

State of Kansas  
Department of Transportation

**Notice of Public Hearing on Proposed Administrative Regulation**

May 18, 2023

A public hearing will be conducted on Monday, July 17, 2023, at 9:00 a.m. in Auditorium A, which is located on the 4<sup>th</sup> Floor of the Eisenhower State Office Building, 700 SW Harrison Street, Topeka, Kansas 66603 to consider the adoption of a proposed rule and regulation of the Department of Transportation on a permanent basis. Interested parties may also attend the public hearing via Zoom by registering at the following link:  
[https://zoom.us/webinar/register/WN\\_zYtFv-fGTfCKFR6CtQqQJg](https://zoom.us/webinar/register/WN_zYtFv-fGTfCKFR6CtQqQJg).

This 60-day notice of the public hearing shall constitute a public comment period for the purpose of receiving written public comments on the proposed rule and regulation. All interested parties may submit written comments prior to the hearing to the Office of Chief Counsel, 700 SW Harrison Street, 3<sup>rd</sup> Floor West, Topeka, Kansas 66603, or by e-mail to [emily.brown@ks.gov](mailto:emily.brown@ks.gov). Interested parties will be given a reasonable opportunity to present their views orally regarding the adoption of the proposed rule and regulation during the public hearing. To provide interested parties with an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to five minutes.

Any individual with a disability may request an accommodation to participate in the public hearing and may request the proposed regulation and economic impact statement in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting Emily Brown via telephone at (785) 296-3831 (or by calling the Kansas Relay Center at 1-800-766-3777) or via e-mail at [emily.brown@ks.gov](mailto:emily.brown@ks.gov). The north entrance to the Eisenhower State Office Building is accessible. Handicapped parking is located at the parking lot across the street from the north entrance to the building.

A copy of the proposed regulation and the Economic Impact Statement for the proposed regulation can be viewed at the following website: <https://www.ksdot.gov/>. A summary of the proposed regulation and its economic impact follows.

**K.A.R. 36-43-1 – Crew requirements; exceptions.** This is a new regulation that identifies the minimum crew requirements for railroads operating in the State of Kansas with six exceptions.

Nearly all railroads in Kansas are currently operating with two-person crews and will have no increased labor costs from the implementation of the proposed regulation. The primary economic effect for the few railroads operating one-person crews would be the labor. However, railroads operating with a one-person crew may see reduced accidents, which will likely reduce operating costs and may offset any increased labor costs.

It is anticipated that some portion of any additional railroad operating costs, based on two-person crews, may be passed on to railroad customers. It is unknown to what degree this would occur, or the potential dollar amounts involved. Additionally, it would be expected that operating with a two-person crew would have a positive impact on various governmental entities due to more disposable income, purchases, and associated sales tax in local economies.

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## Article 43. Train Crew Requirements

K.A.R. 36-43-1. Crew requirements; exceptions. (a) Each entity operating a railroad in Kansas shall maintain at least two crew members in the control compartment of the lead locomotive unit of each train.

(b) Compliance with subsection (a) shall not be required during switching operations, brake testing, or safety inspections; while stopped at a customer location; or while reducing the number of cars in a train when on a siding track. (Authorized by K.S.A. 66-1,216 and K.S.A. 75-5078; implementing K.S.A. 66-105, K.S.A. 66-1,215, and K.S.A. 66-1,216; effective P-\_\_\_\_\_.)

APPROVED

APR 25 2023

ATTORNEY GENERAL

APPROVED

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DEPT. OF ADMINISTRATION

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## Kansas Administrative Regulations Economic Impact Statement (EIS)

Kansas Department of Transportation  
Agency

Gelene Savage, Chief Counsel (785) 250-6216  
Agency Contact Contact Phone Number

K.A.R. 36-43-1  
K.A.R. Number(s)

☒ Permanent ☐ Temporary

Is/Are the proposed rule(s) and regulation(s) mandated by the federal government as a requirement for participating in or implementing a federally subsidized or assisted program?

