable)	71	24	5

**Q16b:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

Having two crew members on a train provides better monitoring of traffic at public road crossings.

Convincing .....	81%
Not that convincing .....	16
(VOL) Unsure .....	3

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	74%	23	3
Women	88	10	2

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	82	16	2
40-64	81	18	1
65 plus	80	15	5

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	85	11	4
Some College/AA Degree	78	19	2
Bachelor/Graduate Degree	80	19	1

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	80	22	4
West City	80	28	7
East Rural	75	19	5
Central Rural	92	19	11
West Rural	79	5	0

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	86	12	2
Independent	79	19	2
Republican	80	16	4

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	87	9	4
Moderate	83	15	2
Conservative	78	19	3
Tea Party (Favorable)	76	18	6

**Q16c:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

Having two people on a train allows the crew members to supervise and communicate with each other to help avoid mistakes that may contribute to an accident.

Convincing ..... **93%**  
 Not that convincing ..... **5**  
 (VOL) Unsure ..... **2**

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	91%	8	2
Women	95	3	2

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	92	6	2
40-64	95	4	1
65 plus	90	8	2

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	92	6	1
Some College/AA Degree	94	4	2
Bachelor/Graduate Degree	92	7	1

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	94	3	3
West City	96	4	0
East Rural	86	11	2
Central Rural	98	0	2
West Rural	91	9	0

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	96	2	2
Independent	92	7	1
Republican	92	6	2

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	95	0	5
Moderate	96	4	0
Conservative	90	8	2
Tea Party (Favorable)	91	7	1

**Q16d:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

The Federal Railroad Administration has stated its belief that multiple person crews enhance safety.

Convincing .....	85%
Not that convincing .....	8
(VOL) Unsure .....	6

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	83%	11	6
Women	87	6	7

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	89	3	8
40-64	86	12	3
65 plus	79	11	10

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	82	11	8
Some College/AA Degree	89	5	6
Bachelor/Graduate Degree	86	9	5

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	85	7	9
West City	91	6	2
East Rural	88	7	5
Central Rural	85	8	6
West Rural	77	13	10

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	90	4	6
Independent	89	6	5
Republican	77	13	9

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	89	6	5
Moderate	85	10	4
Conservative	85	7	8
Tea Party (Favorable)	82	10	8

**Q16e:** I now want to read you a few reasons why some would like to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing argument to pass the legislation: (Questions 22a through 22e; N=240, MoE  $\pm 6.3\%$ pts)

According to federal regulations, the engineer is not allowed to leave the locomotive cab while operating the train. A second crew member is necessary to investigate incidents such as derailment or a collision between a train and a motor vehicle at a crossing.

Convincing .....	<b>84%</b>
Not that convincing .....	<b>11</b>
(VOL) Unsure .....	<b>5</b>

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	77%	18	6
Women	92	4	4

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	81	16	3
40-64	88	9	3
65 plus	85	5	10

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	82	9	9
Some College/AA Degree	93	5	2
Bachelor/Graduate Degree	77	21	3

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	86	11	3
West City	80	13	7
East Rural	82	9	9
Central Rural	90	8	2
West Rural	85	13	2

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	89	5	5
Independent	81	16	3
Republican	85	8	7

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	89	3	8
Moderate	84	11	6
Conservative	84	13	3
Tea Party (Favorable)	82	15	3

**Q17a:** I now want to read you a few reasons why some **DO NOT** want to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing reason to not pass the legislation: (Questions 23a through 23e; N=300, MoE  $\pm 5.7\%$ pts)

Train crew size is addressed in the collective bargaining process between management and labor, and a law is not needed.

Convincing .....	13%
Not that convincing .....	78
(VOL) Unsure .....	9

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	12%	80	8
Women	13	77	10

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	10	79	11
40-64	11	84	5
65 plus	19	68	13

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	19	79	9
Some College/AA Degree	9	77	11
Bachelor/Graduate Degree	9	83	2

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	7	85	7
West City	13	80	8
East Rural	14	75	11
Central Rural	18	72	11
West Rural	14	77	9

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	11	82	8
Independent	14	80	7
Republican	13	75	13

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	20	71	9
Moderate	8	85	7
Conservative	14	77	8
Tea Party (Favorable)	16	74	10

**Q17b:** I now want to read you a few reasons why some **DO NOT** want to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing reason to not pass the legislation: (Questions 23a through 23d; N=300, MoE  $\pm 5.7\%$ pts)

Commuter rail operates thousands of trains a day with one person in the locomotive, and the data going back to the 1970s shows an excellent safety record.

Convincing .....	<b>26%</b>
Not that convincing .....	<b>69</b>
(VOL) Unsure .....	<b>5</b>

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	24%	73	3
Women	28	65	7

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	34	60	6
40-64	20	78	2
65 plus	20	71	9

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	28	62	10
Some College/AA Degree	25	71	4
Bachelor/Graduate Degree	24	65	1

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	27	65	8
West City	20	72	7
East Rural	28	65	7
Central Rural	33	65	2
West Rural	19	81	0

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	29	65	6
Independent	17	79	4
Republican	34	59	7

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	24	64	12
Moderate	20	75	4
Conservative	32	63	4
Tea Party (Favorable)	32	61	7

**Q17c:** I now want to read you a few reasons why some **DO NOT** want to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing reason to not pass the legislation: (Questions 23a through 23d; N=300, MoE  $\pm 5.7\%$ pts)

In 2009, the Federal Railroad Administration found no factual evidence to support the prohibition against one-person operation of trains.

Convincing .....	16%
Not that convincing .....	78
(VOL) Unsure .....	6

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	19%	76	4
Women	12	80	8

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	19	74	8
40-64	13	84	2
65 plus	14	75	11

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	14	74	12
Some College/AA Degree	15	81	4
Bachelor/Graduate Degree	18	80	2

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	15	80	5
West City	18	74	8
East Rural	22	69	9
Central Rural	12	83	5
West Rural	10	86	4

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	19	78	3
Independent	11	85	5
Republican	20	70	10

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	10	81	9
Moderate	10	87	3
Conservative	25	67	8
Tea Party (Favorable)	20	73	7

**Q17d:** I now want to read you a few reasons why some **DO NOT** want to see The Safe Freight Act become North Dakota law. For each one, tell me if you find it a convincing or not that convincing reason to not pass the legislation: (Questions 23a through 23d; N=300, MoE  $\pm 5.7\%$ pts)

The railroads say that two or more crew members in an engine may be a distraction to the engineer, causing loss of focus.

Convincing .....	<b>8%</b>
Not that convincing .....	<b>88</b>
(VOL) Unsure .....	<b>4</b>

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	8%	88	4
Women	8	88	4

<u>Age</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
18-39	8	89	4
40-64	8	89	4
65 plus	8	87	5

<u>Education</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
High School/Less	8	84	9
Some College/AA Degree	5	93	2
Bachelor/Graduate Degree	11	88	0

<u>Region</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
East City	8	87	5
West City	9	88	3
East Rural	8	88	4
Central Rural	9	87	4
West Rural	4	92	4

<u>Party Identification</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Democrat	6	89	5
Independent	7	90	4
Republican	10	86	4

<u>Ideology</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Liberal	2	90	8
Moderate	9	89	3
Conservative	8	87	5
Tea Party (Favorable)	10	85	5

**Q18:** Now considering everything you just heard about the Safe Freight Act; suppose you could vote on the bill. Would you vote YES to pass the Safe Freight Act or would you voted NO, and reject The Safe Freight Act?

