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(1) The railroad's employees, passengers, or patrons;

(2) The railroad's property or property entrusted to the railroad for transportation purposes;

(3) The intrastate, interstate, or foreign movement of cargo in the railroad's possession or in possession of another railroad or non-rail carrier while on the railroad property; and

(4) The railroad movement of personnel, equipment, and materials vital to the national defense.

(c) The authority exercised under this part by an officer for whom the railroad has provided notice in accordance with § 207.4 shall be the same as that of a railroad police officer commissioned under the laws of that state.

(d) The railroad police officer's law enforcement powers shall apply only on railroad property, except that an officer may pursue off railroad property a person suspected of violating the law on railroad property, and an officer may engage off railroad property in law enforcement activities, including, without limitation, investigation and arrest, if permissible under state law.

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APPENDIX C TO PART 209—FRA'S POLICY STATEMENT CONCERNING SMALL ENTITIES

AUTHORITY: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.89.

SOURCE: 42 FR 56742, Oct. 28, 1977, unless otherwise noted.

Subpart A—General

§ 209.1 Purpose.

Appendix A to this part contains a statement of agency policy concerning enforcement of those laws. This part describes certain procedures employed by the Federal Railroad Administration in its enforcement of statutes and regulations related to railroad safety. By delegation from the Secretary of Transportation, the Administrator has responsibility for:

(a) Enforcement of subchapters B and C of chapter I, subtitle B, title 49, CFR, with respect to the transportation or shipment of hazardous materials by railroad (49 CFR 1.49(s));

(b) Exercise of the authority vested in the Secretary by the Federal Railroad Safety Act of 1970, 45 U.S.C. 421, 431–441, as amended by the Rail Safety Improvement Act of 1988, Public Law 100–342 (June 22, 1988) (49 CFR 1.49(m)); and

(c) Exercise of the authority vested in the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by section 6(e) of the Department of Transportation Act, 49 App. U.S.C. 1655(e) (49 CFR 1.49 (c), (d), (f), and (g)).

[42 FR 56742, Oct. 28, 1977, as amended at 53 FR 52920, Dec. 29, 1988; 54 FR 42905, Oct. 18, 1989]

§ 209.3 Definitions.

As used in this part—

Administrator means the Administrator of FRA, the Deputy Administrator of FRA, or the delegate of either.

Associate Administrator means the Associate Administrator for Safety, Federal Railroad Administration, or that person's delegate as designated in writing.

Chief Counsel means the Chief Counsel of FRA or his or her delegate.

Day means calendar day.

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

Federal railroad safety laws means the provisions of law generally at 49 U.S.C. subtitle V, part A or 49 U.S.C. chap. 51 or 57 and the rules, regulations, orders, and standards issued under any of those provisions. See Pub. L. 103–272 (1994). Before recodification, these statutory provisions were contained in the following statutes: (i) the Federal Railroad Safety Act of 1970 (Safety Act) (49 U.S.C. 20101–20117, 20131, 20133–20141, 20143, 21301, 21302, 21304, 21311, 24902, and 24905, and sections 4(b)(1), (i), and (t) of Pub. L. 103–272, formerly codified at 45 U.S.C. 421, 431 *et seq.*); (ii) the Hazardous Materials Transportation Act (Hazmat Act) (49 U.S.C. 5101 *et seq.*, formerly codified at 49 App. U.S.C. 1801 *et seq.*); (iii) the Sanitary Food Transportation Act of 1990 (SFTA) (49 U.S.C. 5713, formerly codified at 49 App. U.S.C. 2801 (note)); and those laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act (DOT Act), as in effect on June 1, 1994 (49 U.S.C. 20302, 21302, 20701–20703, 20305, 20502–20505, 20901, 20902, and 80504, formerly codified at 49 App. U.S.C. 1655(e)(1), (2), and (6)(A)). 49 U.S.C. 20111 and 20109, formerly codified at 45 U.S.C. 437 (note) and 441(e). Those laws transferred by the DOT Act include, but are not limited to, the following statutes: (i) the Safety Appliance Acts (49 U.S.C. 20102, 20301, 20302, 20304, 21302, and 21304, formerly codified at 45 U.S.C. 1–14, 16); (ii) the Locomotive Inspection Act (49 U.S.C. 20102, 20701–20703, 21302, and 21304, formerly codified at 45 U.S.C. 22–34); (iii) the Accident Reports Act (49 U.S.C. 20102, 20701, 20702, 20901–20903, 21302, 21304, and 21311, formerly codified at 45 U.S.C. 38–43); (iv) the Hours of Service Act (49 U.S.C. 20102, 21101–21107, 21303, and 21304, formerly codified at 45 U.S.C. 61–64b); and (v) the Signal Inspection Act (49 U.S.C. 20102, 20502–20505, 20902, 21302, and 21304, formerly codified at 49 App. U.S.C. 26).

