



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Sam Graves
Chairman

Rick Larsen
Ranking Member

Jack Ruddy, Staff Director

Katherine W. Dedrick, Democratic Staff Director

May 2, 2023

The Honorable Amit Bose
Administrator
Federal Railroad Administration
1200 New Jersey Avenue SE
Washington, DC 20590

Dear Administrator Bose:

We write to strongly encourage the Federal Railroad Administration (FRA) to reinstitute its longstanding policy of approving waivers to promote freight railroads' use of automated track inspection (ATI) safety technology. Specifically, we ask FRA to approve a waiver requested by BNSF Railway Company (BNSF) to expand its use of ATI safety technology. FRA should act quickly to issue the waiver following a recent Federal Appeals Court decision vacating the agency's denial of this request and remanding the decision back to FRA.¹ Moreover, as the agency charged with overseeing and advancing rail safety, the FRA must prioritize innovative safety improvements and embrace the use of ATI safety technology as an essential complement to manual safety inspections.

The Biden Administration's abrupt decision to deny waivers for freight railroads to expand the use of ATI safety technology represents an inappropriate and troubling break from FRA's well-defined mission "to enable the safe, reliable, and efficient movement of people and goods," and long history of supporting railroad safety improvements.² In enacting the *Federal Railroad Administration Act*, Congress specifically sought "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."³ Furthermore, the law mandates FRA prioritize safety as its "Highest Priority."⁴ Specifically, the statute requires:

(c) Safety as Highest Priority. —

¹ BNSF Ry. Co. v. Fed. R.R. Admin., No. 22-60217 (5th Cir. Mar. 15, 2023), available at <https://www.ca5.uscourts.gov/opinions/pub/22/22-60217-CV0.pdf> [hereinafter BNSF Ry. Co., No. 22-60217].

² See FRA, *About FRA*, available at <https://railroads.dot.gov/about-fra/about-fra> (stating "The Federal Railroad Administration's mission is to enable the safe, reliable, and efficient movement of people and goods for a strong America, now and in the future.").

³ 49 U.S.C. § 20101.

⁴ 9 U.S.C. § 103.

In carrying out its duties, the [Federal Railroad] Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.⁵

For decades until this Administration changed its policy,⁶ FRA fully supported the continued growth of ATI safety technology through FRA's Automated Track Inspection Program (ATIP).⁷ As you may know, information collected by ATIP is used by the government and the rail industry to improve railroad safety.⁸ Specifically, ATIP "helps America's railroads improve railroad quality and safety under statutes mandated by Congress."⁹

After results of ATI testing produced clear public safety benefits, freight railroads increasingly sought, and unconditionally received, FRA approval to test this technology to accompany in-person track inspections required under an outdated 1971 regulation.¹⁰ Under President Biden, FRA suddenly and without any valid safety reason, began denying waivers for ATI safety use.¹¹ The Committee previously expressed concerns over this denial in a June 10, 2022 letter.¹²

Now, consistent with the Committee's inquiries, the Fifth Circuit Court of Appeals vacated FRA's decision to deny BNSF a waiver to test ATI safety technology, and remanded FRA's flawed decision back to the agency.¹³ The Court's remand came after BNSF sued FRA alleging the agency's denial of the waiver request was arbitrary and capricious.¹⁴ In its decision, the Court noted that BNSF's prior execution of ATI technology rendered operations safer and more efficient.¹⁵ Specifically, the Court found "the implementation [of ATI safety technology] was a success: The defect rate decreased, the number of employees on the track decreased, and the efficiency of the railroad increased."¹⁶

Accordingly, the Court found that FRA lacked a reasonable explanation – let alone an explanation consistent with promoting safety – in denying BNSF's request for a waiver.¹⁷ In a

⁵*Id.*

⁶ Letter from Rep. Rick Crawford, Ranking Member, Subcomm. R.R., Pipelines, & Hazardous Materials, H. Comm. on Transp. and Infrastructure to The Hon. Amit Bose, Adm'r, FRA, (June 10, 2022), (on file with Comm.) [hereinafter Crawford Letter].

⁷ FRA, *History of ATIP*, available at <https://railroads.dot.gov/track/automated-track-inspection-program-atip/history-atip> [hereinafter *History of ATIP*].