Yes, pass .....	88%
No, reject .....	6
(VOL) Unsure .....	5

<u>Gender</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Men	83%	11	6
Women	93	2	5

<u>Age</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
18-39	87	8	6
40-64	89	6	5
65 plus	90	5	5

<u>Education</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
High School/Less	88	3	8
Some College/AA Degree	88	9	3
Bachelor/Graduate Degree	88	7	5

<u>Region</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
East City	94	3	3
West City	82	10	8
East Rural	83	10	7
Central Rural	92	7	1
West Rural	87	4	9

<u>Party Identification</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Democrat	93	3	3
Independent	88	6	6
Republican	85	9	5

<u>Ideology</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
Liberal	92	2	6
Moderate	91	4	5
Conservative	84	11	5
Tea Party (Favorable)	79	11	9

**Q19:** Generally speaking, when it comes to railroad safety, whom would you say you trust more to promote the right policies: railroad employees or railroad management?

Railroad Employees .....	72%
Railroad Management .....	19
(VOL) Unsure / Both / Neither .....	9

<u>Gender</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
Men	69%	23	8
Women	76	15	10

<u>Age</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
18-39	71	20	9
40-64	76	16	8
65 plus	68	22	10

<u>Education</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
High School/Less	71	18	11
Some College/AA Degree	72	21	7
Bachelor/Graduate Degree	74	16	10

<u>Region</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
East City	67	21	12
West City	77	15	8
East Rural	75	21	4
Central Rural	64	21	15
West Rural	81	15	4

<u>Party Identification</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
Democrat	77	16	7
Independent	74	15	10
Republican	66	25	9

<u>Ideology</u>	<u>Emp</u>	<u>Mgmt</u>	<u>Unsure</u>
Liberal	76	17	7
Moderate	73	16	11
Conservative	71	22	7
Tea Party (Favorable)	70	21	9

**Q20:** Rail labor unions are in support of the Safe Freight Act requiring a crew of two on all trains; which do you believe is their motive: to protect members' jobs, protect rail safety for the general public and members, or both jobs and public safety?

Members' jobs .....	12%
Rail safety for public and members.....	11
Both .....	73
(VOL) Unsure .....	4

<u>Gender</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
Men	19%	12	66
Women	7	11	79

<u>Age</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
18-39	13	11	73
40-64	14	11	73
65 plus	8	12	73

<u>Education</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
High School/Less	8	11	73
Some College/AA Degree	13	12	73
Bachelor/Graduate Degree	17	11	72

<u>Region</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
East City	13	11	70
West City	10	13	73
East Rural	12	6	78
Central Rural	13	15	71
West Rural	13	12	73

<u>Party Identification</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
Democrat	3	14	79
Independent	13	10	72
Republican	18	10	69

<u>Ideology</u>	<u>Jobs</u>	<u>Safety</u>	<u>Both</u>
Liberal	8	20	66
Moderate	7	12	78
Conservative	18	8	70
Tea Party (Favorable)	22	12	63

HB 1357  
2-5-15  
#3

**Testimony of Mike Muscha**  
**Before the House Transportation Committee**  
**In Support of HB 1357**  
**February 5, 2015**

1 of 2

Chairman Ruby, Members of the Transportation Committee. My name is Mike Muscha and I'm here today testifying for, as I call it, my family of 25 (four children and their wives and 15 grandchildren) and for citizens across this great state of North Dakota.

Chairman Ruby and members of this committee, if you want to give your loved ones a chance to survive a train/vehicle crash, you will support HB 1357 to keep two persons on a train. I'm retired now, but my personal experience is as a railroad worker for nearly 42 years, most of it as a locomotive engineer. I will explain why it is important to support this legislation. I will give you the facts about what it is like to run a train out there and how two crew members in the cab cooperate to operate a train that's traveling across the state in a safe manner.

First off, I would like to remind you of the inclement weather we often must operate through as we move our trains across North Dakota. On Canadian Pacific Railway, we used to average 7800 feet in length, but since I retired three years ago, that length has been increased to 10,000 feet, nearly two miles. Think about how many crossings a train may occupy at this length. And the most dangerous crossing is a blocked crossing in foul weather.

I would like to briefly explain the air system on a train. From the locomotives to the rear car on the train, we are coupled together by knuckles and air hoses between each car that allow the system to be charged up and allow us to apply the brakes both in normal stops and in an emergency application. If there is a break in this air system for any reason and the train goes into emergency, there is only one way to recover this air. The engineer must stay in the locomotive cab, and the other crew member must suit up and walk the train to find the break in the air line, regardless of the weather conditions.

Now, as we go down the track at speeds from 25 to 60 miles per hour on freight and 80 mph on passenger trains here in North Dakota, I will tell you, we don't slow down due to weather. Imagine holding a white sheet in front of you and going 60 mph; that is what it is like to operate a train in dense fog. In snow storms the snow is swirling as we look back at our trains, and we can see very little.

So now I get to my main point. When our train goes into emergency brake application, we don't know why; we only know that we have to recover the air. In adverse conditions, we may not think we have been run into, but guess what we may discover as my partner walks back,

inspecting the train? In most cases, it is just an air hose failure, but sometimes it's not. We may have collided with a vehicle.

In the case of a vehicle crash, here is what happens: My partner has now become the first responder. Under adverse conditions such as a blizzard or heavy fog, there are very few vehicles on the road. Some of these roads go one way down a driveway with access from only one direction. Some are state highways with very little traffic on them due to the weather.

Of course, I feel very sorry for my partner, but he or she has a job to do, and I have to stay with the locomotives. The second crew member must use good judgment, assess the situation, and relay to me by radio as much information as possible. I then use the locomotive emergency radio system and alert the dispatcher to start the rescue squads, first responders, etc. By now my partner has let me know what crossings are blocked and hopefully we can guide the responders to the best route to use to reach the accident scene. My partner will also relay to have me ask for permission from the dispatcher to move the train, if possible, to better access the accident site.

Remember, a train/vehicle collision may be more likely occur under adverse conditions such as dense fog or a snow storm and 30 below zero. And yes, as an engineer, this has happened to me. My partner on the train and I worked through it. Some of the crashes, we came away with better results than others, but the good outcomes were only due to a second person being on that train. If anybody in this room thinks their loved one would have a better chance of survival after a train/vehicle crash with one person on the train, please talk to me after the hearing.

Chairman Ruby, members of the committee, please join me and recommend a Do Pass on HB 1357.

I will answer any questions from the committee to the best of my ability.

Mike Muscha

Retired Locomotive Engineer

HB1357  
2-5-15

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#4

A GUIDE TO THE COURT RULING ON THE  
REQUIRING TWO-PERSON CREW, FROM THE  
UNITED STATES COURT OF APPEALS SEVEN  
CIRCUITS.

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neys, seeking invalidation of Wisconsin's "two-person crew" statute because Federal Railroad Administration (FRA) regulations allegedly preempted same safety concerns. The United States District Court for the Eastern District of Wisconsin, J.P. Stadtmueller, Chief Judge, 24 F.Supp.2d 928, held that parts of statute requiring certain qualifications for engineers and train crew members were preempted, but that part requiring two-person crews was not. On cross-appeals, the Court of Appeals, Manion, Circuit Judge, held that: (1) qualification requirements for locomotive engineers and trainmen and requirement that a locomotive engineer be at the controls of moving locomotive were preempted by federal regulations; (2) statute's "two-person crew" requirement was preempted insofar as it banned one-person hostling and helper movements; (3) statute's prohibiting one-person crews on over-the-road operations was not preempted by FRA regulations; and (4) statute's preempted provisions were severable from two-person crew requirement for operations that were neither hostling nor helper service.

Affirmed in part and reversed in part.

#### 1. Federal Courts ⇌776

Federal preemption is a question of statutory interpretation, which the Court of Appeals reviews de novo.

#### 2. States ⇌18.9

Preemption does not depend on a single federal regulation itself covering the subject matter of the state law.