- ☐ Yes If yes, continue to fill out the remaining form to be included with the regulation packet submitted in the review process to the Department of Administration and the Attorney General. Budget approval is not required; however, the Division of the Budget will require submission of a copy of the EIS at the end of the review process.
- ☒ No If no, do the total annual implementation and compliance costs for the proposed rule(s) and regulation(s), calculated from the effective date of the rule(s) and regulation(s), exceed \$1.0 million over any two-year period through June 30, 2024, or exceed \$3.0 million over any two-year period on or after July 1, 2024 (as calculated in Section III, F)?
- ☒ Yes If yes, continue to fill out the remaining form to be included with the regulation packet submitted in the review process to the Department of Administration, the Attorney General, AND the Division of the Budget. The regulation(s) and the EIS will require Budget approval.
- ☐ No If no, continue to fill out the remaining form to be included with the regulation packet submitted in the review process to the Department of Administration and the Attorney General. Budget approval is not required; however, the Division of the Budget will require submission of a copy of the EIS at the end of the review process.

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## Section I

Brief description of the proposed rule(s) and regulation(s).

The Kansas Department of Transportation is proposing the promulgation of a new rule and regulation relating to the minimum railroad crew size as authorized by K.S.A. § 75-5078 and K.S.A. § 66-1,216.

Proposed K.A.R. 36-43-1 -This regulation identifies the minimum crew requirements for railroads operating in the State of Kansas with six exceptions.

## Section II

Statement by the agency if the rule(s) and regulation(s) exceed the requirements of applicable federal law, and a statement if the approach chosen to address the policy issue(s) is different from that utilized by agencies of contiguous states or the federal government. *(If the approach is different or exceeds federal law, then include a statement of why the proposed Kansas rule and regulation is different.)*

### A. Federal Level.

#### 1. Regulations.

This proposed rule and regulation is not yet mandated by Federal law. However, the Federal Railroad Administration (FRA) of the United States Department of Transportation (USDOT) has proposed a rule regulating rail crew sizes for safety purposes.<sup>1</sup>

#### 2. Statutes.

Pursuant to 49 U.S.C.A. 20106(a)(2), "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), 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 or security when the law, regulation, or order-

- A) is necessary to eliminate or reduce an essentially local safety or security hazard;
- B) is not incompatible with a law, regulation or order of the United States Government; and
- C) does not unreasonably burden interstate commerce."

#### 3. Caselaw.

On February 23, 2021, the United States Court of Appeals, Ninth Circuit, issued an opinion

<sup>1</sup> 2022-15540.pdf (govinfo.gov)

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regarding the May 29, 2019, FRA order effectively preempting any state laws concerning crew size. The Court held that FRA's order does not implicitly preempt state safety rules, the FRA failed to comply with the Administrative Procedure Act's (APA) notice-and-comment provisions in issuing the order, and the order is arbitrary and capricious. The order was vacated and remanded to the FRA. *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170 (9<sup>th</sup> Cir. 2021). As of March 27, 2023, the decision has not been appealed.

#### 4. No Preemption.

The Interstate Commerce Commission Termination Act (ICCTA) does not preempt K.A.R. 36-43-1 because the ICCTA is limited to economic legislation, not safety. When it comes to public health and safety concerns, states retain certain traditional police power under the principle of federalism. *See State v. BNSF Railway Company*, 56 Kan.App.2d 503, 511, 517 (2018).

The ICCTA confers upon the Surface Transportation Board (STB) all regulatory power over the economic affairs and non-safety operating practices of railroads." [Emphasis added] *Petition of Paducah & Louisville Ry., Inc.*, FRA Docket No. 1999-6138, at 6-7 (Jan. 13, 2000); *See also*, S. Rep. No. 104-176, at 5-6 (1995). The relevant statute for any safety preemption analysis is the Federal Railroad Safety Act of 1970 (FRSA). While the STB may consider safety, along with other issues under its jurisdiction, it cannot adopt safety rules or standards. That is the duty of the Secretary of Transportation, or the states if the USDOT has not prescribed a regulation covering the subject matter involved.