⁸ *Id.*

⁹ FRA, *ATIP Overview*, available at <https://railroads.dot.gov/track/automated-track-inspection-program-atip/atip-overview>.

¹⁰ Chris Woodward, *Why Is Biden Admin. Blocking Increased Rail Safety Program?*, INSIDE SOURCES, (May 4, 2022), available at <https://insidesources.com/why-is-biden-admin-blocking-increased-rail-safety-program/>.

¹¹ Letter from Karl Alexy, Assoc. Adm'r For R.R. Safety & Chief Safety Officer, FRA to John Cech, Vice President, BNSF Ry. Co. (Mar. 21, 2022), available at http://downloads.regulations.gov/FRA-2020-0064-0020/attachment_1.pdf

¹² Crawford Letter.

¹³ BNSF Ry. Co., No. 22-60217, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

harsh rebuke of FRA's unjustified decision, the Court noted:

The paucity of reasoning is especially glaring in the face of the agency's statutory mandate to prioritize safety. BNSF has made evidence-based claims that ATI is safer and more efficient than visual inspection alone. The implementation of ATI pursuant to the prior waiver appears to have been an unqualified success. The FRA is thus duty-bound to provide further justification for its rejection of the technology's expansion.¹⁸

As noted in the Committee's June 10, 2022 letter, the only opposition to ATI technology arose from labor unions, likely based on political motives instead of safety concerns.¹⁹ Following the Court's decision, we fail to see a legitimate reason for FRA to deny waivers to BNSF or other freight railroads to use essential ATI safety technology. Continuation of the Biden Administration's reckless new policy threatens to result in railroads foregoing invaluable safety innovations.

Accordingly, we ask that FRA return to following its statutory mandate, fully prioritizing freight rail safety, and immediately abandon the Biden Administration's anti-safety, pro-special interests policy. The Court gave FRA one-hundred days from its March 15, 2023, opinion to enter a new decision.²⁰ We urge FRA to reverse its dangerous and unfounded waiver denial as soon as possible. We further request that FRA reverse any other previous denials related to ATI safety technology – or similar technology – and revert to the longstanding policy of fully supporting and unconditionally approving waivers to test and use railroad and track safety technologies.²¹

We will continue monitoring this matter closely. To continue the Committee's oversight, we hereby renew and resubmit the following requests from the June 10, 2022 letter. To date, FRA has failed to substantively respond to all these inquiries. FRA's December 2, 2022 response letter was received roughly six months after the requested deadline and failed to address all questions.²² Accordingly, please provide responses to the following questions, as soon as possible, but no later than 5:00 p.m. ET on May 16, 2023:

Reiterated Requests from June 10, 2022, letter:

1. All documents sufficient to show FRA's current process to decide railroad waiver requests, including items related to the role of the Safety Board. Please also include any standard operating procedures, memos, or internal process documents which relate to this decision process.

¹⁸ *Id.*

¹⁹ Crawford Letter, *supra* note 10.

²⁰ BNSF Ry. Co., No. 22-60217, *supra* note 1.

²¹ See Crawford Letter, *supra* note 10 (regarding FRA's denial of Norfolk Southern Railways' request for a waiver to tested track safety technology).

²² See Letter from The Hon. Amit Bose, Administrator, FRA, to Rep. Rick Crawford, Ranking Member, Subcomm. on R.R., Pipelines Hazardous Materials, H. Comm. on Transp. and Infrastructure (Dec. 2, 2022) (on file with Comm.).