#### 3. Railroads ⇌230

##### States ⇌18.21

Provisions of Wisconsin's "two-person crew" statute establishing qualification requirements for locomotive engineers and trainmen and requiring that an engineer be at the controls of the locomotive any time it moved were preempted by federal regulation, which excluded persons who moved locomotives up to 100 feet in a repair or servicing area to inspect and

maintain it from the definition of "locomotive engineers," and, thus, from qualification requirements. 49 U.S.C.A. § 20106; W.S.A. 192.25(1)(a, b), (2); 49 C.F.R. § 240.7.

#### 4. Railroads ⇌230

##### States ⇌18.21

Provision of Wisconsin statute requiring at least two crew members on the train or locomotive whenever it was moving was preempted insofar as it banned one-person hostling movements, involving short distance in train yards, and helper movements, which involve light ascending or descending movements; Federal Railroad Administration's (FRA) so-called "blue signal" regulations permitted one-person crews to perform hostling and helper movements, and FRA's decision to suspend added safety requirements for certain one-person operations were final dispositions of its position on the matter. 49 U.S.C.A. § 20106; W.S.A. 192.25(2); 49 C.F.R. § 218.24.

#### 5. Railroads ⇌223

When the Federal Railroad Administration (FRA) examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted.

#### 6. Railroads ⇌230

##### States ⇌18.21

Provision of Wisconsin statute prohibiting one-person crews on over-the-road operations was not preempted by Federal Railroad Administration (FRA) regulations; FRA's decisions regarding blue signal protection for one-person crews showed that the agency considered and decided the issue with regard to hostling and helper operations only. W.S.A. 192.25(2).

#### 7. Railroads ⇌230

##### States ⇌18.21

Federal Railroad Administration's (FRA) safety compliance agreements with

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, Soo Line Railroad Company, Union Pacific Railroad Company, and Wisconsin Central Ltd., Plaintiffs-Appellants, Cross-Appellees,

v.

James E. DOYLE, Attorney General of Wisconsin, E. Michael McCann, District Attorney of Milwaukee County, Thomas L. Storm, District Attorney of Fond du Lac County, et al., Defendants-Appellees, Cross-Appellants,

and

United Transportation Union, Intervening Defendant-Appellee, Cross-Appellant.

Nos. 98-4057, 98-4149 and 98-4166.

United States Court of Appeals,  
Seventh Circuit.

Argued May 19, 1999.

Decided July 23, 1999.

Railroads brought action against Wisconsin Attorney General and district attorney

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railroad did not negate FRA's position on operations of one-person crews expressly covered by the agreements, for purposes of federal preemption analysis, even though agreements were temporary and FRA was evaluating and revising its position. 49 U.S.C.A. § 20106.

#### 8. Railroads ⇌223

##### States ⇌18.21

Federal Railroad Administration's (FRA) affirmative decision that a specific activity should be permitted, even if just so that it can be studied, is a final disposition approving the activity, for purposes of federal preemption analysis. 49 U.S.C.A. § 20106.

#### 9. Railroads ⇌230

##### States ⇌18.21

Federal Railroad Administration's (FRA) approval of a test program for remote control devices in a particular operation with a one-person crew preempted state regulation of one-person crews for remote control operation of locomotive. 49 U.S.C.A. § 20106.

#### 10. Statutes ⇌64(2)

Preempted provisions of Wisconsin's "two-person crew" statute were severable from two-person crew requirement for operations that were neither hostling nor helper service. W.S.A. 192.25(2), 990.001(11).

#### 11. Federal Courts ⇌386

Whether invalid provisions in a state law can be severed from the whole to preserve the rest is a question of state law. W.S.A. 990.001(11).

Jon P. Axelrod, Dewitt, Ross & Stevens, Madison, WI, Ronald M. Johnson (argued), Akin, Gump, Strauss, Hauer & Feld, Washington, DC, for Plaintiffs-Appellants, Cross-Appellees.

James E. Doyle, pro se, Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees and Defendants.

Thomas C. Bellavia (argued), Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees and Defendants-Appellants.

Marilyn Townsend, Madison, WI, Lawrence M. Mann (argued), Alper, Mann & Weisbaum, Washington, DC, for United Transportation Union.

Thomas L. Smallwood, Borgelt, Powell, Peterson & Frauen, Milwaukee, WI, for Association of American Railroads, Amicus Curiae, American Short Line and Regional Railroad Association, Amicus Curiae and American Short Line Railroad Association, Amicus Curiae.

Susan K. Ullman, Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellants.

Before WOOD, JR., FLAUM, and MANION, Circuit Judges.

MANION, Circuit Judge.

The plaintiffs, four railroads that operate in Wisconsin, sued the Wisconsin attorney general and three county district attorneys seeking a declaration that a Wisconsin law requiring train crews to consist of at least two persons and also requiring crew members to have certain qualifications is preempted by federal regulations promulgated under the Federal Rail Safety Act, 49 U.S.C. § 20101 *et seq.* The United Transportation Union, which represents nearly all unionized trainmen in the United States, intervened as a defendant. The district court decided the case on cross motions for summary judgment. It held that the parts of the statute requiring certain qualifications for engineers and train crew members were preempted, but held that the part requiring two-person crews was not. The railroads appeal from the ruling regarding the two-person crew requirement. We disagree with the district court's conclusion that the two-person crew requirement is preempted in no circumstances. We hold that federal regulations have approved the

use of one-person crews in two types of operations but not in a third. Thus, Wisconsin's two-person crew requirement is preempted in part. The defendants cross-appeal from the finding that the statute's crew qualification provisions are preempted. We agree with the district court. We also hold that the state law is severable, so that the part that is not preempted can survive on its own. We therefore affirm the judgment of the district court in part and reverse in part.

#### I.

#### A. Wisconsin's Two-Person Crew Law and This Suit

On December 15, 1997, Wisconsin enacted Wis. Stat. § 192.25 to regulate the qualifications of train crew members and to require at least two persons in all train crews. In its entirety, the statute provides:

(1) In this section:

(a) "Certified railroad locomotive engineer" means a person certified under 49 CFR 240 as a train service engineer, locomotive servicing engineer or student engineer.

(b) "Qualified railroad trainman" means a person who has successfully completed a railroad carrier's training program and passed an examination on railroad operation rules.

(2) No person operating or controlling any railroad, as defined in s. 85.01(5), may allow the operation of any railroad train or locomotive in this State unless the railroad train or locomotive has a crew of at least 2 individuals. One of the individuals shall be a certified railroad locomotive engineer. The other indi-

1. The defendants are James E. Doyle, Wisconsin Attorney General, E. Michael McCann, District Attorney of Milwaukee County, Thomas L. Storm, District Attorney of Fond du Lac County, and David Blank, District Attorney of Douglas County. Each defendant was sued in his individual and official capacities.

vidual shall be either a certified railroad locomotive engineer or a qualified railroad trainman. A certified railroad locomotive engineer shall operate the control locomotive at all times that the railroad train or locomotive is in motion. The other crew member may dismount the railroad train or locomotive when necessary to perform switching activities and other duties in the course of his or her job.

(3)(a) The office, by rule, may grant an exception to sub. (2) if the office determines that the exception will not endanger the life or property of any person.

(b) Subsection (2) does not apply to the extent it is contrary to or inconsistent with a regulation or order of the federal railroad administration.

(4) Any person who violates sub. (2) may be required to forfeit not less than \$25 nor more than \$100 for a first offense, not less than \$100 nor more than \$500 for a 2nd offense committed within 3 years, and not less than \$500 nor more than \$1,000 for a 3rd offense committed within 3 years.