FRA means the Federal Railroad Administration, U.S. Department of Transportation.

FRA Safety Inspector means an FRA safety inspector, a state inspector participating in railroad safety investigative and surveillance activities under part 212 of this chapter, or any other official duly authorized by FRA.

Motion means a request to a presiding officer to take a particular action.

Person generally includes all categories of entities covered under 1 U.S.C. 1, including but not limited to the following: a railroad; any manager,

supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor; however, *person,* when used to describe an entity that FRA alleges to have committed a violation of the provisions of law formerly contained in the Hazardous Materials Transportation Act or contained in the Hazardous Materials Regulations, has the same meaning as in 49 U.S.C. 5102(9) (formerly codified at 49 App. U.S.C. 1802(11)), i.e., an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or authority of a government or tribe when offering hazardous material for transportation in commerce or transporting hazardous material to further a commercial enterprise, but such term does not include the United States Postal Service or, for the purposes of 49 U.S.C. 5123–5124 (formerly contained in sections 110 and 111 of the Hazardous Materials Transportation Act and formerly codified at 49 App. U.S.C. 1809–1810), a department, agency, or instrumentality of the Federal Government.

Pleading means any written submission setting forth claims, allegations, arguments, or evidence.

Presiding Officer means any person authorized to preside over any hearing or to make a decision on the record, including an administrative law judge.

Railroad means any form of nonhighway ground transportation that runs on rails or electro-magnetic guideways, including (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad carrier means a person providing railroad transportation.

Respondent means a person upon whom FRA has served a notice of probable violation, notice of investigation, or notice of proposed disqualification.

[59 FR 43676, Aug. 24, 1994, as amended at 71 FR 77294, Dec. 26, 2006; 73 FR 72199, Nov. 26, 2008]

§ 209.5 Service.

(a) Each order, notice, or other document required to be served under this part shall be served personally or by registered or certified mail, except as otherwise provided herein.

(b) Service upon a person's duly authorized representative constitutes service upon that person.

(c) Service by registered or certified mail is complete upon mailing. An official United States Postal Service receipt from the registered or certified mailing constitutes prima facie evidence of service.

(d) Service of requests for admission and motions may be made by first-class mail, postage prepaid.

(e) Each pleading must be accompanied by a certificate of service specifying how and when service was made.

[42 FR 56742, Oct. 28, 1977, as amended at 54 FR 42906, Oct. 18, 1989]

§ 209.6 Requests for admission.

(a) A party to any proceeding under subpart B, C, or D of this part may serve upon any other party written requests for the admission of the genuineness of any relevant documents identified within the request, the truth of any relevant matters of fact, and the application of law to the facts as set forth in the request.

(b) Each matter of which an admission is requested shall be deemed to be admitted unless, within 30 days after receipt of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer under oath or objection addressed to the matter, signed by the party.

(c) The sworn answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit

or deny the matter. If an objection is made, the reasons therefor shall be stated.

(d) Any matter admitted under this section is conclusively established unless the presiding official permits withdrawal or amendment of the admission for good cause shown.

(e) Upon motion, the presiding officer may order any party to respond to a request for admission.

[54 FR 42906, Oct. 18, 1989]

§ 209.7 Subpoenas; witness fees.

(a) The Chief Counsel may issue a subpoena on his or her own initiative in any matter related to enforcement of the railroad safety laws. However, where a proceeding under subpart B, C, or D of this part has been initiated, only the presiding officer may issue subpoenas, and only upon the written request of any party to the proceeding who makes an adequate showing that the information sought will materially advance the proceeding.

(b) A subpoena may require attendance of a witness at a deposition or hearing or the production of documentary or other tangible evidence in the possession or control of the person served, or both.