- a. Please outline the Administrator's role, if any, in granting or denying a waiver petition in the first instance under 49 C.F.R. § 211.41.
 - b. Please outline the Administrator's role, if any, regarding considering petitions for reconsideration of the grant or denial of a waiver, per 49 C.F.R. §§ 211.41(f) & 211.57-.59.
 - c. Please outline and explain what factors are considered when the Administrator is weighing whether to overrule a recommendation of the safety board?
 - d. Please explain in detail changes made to the process to decide railroad waiver requests since 2021 and the justification for such changes.
 - e. Please explain what steps have been taken to formally notify stakeholders of these changes. If notice has not been provided, please explain the justification.
2. How does the FRA Safety Board fulfill and review the requirements of 49 C.F.R. § 211.41 when it is considering waivers, including the nine-month timeline under that regulation?
 - a. Does FRA have adequate resources and staff to timely evaluate and decide railroad waiver requests?
 - b. If not, what is impacting the agency's overall ability to timely issue waiver decisions since 2021, and what additional resources might be needed to ensure decisions are made in the regulatorily required time periods.
3. Does FRA believe any deficiencies existed in the transparency of the waiver process prior to January 20, 2021?
 - a. If so, what specific steps has FRA taken to improve the transparency in the process?
4. Provide all documents and communications related to the waiver process since January 20, 2021; this includes but is not limited to standard operating procedures, memos, or internal documents.
5. How does the FRA interact with stakeholders to ensure the efficient handling of waiver requests? Please also provide a list of individual or entities that the FRA views as stakeholders in this space.
6. What steps is the FRA taking to encourage and support implementation of new technologies to improve safety for freight railroads? Please provide specific examples of what areas the FRA is examining as well as specific technologies that are under examination.

7. Another promising safety innovation, which is particularly important during the COVID pandemic, is 3-D virtual training. These programs could also be helpful in ensuring employee re-training and availability of training in the wake of supply chain challenges. After 14 months, the FRA recently denied railroad waiver requests even though they have previously approved similar requests. Please explain FRA's reasoning for the reversal.
8. In addition to safety improvements, new technologies also have the potential to provide environmental benefits. However, FRA has changed its decades-long precedent of expeditiously reviewing and approving energy management system advancements under 49 CFR Part 229, Subpart E – Locomotive Electronics, and instead, without explanation, is now conducting them under 49 CFR Part 236, Subpart H – Standards for Processor-Based Signal and Train Control Systems. Please explain why FRA made change.
 - a. Prior to this change, were stakeholders consulted? If yes, please explain which stakeholders and the method for consultation.
 - b. Please explain what steps have been taken to notify stakeholders of these changes. If notice has not been provided, please explain the justification.
 - c. Provide specific examples of freight railroad technologies being explored by the FRA that provide environmental benefits.

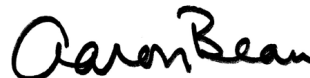
Pursuant to House Rule X(r), the Committee has jurisdiction over these issues and shall conduct appropriate oversight of these actions. This request and any documents created because of this request will be deemed Congressional documents of the Committee. An attachment contains additional instructions for responding to this request. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2165 of the Rayburn House Office Building and the Minority Staff in Room 2164 of the Rayburn House Office Building.

If you have questions, please contact Majority Staff on the Subcommittee on Railroads, Pipelines, and Hazardous Materials at (202) 225-9446. Thank you for your prompt attention to this matter.

Sincerely,



Troy E. Nehls
Chairman
Subcommittee on Railroads,
Pipelines, and Hazardous Materials



Aaron Bean
Member of Congress



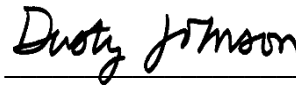
Eric A. "Rick" Crawford
Member of Congress



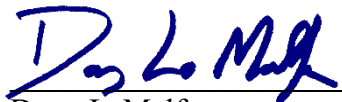
John Duarte
Member of Congress



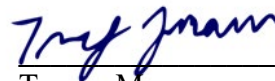
Mike Ezell
Member of Congress



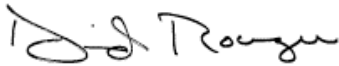
Dusty Johnson
Member of Congress



Doug LaMalfa
Member of Congress



Tracey Mann
Member of Congress



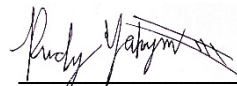
David Rouzer
Member of Congress



Daniel Webster
Member of Congress



Brandon Williams
Member of Congress



Rudy Yakym III
Member of Congress

CC: The Honorable Donald M. Payne Jr.
Ranking Member
Subcommittee on Railroads, Pipelines, and Hazardous Materials

Enclosures:

Attachment A – Requirements for Responding to the House Committee on Transportation and Infrastructure Records Requests in the 118th Congress

Attachment B – Ranking Member Rick Crawford's June 10, 2022, letter to Administrator Bose