Section 192.25 was to become effective January 1, 1998. On December 31, 1997, the plaintiffs filed this suit, naming the Wisconsin Attorney General and three county district attorneys as defendants.<sup>1</sup> (For convenience, we will refer to these defendants as "Wisconsin.") Three of the plaintiffs are large, national railroads: Burlington Northern & Santa Fe Railway Company, Soo Line Railroad Company, and Union Pacific Railroad Company. The fourth plaintiff is a smaller, regional railroad: Wisconsin Central Limited.<sup>2</sup>

2. Two associations to which the plaintiffs belong filed an *amicus curiae* brief in this court and the district court. The Association of American Railroads (AAR) is a trade association whose members are large freight railroads and the National Railroad Passenger Corporation (Amtrak). Its members include

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Each plaintiff operates in Wisconsin. The complaint alleged that regulations promulgated under the Federal Rail Safety Act preempted § 192.25, and that the statute violated the federal and Wisconsin constitutions. The plaintiffs sought declaratory and injunctive relief. The parties agreed that Wisconsin would not enforce the statute in part pending the outcome of this litigation, or until December 31, 1998. (The parties have not informed us whether they have agreed to continue the stay.) The United Transportation Union (UTU) later intervened as a defendant. The parties filed cross motions for summary judgment, and subsequently stipulated that the plaintiffs would dismiss without prejudice the counts raising constitutional issues. The district court granted each side summary judgment in part. The court held that § 192.25's crew qualification requirements were preempted by federal law but held that its requirement for two-person crews was not. The parties have each appealed parts of the district court's decision.

## B. FRSA Preemption

[1] "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Federal law, therefore, preempts state law. The Supreme Court summarized how the courts are to analyze preemption issues:

In the interest of avoiding unintended encroachment on the authority of states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluc-

plaintiffs Burlington Northern, Soo Line, and Union Pacific. AAR's members represent the substantial majority of all rail freight in the United States. The second *amicus*, the American Short Line and Regional Railroad Association (ASLRRRA), is a trade association whose members are small and medium sized regional freight railroads. ASLRRRA's members include plaintiff Wisconsin Central and two other regional railroads that operate in Wisconsin.

tant to find preemption. Thus, preemption will not lie unless it is the clear and manifest purpose of Congress. Evidence of preemptive purpose is sought in the text and structure of the statute at issue. If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.

*CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-64, 113 S.Ct. 1732, 123 L.Ed.2d 387, (1993) (citations and internal quotations omitted). Because federal preemption is a question of statutory interpretation, we review this issue *de novo*.

In response to a perceived need for comprehensive rail safety regulation, Congress passed the Federal Rail Safety Act of 1970 (FRSA), as amended 49 U.S.C. § 20101 *et seq.*<sup>3</sup> The purpose of the FRSA was to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Thus, the Secretary of Transportation was given broad power to regulate and a mandate to use that power: "The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. The Secretary regulates rail safety through the Federal Railroad Administration (FRA). The FRSA also advanced the goal of national uniformity of regulation because one of its provisions expressly preempts state laws regulating rail safety. 49 U.S.C. § 20106. Because the FRSA contains an express preemption provision, our task principally is to apply

3. FRSA was formerly codified at 45 U.S.C. § 421 *et seq.* but was recodified without substantive change in Title 49 as part of a recodification of rail safety laws in 1994. See Pub. L. No. 103-272. Many prior court decisions interpreting FRSA refer to the prior U.S. Code sections. FRSA's preemption provision, 49 U.S.C. § 20106, was codified at 45 U.S.C. § 434.

the provision according to its terms. Section 20106 provides:

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement. A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation or order—

- (1) is necessary to eliminate or reduce an essentially local safety hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

Under this scheme, then, state regulations can fill gaps where the Secretary has not yet regulated, and it can respond to safety concerns of a local rather than national character. Wisconsin does not justify § 192.25 as a response to a local safety hazard, so the precise issue before us is whether the Secretary "prescribe[d] a regulation or issue[d] an order covering the subject matter" of § 192.25. This issue requires us to answer three sub-issues: What is the "subject matter" of the state requirement? What action by the Secretary amounts to issuing an "order"? ("Prescrib[ing] a regulation" is a clear enough term.) When does such an order or regulation "cover" the subject matter of a state requirement?

[2] The third question is the most easily answered because in *Easterwood* the Supreme Court thoroughly analyzed when FRA regulations "cover" the subject matter of a state requirement. Noting that "cover" was a somewhat restrictive term, the Court held that "[the party asserting preemption] must establish more than that [the regulations] 'touch upon' or 'relate to'

the subject matter... pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." 507 U.S. at 664-65, 113 S.Ct. 1732 (citations omitted). Importantly, preemption does not depend on a single federal regulation itself covering the subject matter of the state law. In *Easterwood* the Court found preemption by examining "related safety regulations" and "the context of the overall structure of the regulations." *Id.* at 674, 113 S.Ct. 1732.

What constitutes an "order" for FRSA preemption is less clear. This term is not defined in the FRSA, and the Supreme Court has not had occasion to define it. The district court relied upon the definition of "order" in the Administrative Procedures Act, 5 U.S.C. § 551(6), which defines an order to include "a final disposition, whether affirmative, negative, injunctive, or declaratory in form[,] . . . other than rulemaking." Certainly if an agency action constitutes an "order" under the APA definition, it would be an order for FRSA preemption. Because the actions in this case fit the APA definition, we need not decide whether an action that does not fit that definition could nonetheless be an order under § 20106. But we also note that "final disposition" includes informal decisions. See *Atchison, Topeka & S. F. R.R. v. Pena*, 44 F.3d 437, 441 (7th Cir. 1994) (*en banc*) (letter from the FRA's Chief Counsel announcing change in the FRA's interpretation of law was "final agency action" because letter made the FRA's position "absolutely clear"), *aff'd sub nom. Brotherhood of Locomotive Engineers v. Atchison, T. & S. F.R.R.*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996) (not addressing issue of "final agency action"); see also *United Transp. Union v. Lewis*, 711 F.2d 233, 240 (D.C. Cir.1983) (court reviewed agency's interpretation of law expressed in letter). For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it.

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The particular form of the decision is not dispositive.

"The subject matter of the state requirement" is the safety concerns that the state law addresses. See *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir.1989) ("[The FRSA] preempts all state regulations aimed at the same safety concerns addressed by FRA regulations."). Generally, determining the safety concerns that a state or federal requirement is aimed at will necessarily involve some level of generalization that requires backing away somewhat from the specific provisions at issue. See *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 307 (7th Cir.1994) (in analyzing preemption of state negligence claim for inadequate warning device at rail crossing, court referred to "subject matter of highway safety at that crossing"). Otherwise a state law could be preempted only if there were an identical federal regulation, and, as we noted, *Easterwood* teaches that this is not so. See 507 U.S. at 674, 113 S.Ct. 1732 (preemption found through series of related regulations and overall structure of the regulations, although no regulation directly addressed the state requirement); see also *Burlington Northern R.R.*, 880 F.2d at 1106 (FRA regulation permitting telemetry device rather than visual inspection preempted state law requiring trains to have a caboose because both were aimed at the safety concern of monitoring brakes and signals at the rear of the train). But with too much generalizing—"public safety" or "rail safety"—our analysis would be meaningless because all FRA regulations cover those concerns.

## II.

### A. Whether Section 192.25's Crew Qualification Requirements Are Preempted

The broad safety concern that § 192.25 is aimed at is ensuring that a train or locomotive crew can operate safely. The statute addresses this broad concern by addressing two related concerns: (1) who is qualified to operate a train or locomotive

safely, and (2) what is the minimum number of crew persons needed to operate a train or locomotive safely. This section of our opinion addresses the statute's provisions regarding the first concern, and the next section addresses the statute's provisions regarding the second concern.