The history of rail safety rulemaking since the passage of the ICCTA is equally indicative of how the STB and the FRA each have construed the ICCTA as not vesting preemptive jurisdiction for railroad safety in the STB. In the ensuing years of its existence, the STB has not issued any railroad safety regulations; however, the FRA and states continue to issue numerous railroad safety regulations. Notably, the STB and FRA both filed *amicus* briefs in *Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517 (6<sup>th</sup> Cir. 2001) arguing that the FRSA, not the ICCTA, is the appropriate statute to determine state safety preemption. The court reversed the district court stating that its decision erroneously preempted "state safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA." *Id.* at 522-523. The court also concluded,

While the STB must adhere to federal policies encouraging "safe and suitable working conditions in the railroad industry," the ICCTA and its legislative history contains no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. 10101(11) ...while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. 20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment.

*Id.* at 523.

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Furthermore, the STB's own order delineated the extent of its jurisdiction to emphasize that the ICCTA did not preempt federal safety laws. In *Borough of Riverdale*, STB Finance Docket N. 33466 (Sept. 9, 1999), the STB stated,

Our view [is] that not all state and local regulations that affect railroads are preempted...state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.

Decision at 6.

Thus, both the STB and FRA take the position that the FRA and the states retain primary jurisdiction over railroad safety regulation, while assisting the STB with its expertise in matters of principal concern to the STB. Substantial deference should be given to the positions of the affected agencies that the ICCTA does not preempt/preclude the congressional scheme for railroad safety.

Ultimately, requiring a minimum of a two-person crew for trains operating in the state is a public health and safety concern for Kansans. *See Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1132-33 (2007) (stating state and local regulation of railroads is "permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."). This is evidenced by the derailments, explosions, hazardous chemical spills, environmental issues, property damage, injuries, and fatalities that have occurred as a result from or in connection with trains operating with minimal crew members *See Exhibit 2*. In fact, according to 2022 FRA statistics, there were 71 train accidents in Kansas with reportable damage totaling \$10,779,925.00. *See Exhibit 3*.<sup>2</sup> Additionally, Kansas was one of the states with the most collisions and fatalities involving trains, with 38 collisions, five deaths, and 14 injuries. *See Exhibit 4*.<sup>3</sup> As further evidenced in Exhibit 2, damage, fatalities, and injuries may have been preventable by having a minimum crew.

## **B. Kansas.**

Even if the FRA's proposed rule is not adopted, Kansas law authorizes KDOT to adopt this proposed rule and regulation pursuant to K.S.A. § 66-1,216 and K.S.A. § 75-5078.

Prior to 2005, the Kansas Corporation Commission (KCC) had legal authority under state law to issue rules and regulations concerning common carriers in the state of Kansas, including the safety of users and employees. *See K.S.A. § 66-1,216* ("The [KCC] is given full power, authority and

<sup>2</sup> Exhibit 3 - *See 2022 State of Kansas Summary of Train Accidents With Reportable Damage, Casualties, and Major Causes*, Federal Railroad Administration, available at

<https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TrainAccidentDamage.aspx> (last visited Apr. 12, 2023).

<sup>3</sup> Exhibit 4 - *See Collisions & Fatalities by State – Highway-Rail Grade Crossings – Top 25 States*, Operation Lifesaver, available at <https://oli.org/track-statistics/collisions-fatalities-state> (last updated Apr. 10, 2023).

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jurisdiction to supervise and control the common carriers ... doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”); *see also* K.S.A. § 66-1,222 (“As applied to regulation of common carriers, the provisions of this act and all grants of power, authority and jurisdiction herein made to the [KCC] shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the [KCC].”). Kansas law defines railroads as common carriers. *See* K.S.A. § 66-105.

In 2005, the Kansas Legislature transferred to KDOT all powers, duties, and functions of the KCC with regards to regulating railroads in the State of Kansas via K.S.A. § 75-5078. Subsection (a) of that statute provides that “[e]xcept as otherwise provided by law, all of the powers, duties and functions of the [KCC] as it relates to railroads are hereby transferred to and conferred upon the [KDOT].” Therefore, KDOT has specific statutory authority to issue its proposed rule and regulation.