(c) A subpoena may be served personally by any person who is not an interested person and is not less than eighteen (18) years of age, or by certified or registered mail.

(d) Service of a subpoena shall be made by delivering a copy of the subpoena in the appropriate manner, as set forth below. Service of a subpoena requiring attendance of a person is not complete unless delivery is accompanied by tender of fees for one day's attendance and mileage as specified by paragraph (f) of this section. However, when a subpoena is issued upon the request of any officer or agency of the United States, fees and mileage need not be tendered at the time of service but will be paid by FRA at the place and time specified in the subpoena for attendance.

Delivery of a copy of the subpoena may be made:

(1) To a natural person by:

(i) Handing it to the person;

(ii) Leaving it at his or her office with the person in charge thereof;

(iii) Leaving it at his or her dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;

(iv) Mailing it by registered or certified mail to him or her at his or her last known address; or

(v) Any method whereby actual notice of the issuance and content is given (and the fees are made available) prior to the return date.

(2) To an entity other than a natural person by:

(i) Handing a copy of the subpoena to a registered agent for service or to any officer, director, or agent in charge of any office of the person;

(ii) Mailing it by registered or certified mail to any representative listed in paragraph (d)(2)(i) of this section at his or her last known address; or

(iii) Any method whereby actual notice is given to such representative (and the fees are made available) prior to the return date.

(e) The original subpoena bearing a certificate of service shall be filed in accordance with § 209.9.

(f) A witness subpoenaed by the FRA shall be entitled to the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. See 28 U.S.C. 1821. The witness fees and mileage shall be paid by the person requesting that the subpoena be issued. In an appropriate case, the Chief Counsel or the hearing officer may direct the person requesting issuance of a subpoena for the production of documentary or other tangible evidence to reimburse the responding person for actual costs of producing and/or transporting such evidence.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, witness fees and mileage or the costs of producing other evidence may be paid by the FRA if the official who issued the subpoena determines on the basis of good cause shown that:

(1) The presence of the subpoenaed witness or evidence will materially advance the proceedings; and

(2) The party at whose instance the subpoena was issued would suffer a serious financial hardship if required to pay the witness fees and mileage.

(h) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than ten (10) days after the date of service of such subpoena, apply in writing to the official who issued the subpoena, or if that person is unavailable, to the Chief Counsel, to quash or modify the subpoena. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The issuing official or the Chief Counsel, as the case may be, may:

(1) Deny the application;

(2) Quash or modify the subpoena; or

(3) In the case of subpoena to produce documentary or other tangible evidence, condition denial of the application upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the evidence.

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, the FRA may request the Attorney General to seek the aid of the United States District Court for any district in which the person is found to compel that person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the FRA, or both.

(j) Attendance of any FRA employee engaged in an investigation which gave rise to a proceeding under subpart B or C of this part for the purpose of eliciting factual testimony may be assured by filing a request with the Chief Counsel at least fifteen (15) days before the date of the hearing. The request must indicate the present intent of the requesting person to call the employee as a witness and state generally why the witness will be required.

[42 FR 56742, Oct. 28, 1977, as amended at 54 FR 42906, Oct. 18, 1989]

§ 209.8 Depositions in formal proceedings.

(a) Any party to a proceeding under subpart B, C, or D of this part may take the testimony of any person, including a party, by deposition upon oral examination on order of the presiding officer following the granting of a motion under paragraph (b) of this section. Depositions may be taken before any disinterested person who is authorized by law to administer oaths. The attendance of witnesses may be compelled by subpoena as provided in § 209.7 and, for proceedings under subpart D of this part, § 209.315.

(b) Any party desiring to take the deposition of a witness shall file and serve a written motion setting forth the name of the witness; the date, time, and place of the deposition; the subject matter of the witness' expected testimony; whether any party objects to the taking of the deposition; and the reasons for taking such deposition. Such motion shall be granted only upon a showing of good cause. Good cause exists to take a person's deposition when the information sought is relevant to the subject matter involved in the proceeding and:

(1) The information is not obtainable from some other source that is more convenient, less burdensome, and less expensive; or

(2) The request is not unreasonably cumulative, unduly burdensome, or unduly expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in the case.

(c) Such notice as the presiding officer shall order will be given for the taking of a deposition, but this shall not be less than 10 days' written notice unless the parties agree to a shorter period.