[3] The statute addresses who is qualified to operate a train in three ways: § 192.25(1)(a) requires certain qualifications for a "Certified railroad locomotive engineer"; § 192.25(1)(b) requires certain qualifications for a "Qualified railroad trainman"; and § 192.25(2) requires that a certified railroad locomotive engineer operate the controls of the locomotive any time the train or locomotive is moving. Federal regulations clearly cover the subject matter of these requirements. Section 192.25(1)(a) itself expressly incorporates the numerous federal regulations in 49 C.F.R. part 240 that set the qualifications of an engineer. Section 192.25(1)(b) requires that a trainman be instructed and tested in the railroad's operating procedures, and the training of railroad employees is covered by federal regulations. See, e.g., 49 C.F.R. § 217.11(c) (requires tests of employees). In the face of the federal regulations, Wisconsin argues that these provisions are not preempted not because the federal regulations do not cover the subject matter of the state requirements, but because the state statute does not impose contradictory requirements. The short answer to this argument is that the text of § 20106 provides that a state may enforce a law "related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement." (Emphasis supplied.) This language does not distinguish between contradictory state requirements and merely duplicative state requirements. We previously stated:

If the Secretary promulgates a regulation that covers the subject matter of some state safety requirement, the state

requirement must give way (with an inapplicable exception) even if there is no direct conflict, that is, even if the federal and state requirements would not place the railroad under conflicting duties.

*Shots*, 38 F.3d at 307. Moreover, Wisconsin's requirement that an engineer be at the controls of the locomotive any time it moves does directly conflict with a federal regulation: 49 C.F.R. § 240.7, which excludes from the definition of locomotive engineers—and thus the requirement to satisfy all qualifications—persons who move the locomotive up to 100 feet in a repair or servicing area to inspect and maintain it. These three provisions of § 192.25 are therefore preempted by the federal regulations.

### B. Whether § 192.25's Two-Person Crew Requirement Is Preempted

#### 1. General Background

Section 192.25(2) also requires that at least two crew members be on the train or locomotive whenever it is moving, although it permits the second crew member to dismount the train to perform tasks such as switching and coupling or uncoupling. This provision expresses Wisconsin's conclusion that lone engineer and remote control operations are always unsafe. There is no federal regulation directly addressing when lone engineer or remote control operations are safe; if there were, this would be an easier case. So, as *Easterwood* teaches, we have to examine all related regulations and orders to see if the FRA has determined when these operations may be done. The parties make all-or-nothing arguments regarding the two-person crew requirement. That is, they argue either that the FRA has approved all one-person crew operations, or that it has approved none. We think a more flexible analysis is required because one-person crews are used in various types of operations that differ from each other considerably.

The number of crew persons on a train is determined by the operating conditions

and, sometimes, by the terms of the railroad's collective bargaining agreements. Generally trains operate with two or three crew members: an engineer and a conductor and (possibly) a brakeman. (The crew members are sometimes called "trainmen.") Prior to the demise of the steam locomotive, at least two crew members were needed in the locomotive itself: the engineer and the fireman. But with the advent of diesel locomotives, the engineer can operate the locomotive by himself, and in some operations, a conductor or brakeman is not essential. Thus, some railroads operate trains with only one crew member in three different situations that are relevant to this case: "hostling" movements, "helper" movements, and "over-the-road" movements. "Hostling" movements involve short distances at a train yard. After the train has arrived at the yard and its cars are uncoupled, an employee, called a "hostler," will often move the locomotive to another area. Locomotive movements without any attached cars are called "light" movements. "Helper" movements are another type of light movement. Sometimes a train will have to ascend or descend a restrictive grade that requires more locomotive power than it has. To assist it over the grade, a "helper" locomotive is sent from the yard and connects to the front or back of the train, which then is able to make the ascent or descent. Afterwards, the helper locomotive is uncoupled and returns to the yard. Finally, "over-the-road" movements involve hauling train cars between terminals. Presently it appears that none of the plaintiffs uses one-person crews for over-the-road movements in Wisconsin. Under their current collective bargaining agreements, Burlington Northern, Soo Line, and Union Pacific cannot use one-person crews for any over-the-road movements. They state that they would consider doing so when and if they are able to negotiate a change to their bargaining agreements. Wisconsin Central previously used one-person crews for over-the-road movements in Wisconsin,

but its use of them has been dictated by the terms of safety agreements with the FRA.

The FRA has had several occasions in the 1990's to review the safety of some aspects of one-person crews. To decide the extent to which § 192.25's two-person crew requirement has been preempted, we must examine the FRA's various orders and regulations and determine whether they have "covered" the subject matter of safety for one-person crews in any of these different types of operations.

## 2. Federal Regulations and Orders Regarding Train Crew Size

### a. The Blue Signal Regulations

In 1993, the FRA promulgated a new rule regarding "utility employees" temporarily assigned to work with train or yard crews. Some background is necessary to understand the FRA's rule-making. Since 1970, the FRA's regulations had distinguished "train and yard crews" from "workers."<sup>4</sup> The former were the engineers, conductors, and brakemen who were assigned to a particular train—"rolling equipment." "Workmen" were employees who were not a part of a particular crew but whose job required them to work on, under, or between rolling equipment doing such things as inspecting or repairing locomotives and cars. When a worker was working on, under, or between rolling equipment, he was required to comply with certain "blue signal" rules found in 29 C.F.R. part 218. Essentially, the worker posted a blue flag or sign on or near the train. No one could then move the train until he had found the worker who posted the blue signal and verified that the worker was not in danger when the train moved. Train and yard crew members were generally excluded from the blue signal requirement. The logic of the rule is simply that one of the greatest dangers to an employee working around rolling equipment is that the equipment might move

4. Actually the regulations first called these employees "workmen," but that term was

unexpectedly because of a lack of communication between the crew and a worker. Because train and yard crews work together as a team and keep in constant communication, there is much less danger of the engineer unexpectedly moving the train while another crewman is, for example, uncoupling a car.

In 1993, however, the FRA modified its regulations to account for substantial changes in the typical size of train crews, and the development of a new type of employee: the "utility employee." In announcing the new regulation, the FRA stated:

Since promulgation of the regulation [in 1970], the size of train and yard crews has been significantly reduced through the collective bargaining process and increased operating efficiencies. Implementation of the recommendations of Presidential Emergency Board No. 219 ("PEB 219") (see Pub. L. No. 102-29, 1991) is greatly accelerating this process. Through this and prior processes, crews that once consisted of a locomotive engineer, fireman, conductor, and two trainmen, have in many cases been reduced to a locomotive engineer and conductor only.

58 Fed.Reg. 43288. As the crew sizes decreased, many railroads began using "utility employees" who were attached temporarily to train and yard crews. Under the prior regulations, there was confusion and disagreement about whether these utility employees were train and yard crew members, thus excluded from the blue signal requirement, or were workers who were not. After studying the situation, in 1993 the FRA changed the regulations to expressly account for the changes in the industry. The new regulations defined train and yard crews, utility employees, and workers, and set out when each was subject to the blue signal requirement. In so doing, the FRA recog-

changed to "worker" in 1993. We use the current term for convenience.

nized that sometimes train or yard crews had only one person, and it adopted a different standard for such crews.

The regulations provided that a utility employee could be part of train and yard crews, and so excluded from the blue signal requirement, only when an engineer was at the controls of the locomotive, or at least in the cab. 29 C.F.R. § 218.22(c) & (e). The FRA explained that "[t]he presence and vigilance of the engineer at the controls (or, at the very least, in the cab) of the controlling locomotive is essential." 58 Fed.Reg. 43291. The FRA permitted, however, another member of the train or yard crew to go into the cab if the engineer had to perform some function outside. *Id.* The notice also explained:

A single locomotive engineer in helper service, or a single hostler may not take advantage of the exclusion from blue signal protection unless joined by a utility employee. Absent a crew member to monitor the locomotive, blue signal protection is required.