### C. Other States.

Washington, Wisconsin, Arizona, Oregon, California, West Virginia, Colorado, Nevada and Illinois, have enacted legislation on minimum railroad crew requirements. Furthermore, Arizona has enacted both statutes and regulations on the issue of railroad crew size. Specifically, ARS 40-881 provides crew size requirements and ARS 40-882 provides for penalties for violating the statute. Furthermore, like proposed Kansas regulation 36-43-1, Arizona regulation R14-5-111 provides a requirement that at least two employees must be in the control compartment of the lead locomotive.

## Section III

Agency analysis specifically addressing the following:

- A. The extent to which the rule(s) and regulation(s) will enhance or restrict business activities and growth;

The proposed rule and regulation likely would not restrict Kansas business growth and activities as it pertains to rail service for the transport of finished products for retail distribution in Kansas or export to regional, national and international markets for Kansas made products, agricultural grains or raw materials. It may enhance business growth and activities by ensuring safe operation of rail services and avoiding property damage and injuries or loss of life. Likewise, the proposed rule and regulation likely would not have a negative impact on the transport of inbound raw materials for use in Kansas manufacturing and agricultural production.

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- B. The economic effect, including a detailed quantification of implementation and compliance costs, on the specific businesses, sectors, public utility ratepayers, individuals, and local governments that would be affected by the proposed rule(s) and regulation(s) and on the state economy as a whole;

Nearly all railroads in Kansas are currently operating two-person crews and will have no increased labor costs from the implementation of this regulation. The primary economic effect for the few railroads operating one-person crews would be the labor. However, railroads operating one-person crews may see reduced accidents which will likely reduce operating costs and may offset any increased labor costs. It is anticipated that some portion of any additional railroad operating costs, based on two-person crews, would be passed on to railroad customers. It is not known to what degree this would occur, or the potential dollar amounts involved. Additionally, it would be expected that operating a two-person crew would have a positive impact on various governmental entities due to more disposable income, purchases and associated sales tax in local economies.

Based on the assumptions provided in Exhibit 1, there are 510 locomotive conductor positions throughout the state. The assumptions in Exhibit 1 show a salary and fringe benefit calculation of \$98,441.00 for a locomotive conductor. Approximately 94% of existing train traffic in Kansas is currently operating a two-person crew. According to information and belief, Class I railroads operate with two-person crews pursuant to union agreement. Assuming the remaining 6% would require an additional crew member, and based on the assumptions provided in Exhibit 1, including that Short Line railroads run 15 trains a day, Short Line railroads would need to add 15 locomotive conductor positions. The increased cost to the railroads for adding a crew member totals 15 X \$98,441.00 annually, resulting in an annual increase of \$1,476,615.00.

\*Assumptions and calculations are attached as Exhibit 1.

- C. Businesses that would be directly affected by the proposed rule(s) and regulation(s);

Those railroads operating in Kansas with one person crews and the businesses they serve, assuming any additional costs are passed on to their customers.

- D. Benefits of the proposed rule(s) and regulation(s) compared to the costs;

The benefits of the proposed rule and regulation is railroad and community safety. The largest railroad operating union in North America, SMART Transportation Division ("SMART"), provided KDOT information (Exhibit 2), which in part delineates multiple rail accidents, survey data of support for two-person crews, and the life-saving benefits of a two-person crew involved in two rail accidents. SMART indicates that two-person crews not only help prevent potential accidents or derailments, they play a critical role in emergency situations. See Exhibit 2. However, Exhibit 2 provides no dollar amount benefit and savings attributable to two-person crews preventing accidents and derailments or statistical analysis.

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No mechanism is found within the language of the proposed regulation regarding how the regulation will be implemented or enforced and no penalty for violations exists. Therefore, implementation and enforcement costs are unknown, and recoupment of those cost is unknown as no penalty for violations exists under the proposed rule and regulation. However, pursuant to the assumptions in Exhibit 1, it is anticipated that the annual combined labor cost of \$1,476,615.00 annually will be incurred by all Kansas railroads combined.

- E. Measures taken by the agency to minimize the cost and impact of the proposed rule(s) and regulation(s) on business and economic development within the State of Kansas, local government, and individuals;

The regulation is to create a two-person crew rule in Kansas; thus, there is no method to minimize the labor cost of the crew. However, minimization of cost and impact to economic development could be through enforcement and/or fines associated with any violations. But the proposed rule and regulation provides no penalty or enforcement measure. A penalty could be a warning for the first two years following enactment of the regulation and then impose a penalty; however, the rule and regulation will require additional language to include a penalty.