*Id.* The exclusion of single-person train and yard crews from the blue signal protection was noted only in the preamble to the new rule, not in the text itself. The FRA later explained why it had done so:

FRA's notice of proposed rule making requested comment on the protection needed for a single locomotive engineer performing helper or hostler service. Protecting one-member crews was therefore within the scope of the notice. FRA chose not to address the subject in rule text because no comments were received. In the preamble to the final rule, however, FRA expressed discomfort with one-member crews. It was stated that a lone engineer could not take advantage of the exclusion from blue signal protection unless joined by a utility employee to ensure that the locomotive cab was always occupied.

60 Fed.Reg. 11047.

In response to the preamble's making one-person train and yard crews subject to the blue signal requirement, the AAR peti-

tioned the FRA for reconsideration. On March 1, 1995, the FRA announced an amendment to the rule. 60 Fed.Reg. 11047. The FRA summary stated "[t]he amendment will permit single-person crews to work within the protections provided for train and yard crews." *Id.* The FRA expressed its continued concern "with the unique risk faced by lone engineers despite the current lack of evidence of a substantial injury record for one-member crews. An engineer assigned to helper or hostler service must frequently perform work, such as placing rear end markers or making connections between locomotives, that puts that employee in danger, particularly when this work is performed in congested terminals and rail yards." 60 Fed.Reg. 11047, 11048. So the FRA issued a new regulation, 49 C.F.R. § 218.24, which permitted a lone engineer to work on, under, or between rolling stock without blue signal protection only if certain specified conditions were met. The regulation also covered how a single engineer in helper service would communicate with the crew he was assisting and how the two crews would go about moving their respective trains. In response to this new rule for one-person crews, the FRA received numerous comments and petitions. After reviewing them, the FRA suspended the regulation as of its effective date, May 15, 1995. 60 Fed. Reg. 30469. The FRA also reopened the comment period on the amendment "regarding only the issue of one-person crews" and the comment period is apparently still open.

### b. The Wheeling & Lake Erie Remote Control Test Program

By 1993 some railroads had begun using remote control devices with their one-person crews. These devices permitted a lone engineer working outside the cab to move the locomotive. Thus, a lone engineer would be able to perform a task that previously would have required the engineer to be in the cab moving the locomotive and communicating by radio with another crew

member working on the ground. The use of these devices raised some significant regulatory compliance issues. In January 1993, the Wheeling & Lake Erie Railway Company petitioned the FRA for waivers from certain regulatory requirements so that it could use remote control devices with lone engineers. The FRA invited comment, conducted a public hearing, and then on November 18, 1994, issued a notice that it would conduct a two-year test program for remote control devices involving Wheeling & Lake Erie, although it encouraged other railroads to join the test program. 59 Fed. Reg. 59826. The FRA allowed the continued use of remote control devices by other railroads only if they participated in the two-year test program. 59 Fed. Reg. 59827. The UTU petitioned the FRA to prohibit any use of remote control devices, but the FRA denied that petition. See 61 Fed. Reg. 58737.

**c. Wisconsin Central's Use of One-Person Crews for Over-the-Road Movements, Use of Remote Controls, and the FRA's Review**

In 1996, Wisconsin Central proposed expanding its use of one-person crews for some over-the-road movements on four new routes. (At the time Wisconsin Central used one-person crews on four other routes.) On April 25, 1996, the UTU petitioned the FRA for an emergency order banning Wisconsin Central from using one-person crews for any over-the-road movements. (The FRA has not yet ruled on this petition.) The FRA then began reviewing Wisconsin Central's use of one-person crews and asked it not to expand its use of one-person crews for over-the-road movement during the review period. Wisconsin Central agreed.

In a May 8, 1996, letter to Wisconsin Central, the FRA stated:

We are aware that other railroads, as well as your own, currently operate one-person trains. For the most part, these operations are short, slow trains. You intend, however, to move mixed freight

over long distances in these four routes. As you no doubt realize, your proposed operations are novel, and pose many complex problems.

Although there are no available data proving one-person crews are unsafe, there are also no data showing operations of the type you propose to be safe. . . .

The FRA listed a number of safety concerns and directed Wisconsin Central to submit an action plan detailing its operating standards for one-person crews and addressing these issues. The FRA approved Wisconsin Central's continued use of one-person crews on the four existing routes while the FRA studied the matter.

In September 1996, Wisconsin Central notified the FRA that it wanted to begin using remote control devices to move locomotives at two of its rail yards in Wisconsin. On September 17, 1996, the UTU petitioned the FRA for an emergency order banning the use of remote control devices not only by Wisconsin Central but by all railroads. (The FRA has not yet ruled on this petition either.) On November 18, 1996, the FRA announced that it would conduct public hearings in Wisconsin on the issue of Wisconsin Central's use of one-person crews and the use of remote control devices in general. The hearings were held on December 4 and 5, 1996, in Appleton, Wisconsin. Numerous persons testified regarding the safety of one-person crews and remote control devices, including then-Wisconsin State Representative John Dobyms. Dobyms admitted he was no expert on railroads, but opined that one-person crews and remote control devices were not safe. Shortly after testifying at the FRA hearings, Dobyms introduced the bill that eventually became § 192.25.

On January 10, 1997, the FRA wrote a letter to Wisconsin Central in which it indicated that it was reviewing the issues raised at the December hearings. The FRA permitted Wisconsin Central to continue with its then-current use of one-

person crews, but told it to wait until a final FRA decision before expanding its use of one-person crews. The FRA did bar Wisconsin Central from implementing remote controlled operations, however. Due to a high accident rate, the FRA began conducting a broad study of all of Wisconsin Central's operations. On February 8, 1997, Wisconsin Central and the FRA entered into a Safety Compliance Agreement. The agreement permitted Wisconsin Central to continue using one-person crews for light movements, that is, locomotive only, but not for over-the-road movements, and it prohibited Wisconsin Central from using remote control devices. Those restrictions did not apply to Wisconsin Central's Port Inland, Michigan, terminal. This agreement ended after 12 months and was replaced with a new Safety Compliance Agreement. The new agreement praised Wisconsin Central for its compliance with the prior agreement and as a result expanded slightly the types of one-person crew movements that Wisconsin Central could conduct. The second agreement also had a 12-month term, which has now expired. The record is silent as to whether Wisconsin Central has entered into another agreement.

**3. The Preemptive Effect of The Federal Orders and Regulations**

[4] As we noted above, the record shows that there are three different kinds of one-person crew operations: hostling movements, helper movements, and over-the-road movements. As we discuss in detail below, on this record, we conclude that the FRA has issued final dispositions—"regulations" and "orders" under § 20106—permitting one-person crews to perform hostling and helper movements, but has not done so for one-person over-the-road operations. Thus, § 192.25(2)'s two-person crew requirement is preempted insofar as it bans one-person hostling and helper movements.

[5] As we discussed above, between 1993 and 1995, the FRA considered and

promulgated regulations governing when blue signal protection had to be used when a lone engineer performed hostling or helper service. In response to a petition for reconsideration, it suspended the regulation placing additional requirements on one-person crews (49 C.F.R. § 218.24). As our description of the rule-making process shows, the FRA considered the issue of safety for one-person crews conducting these two types of operations and whether additional precautions were needed. It ultimately decided not to impose any. When the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted. See *Norfolk & Western Ry. v. Public Util. Comm'n*, 926 F.2d 567, 570 (6th Cir.1991) (FRA decision not to impose requirement of walkways on railroad bridges preempted state requirement of such walkways); *Burlington Northern R.R.*, 880 F.2d at 1106-07 (FRA's considering adopting rule requiring caboose but declining to do so reinforced conclusion that telemetry regulation preempted state requirement for caboose); *Missouri & Pacific R.R. v. Texas R.R. Comm'n*, 850 F.2d 264, 267-68 (5th Cir.1988) (same). The district court was therefore incorrect to conclude that because 49 C.F.R. § 218.24 was suspended it is irrelevant to the issue of preemption. The decision to impose the added safety requirements for certain one-person operations and the decision to suspend it were final dispositions of the FRA's position on the matter, and were thus "orders" under § 20106.

Wisconsin argues that the subject matter of the FRA's orders and regulations was blue signal protection, not the minimum safe crew size. That argument too finely slices the subject matter of the federal regulations. The FRA considered whether a lone engineer could safely conduct hostling and helper service without blue signal or some other additional protection; it concluded that he could. Wisconsin argues that in deciding that these

lone engineer operations were safe without blue signal protection, the FRA did not decide the more basic issue of whether the operations were safe at all. This argument is too narrow. So also is Wisconsin's argument that the FRA's decision that lone engineers could safely conduct hostling and helper operations without blue signal protection merely "touches upon" rather than substantially subsumes the subject of whether one-person crews were safe for these operations. The FRA's more specific conclusion that the operations were safe without added precautions encompasses the more general one that they are safe. Wisconsin's requirement that two persons conduct these operations directly contradicts the FRA's decision that one person may do them safely. Under § 20106, Wisconsin's requirement must give way. To the extent § 192.25(2)'s two-person crew requirement applies to hostling and helper operations, it is preempted.

[6] We do not reach the same conclusion regarding one-person crews on over-the-road operations, however. The plaintiffs argue that the FRA has affirmatively approved all one-person operations, but the record does not support this argument. As we just discussed, the FRA's decisions regarding blue signal protection for one-person crews showed that the agency considered and decided the issue with regard to hostling and helper operations only. The FRA's regulations and its discussion of them in the Federal Register do not show that the agency considered the issue of one-person crews in other types of operations. The plaintiffs rely on the FRA's test program of remote control devices and the statements it made to Wisconsin Central about other railroads conducting one-person operations as evidence that the FRA approves one-person operations generally. The plaintiffs seem to argue that because the FRA is aware of one-person operations and has not proscribed them, it must necessarily approve them as safe. This does not follow. Such a position gives

too much weight to agency in action. The record shows unequivocally that the FRA is aware that the railroad industry uses one-person crews for some over-the-road operations. And it shows that the FRA has not prohibited this practice, although it currently has the matter under consideration. But what the record does not show is that the FRA has considered the issue and affirmatively decided not to regulate such operations. Only this sort of affirmative decision preempts state requirements. As the Supreme Court held in applying a different statute, "where failure of... federal officials affirmatively to exercise their authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," states are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947)) (omission in original). As the Fifth Circuit put it, the difference is between an agency saying "'we haven't looked at [the issue] yet,' rather than, as *Ray* requires, 'we haven't done anything because we have determined it is appropriate to do nothing.'" *Missouri P. R.R. v. Texas R.R. Comm'n*, 833 F.2d 570, 576 (5th Cir.1987). The record does not show that the FRA's consideration of one-person crews on over-the-road operations has taken on the character of an affirmative decision to do nothing; if and when it does, that decision will preempt § 192.25. But until it does, Wisconsin is free to require two-person crews on over-the-road operations.

[7, 8] There are a few more aspects of this case that require further discussion. The first is the preemptive effect of the FRA's Safety Compliance Agreements with Wisconsin Central. The plaintiffs relied on these agreements to show that the FRA had generally approved one-person crews. As discussed above, the agreements show the FRA was aware that some

railroads used one-person crews for over-the-road movements, but they do not show that the FRA had considered the issue of their safety and affirmatively approved these operations. This does not mean, however, that the agreements are totally without effect, as Wisconsin argues and as the district court seemed to think. The agreements showed that the FRA had taken jurisdiction over Wisconsin Central's operations in Wisconsin and had set out things the railroad could and could not do. These agreements, then, showed that the FRA had considered Wisconsin Central's operations and approved various aspects of it—including some one-person operations. Under Wisconsin's theory that these agreements had no preemptive effect, Wisconsin could prevent Wisconsin Central from doing precisely what the FRA had told the railroad it could do. The FRA, not Wisconsin, has the "whip hand" in railroad safety regulations, *Shots*, 38 F.3d at 307. The fact that the agreements were temporary and that the FRA was evaluating and revising its position does not mean the agreements are not final dispositions of the FRA's position on the operations expressly covered by the agreements. If a state could prohibit a railroad from doing that which the FRA expressly approved merely because the FRA was permitting the activity as part of an ongoing study of the matter, then the FRA's ability to make informed decisions would be severely curtailed. The FRA's affirmative decision that a specific activity should be permitted, even if just so that it can be studied, is a final disposition approving the activity. While the Safety Compliance Agreements don't have the broad preemptive effect that the plaintiffs argue for, they do "cover" the subject matter of all operations that they specifically permit.

[9] We have the same view of the preemptive effect of the FRA's 1994 test program for remote control devices. To the extent the FRA approved the use of a remote control device in a particular operation with a one-person crew—apparently

the only type of crew that uses such devices—necessarily the FRA had to have approved a one-person crew for that operation. Again, the FRA's more specific conclusion necessarily had to encompass the more general conclusion. Wisconsin argues, and the district court seemed to agree, that because the test program did not apply to all railroads it had no preemptive effect. It did not have the broad preemptive effect the plaintiffs argue for. But the FRA's decision to permit the use of remote control devices by railroads participating in the test program was an affirmative decision to allow those operations specifically covered by the program, and any state requirement prohibiting them would have been preempted. But an affirmative decision to permit specific operations is not, as the plaintiffs argue, necessarily an affirmative decision to permit all similar operations conducted by railroads not part of the test program. We cannot definitively state what preemptive effect the remote control test program—which is apparently no longer being conducted—would have had on a two-person crew requirement because the record is unclear as to exactly what types of operations were involved. To the extent they were hostling or helper operations, its preemptive effect on a two-person crew requirement is irrelevant because other regulations specifically approved those operations. All that is certain is that to the extent the FRA decided to permit a particular activity as part of the test program, that decision preempted any state requirements on that same subject matter. But as noted, this record does not demonstrate exactly what that extent was.

In response to Wheeling & Lake Erie's request for waivers of certain regulations to conduct remote control operations, the UTU filed a petition for an emergency order banning all remote control operations and the FRA denied that petition. The amici argue that this denial was an affirmative decision that remote control operations were generally permitted and, necessarily, that one-person crews were as

well. But the record does not give any details about the FRA's deliberations leading to its conclusion to deny the UTU's petition. It is unclear what conclusions the FRA reached in making that decision. Thus, as this record stands the denial of the petition does not necessarily mean that no regulation was appropriate.

In sum, § 192.25's two-person crew requirement is preempted for hostling and helper operations. It is also preempted to the extent the FRA through agreements with Wisconsin Central expressly permits that railroad to conduct one-person crew operations.

### C. The Severability of § 192.25

[10] We have held that nearly all of § 192.25 is preempted by federal regulations and orders. The only part remaining is the two-person crew requirement for operations that are neither hostling nor helper service. On appeal, the plaintiffs argue that the statute's provisions are not severable, and so in preempting part we should invalidate the whole. This issue seems not to have been raised in the district court, but neither Wisconsin nor the UTU argue that this issue was waived so we will address it.