- F. An estimate of the total annual implementation and compliance costs that are reasonably expected to be incurred by or passed along to businesses, local governments, or members of the public.

*Note: Do not account for any actual or estimated cost savings that may be realized.*

It is anticipated that some portion of additional railroad operating costs to railroads would be passed on to railroad customers. At this time, it is not known to what degree this would occur, or the potential dollar amounts involved. The labor cost of \$1,476,615.00 may be passed on to railroad customers and, eventually, businesses shipping by rail and members of the public.

Costs to Affected Businesses – \$1,476,615.00

Costs to Local Governmental Units – \$N/A

Costs to Members of the Public – \$N/A

**Total Annual Costs – \$1,476,615.00**  
(sum of above amounts)

Give a detailed statement of the data and methodology used in estimating the above cost estimate.

See Exhibit 1

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- ☐ Yes      If the total implementation and compliance costs exceed \$1.0 million over any two-year period through June 30, 2024, or exceed \$3.0 million over any two-year period on or after July 1, 2024, and prior to the submission or resubmission of the proposed rule(s) and regulation(s), did the agency hold a public hearing to find that the estimated costs have been accurately determined and are necessary for achieving legislative intent? If applicable, document when the public hearing was held, those in attendance, and any pertinent information from the hearing.
- ☒ No
- ☐ Not Applicable

If applicable, click here to enter public hearing information.

Provide an estimate to any changes in aggregate state revenues and expenditures for the implementation of the proposed rule(s) and regulation(s), for both the current fiscal year and next fiscal year.

The proposed rule and regulation does not provide for enforcement. Therefore, KDOT estimates there will be little to no change in aggregate state revenues and expenditures.

Provide an estimate of any immediate or long-range economic impact of the proposed rule(s) and regulation(s) on any individual(s), small employers, and the general public. If no dollar estimate can be given for any individual(s), small employers, and the general public, give specific reasons why no estimate is possible.

It is anticipated that some portion of additional railroad operating costs to railroads would be passed on to railroad customers. At this time, it is not known to what degree this would occur, or the potential dollar amounts involved. The labor cost of \$1,476,615.00 may be passed on to railroad customers and, eventually, businesses shipping by rail and members of the public.

- G. If the proposed rule(s) and regulation(s) increases or decreases revenues of cities, counties or school districts, or imposes functions or responsibilities on cities, counties or school districts that will increase expenditures or fiscal liability, describe how the state agency consulted with the League of Kansas Municipalities, Kansas Association of Counties, and/or the Kansas Association of School Boards.

The proposed rule and regulation does not provide for enforcement. Unless enforcement functions and responsibilities are put on cities, counties, or school districts, there should not be an increased cost to them. Therefore, the League of Kansas Municipalities, Kansas Association of Counties, and the Kansas Association of School Boards were not consulted.

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- H. Describe how the agency consulted and solicited information from businesses, associations, local governments, state agencies, or institutions and members of the public that may be affected by the proposed rule(s) and regulation(s).

KDOT relied on Exhibit 2.

## Section IV

Does the Economic Impact Statement involve any environmental rule(s) and regulation(s)?

- ☐ Yes If yes, complete the remainder of Section IV.  
☒ No If no, skip the remainder of Section IV.

- A. Describe the capital and annual costs of compliance with the proposed rule(s) and regulation(s), and the persons who would bear the costs.

Click here to enter agency response.

- B. Describe the initial and annual costs of implementing and enforcing the proposed rule(s) and regulation(s), including the estimated amount of paperwork, and the state agencies, other governmental agencies, or other persons who would bear the costs.

Click here to enter agency response.

- C. Describe the costs that would likely accrue if the proposed rule(s) and regulation(s) are not adopted, as well as the persons who would bear the costs and would be affected by the failure to adopt the rule(s) and regulation(s).

Click here to enter agency response.

- D. Provide a detailed statement of the data and methodology used in estimating the costs used.

Click here to enter agency response.

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