[11] Whether invalid provisions in a state law can be severed from the whole to preserve the rest is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 116 S.Ct. 2068, 2069, 135 L.Ed.2d 443 (1996); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Both *Leavitt* and *Brockett* involved statutes that were partially invalid because some of their provisions were unconstitutional. We have found no case addressing the severability of a state statute that was partially preempted. We assume for purposes of deciding this case that state law would also govern this issue. Wisconsin's severability law was created by statute:

The provisions of the statutes are severable . . . If any provision of the statutes or of a session law is invalid, or if the application of either to any person or

circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Wis. Stat. § 990.001(11). "The factors to consider in deciding whether a statute should be severed from an invalid provision are the intent of the legislature and the validity of the severed portion standing alone." *In re Hezzie R. (State v. Hezzie R.)*, 219 Wis.2d 848, 580 N.W.2d 660, 665 (1998) (quotation omitted). Section 192.25 (3) provides that subsection (2) of the statute, which contains the two-person crew requirement, shall not apply to the extent it is contrary to federal regulations. This provision of course has no practical effect because the Supremacy Clause of the U.S. Constitution makes the statute apply only to the extent it does not conflict with federal law. But it does evidence a legislative intent to keep whatever part of subsection (2) was not preempted. It does not, of course, expressly show an intent to keep a part of subsection (2) when subsection (1) had also been preempted. But we think the intent is clear enough and the purpose of § 192.25 is not thwarted by federal preemption of subsection (1). Although the state requirements for crew qualifications are ineffective this does not mean that any miscellaneous person could operate a train in Wisconsin. Subsection (1) is preempted precisely because the FRA has covered the subject matter of crew qualifications with its extensive regulations. Indeed, the Wisconsin legislature merely adopted the federal standards for engineers and its standards for trainmen are compatible with the federal requirements and certainly less extensive. Thus, we conclude that the remaining parts of § 192.25 can be given effect without the preempted parts, and that the legislature so intended. We therefore decline to strike down the statute in its entirety.

### III.

In conclusion, the qualification requirements for locomotive engineers in

§ 192.25(1)(a) and for trainmen in § 192.25(1)(b) are preempted. Section § 192.25(2)'s requirement that a locomotive engineer be at the controls of a locomotive anytime it moves is also preempted. Section 192.25(2)'s two-person crew requirement is preempted for hostling and helper movements. It is also preempted to the extent that one-person operations are the subject of a Safety Compliance Agreement between Wisconsin Central and FRA. Finally, the preempted portions of the statute are severable from the rest so that those provisions not preempted may stand on their own.

The judgment of the district court is therefore AFFIRMED IN PART and REVERSED IN PART.

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HB1357  
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House Transportation Committee

HB 1357

February 5, 2015

Testimony of John M. Olson, Lobbyist #148

BNSF Railway

Two person crew

On behalf of BNSF, we are opposed to HB1357 based upon the following:

This bill is unnecessary because of existing federal safety rule making already underway at the federal level. Therefore, the subject matter of the bill is currently covered, and federal preemption applies. Further, the bill ignores new advanced safety technology and questions are raised concerning its breadth.

The bill requires two crew members on all trains hauling freight. Presumably, the idea is to have a pilot and copilot situation. However, it ignores passenger trains, which operate with an engineer alone in the cab with the conductors riding back in coaches, far removed from the controls. They are not copilots. How can one person be safe when hauling people but dangerous when hauling soybeans?

The bill is unnecessary. BNSF uses two man crews now and is required to do so by its labor contracts. A shift to a one person crew requires either that the union advocating this bill agree to it, or an act of Congress to so require (under the Railway Labor Act where Congress can set terms of labor agreements).

In its attempt to negotiate a contract in which one person would be on the train, such proposal excluded trains carrying oil or threshold amounts of hazardous materials. Those trains would absolutely continue with two people on board. Trains with one person would have been supplemented by employees driving vehicles, who would be able to deal with issues such as cutting trains at crossings to avoid blockage. Simply stated, they would have been able to drive to the crossing rather than having to walk a half mile or more from the locomotive.

The U.S. Department of Transportation is currently conducting a hearing a rulemaking process on the subject of crew size and location. The schedule calls for the rule to be published in April and the comment period closes in June, 2015. (This can be found at the DOT.gov website, Reports on Rulemakings). Any action that the state would take now may already be preempted; it almost certainly will be when the rule is enacted.

The bill is overly broad. While it excludes some rail yard and terminal activities, it still covers areas found to be preempted by a federal appellate court involving a Wisconsin statute. See Burlington Northern Santa Fe Railway Company v. Doyle, 186 F.3<sup>rd</sup> (7<sup>th</sup> Cir. 1999).

There is also a question of how the bill affects remote control switching jobs, that the union has already agreed to. In those situations, there is often no one on the locomotive itself.

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HB1357

2-5-15

2 of 3

Train crews operate across state lines. So what happens if a train with one crew member crosses into North Dakota from a neighboring state?

Finally, the bill prohibits the rail industry from taking advantage of new advanced technology. Rail carriers are under a federal mandate to install a new system called Positive Train Control at a cost of more than \$10 Billion to the industry. This system will provide improved safety by controlling train speeds, preventing collisions, stopping trains from going on the wrong track or running through switches. Under this bill, railroads would not only have to bear the cost of this system, they would be prohibited from realizing any labor savings it would provide.

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DOT/FRA

RIN: 2130-AC48

Publication ID: Fall 2014

Title: •+ Train Crew Staffing

Abstract:

This rulemaking would add minimum requirements for the size of different train crew staffs depending on the type of operation. The minimum crew staffing requirements would reflect for the safety risks posed to railroad employees, the general public, and the environment and would account for differences in costs. This rulemaking would also establish minimum requirements for the roles and responsibilities of the second train crew member on a moving train, and promote safe and effective teamwork. Additionally, this rulemaking would permit a railroad to submit information to FRA and seek approval if it wants to continue an existing operation with a one-person train crew or start up an operation with less than two crew members.

Agency: Department of Transportation(DOT)

Priority: Other Significant

RIN Status: First time published in the Unified Agenda

Agenda Stage of Rulemaking: Proposed Rule Stage

Major: No

Unfunded Mandates: No

CFR Citation: [49 CFR 218](#)

Legal Authority: [49 USC 20103](#); [49 USC 20107](#); [49 USC 21301 to 21302](#); [49 USC 21304](#); [28 USC 2461](#). note: [49 CFR 1.89](#)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
NPRM	01/00/2015	

Regulatory Flexibility Analysis Required: Yes

Government Levels Affected: None

Small Entities Affected: Businesses

Federalism: No

Included in the Regulatory Plan: No

RIN Information URL: [www.regulations.gov](http://www.regulations.gov)

Public Comment URL: [www.regulations.gov](http://www.regulations.gov)

RIN Data Printed in the FR: Yes

Agency Contact:

Kathryn Shelton

Chief Attorney

Department of Transportation

Federal Railroad Administration

400 Seventh Street, SW,

Washington, DC 20590

Phone:202 493-6063

Fax:202 493-6068

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# 1 HB1357  
2-19-15  
Paur, Gary A.

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**From:** Fedorchak, Julie L.  
**Sent:** Wednesday, February 18, 2015 10:51 PM  
**To:** Paur, Gary A.  
**Subject:** Two-person rail crews

Hi Gary. Getting back to you on the issue of two-person crews for the railroad. I did talk to the federal rail administration (FRA) and they said they don't support reducing the crews to one engineer. The biggest safety risk of a one man-crews is the inability to break a train, resulting in blocked crossings or, in the case of an accident such as occurred in Larimore, the train would not have been able to be separated to allow for emergency vehicles to arrive at the scene through that crossing. Two-person crews also provide better distribution of duties, more accountability and interaction to remain attentive on long trips, and more hands on deck in the event of an emergency.

I expect the FRA will be coming out with a rule this year requiring two-person crews on all Haz mat trains. The railroads argue that new technology with automatic operating systems facilitates one-man crews. However, that technology won't be available on all the rail in the system, leaving crews where it isn't available short staffed.

Regarding the states authority to pass a law requiring two-person crews the answer is yes, we do have this right and several other states have already passed such requirements.

Thanks for calling. I hope this answers your questions.

Julie  
Sent from my iPad

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