(d) Each witness testifying upon deposition shall be sworn and the adverse party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, subscribed by the witness, and certified by the reporter.

(e) Depositions taken under this section may be used for discovery, to contradict or impeach the testimony of the deponent as a witness, or as evidence in the proceeding as permitted by paragraph (f) of this section and in accordance with the limitations of Fed. R. Civ. Pro. 32 as though it were applicable to these proceedings.

(f) Subject to such objections to the questions and answers as were noted at the time of taking the deposition and as would be valid were the witness personally present and testifying, such deposition may be offered in evidence by any party to the proceeding.

[54 FR 42906, Oct. 18, 1989]

§ 209.9 Filing.

All materials filed with FRA or any FRA officer in connection with a proceeding under subpart B, C, or D of this part shall be submitted in duplicate to the Assistant Chief Counsel for Safety, (RCC–30), Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, except that documents produced in accordance with a subpoena shall be presented at the place and time specified by the subpoena.

[54 FR 42906, Oct. 18, 1989, as amended at 74 FR 25171, May 27, 2009]

§ 209.11 Request for confidential treatment.

(a) This section governs the procedures for requesting confidential treatment of any document filed with or otherwise provided to FRA in connection with its enforcement of statutes or FRA regulations related to railroad safety. For purposes of this section, ''enforcement'' shall include receipt of documents required to be submitted by FRA regulations, and all investigative and compliance activities, in addition to the development of violation reports and recommendations for prosecution.

(b) A request for confidential treatment with respect to a document or portion thereof may be made on the basis that the information is—

(1) Exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552);

(2) Required to be held in confidence by 18 U.S.C. 1905; or

(3) Otherwise exempt by law from public disclosure.

(c) Any document containing information for which confidential treatment is requested shall be accompanied at the time of filing by a statement justifying nondisclosure and referring to the specific legal authority claimed.

(d) Any document containing any information for which confidential treatment is requested shall be marked ''CONFIDENTIAL'' or ''CONTAINS CONFIDENTIAL INFORMATION'' in bold letters. If confidentiality is requested as to the entire document, or if it is claimed that nonconfidential information in the document is not reasonably segregable from confidential information, the accompanying statement of justification shall so indicate. If confidentiality is requested as to a portion of the document, then the person filing the document shall file together with the document a second copy of the document from which the information for which confidential treatment is requested has been deleted. If the person filing a document of which only a portion is requested to be held in confidence does not submit a second copy of the document with the confidential information deleted. FRA may assume that there is no objection to public disclosure of the document in its entirety.

(e) FRA retains the right to make its own determination with regard to any claim of confidentiality. Notice of a decision by the FRA to deny a claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

[42 FR 56742, Oct. 28, 1977, as amended at 70 FR 11094, Mar. 7, 2005]

§ 209.13 Consolidation.

At the time a matter is set for hearing under subpart B, C, or D of this part, the Chief Counsel may consolidate the matter with any similar matter(s) pending against the same respondent or with any related matter(s) pending against other respondent(s) under the same subpart. However, on certification by the presiding officer that a consolidated proceeding is unmanageable or otherwise undesirable, the Chief Counsel will rescind or modify the consolidation.

[54 FR 42906, Oct. 18, 1989]

§ 209.15 Rules of evidence.

The Federal Rules of Evidence for United States Courts and Magistrates

shall be employed as general guidelines for proceedings under subparts B, C, and D of this part. However, all relevant and material evidence shall be received into the record.

[54 FR 42907, Oct. 18, 1989]

§ 209.17 Motions.

Motions shall be in writing, filed with the presiding officer, and copies served upon the parties in accordance with § 209.5, except that oral motions may be made during the course of any hearing or appearance before the presiding officer. Each motion shall state the particular order, ruling, or action desired and the grounds therefor. Unless otherwise specified by the presiding officer, any objection to a written motion must be filed within 10 days after receipt of the motion.

[54 FR 42907, Oct. 18, 1989]

Subpart B—Hazardous Materials Penalties

CIVIL PENALTIES

§ 209.101 Civil penalties generally.

(a) Sections 209.101 through 209.121 prescribe rules of procedure for the assessment of civil penalties pursuant to the Federal hazardous materials transportation safety law, 49 U.S.C. Chapter 51.

(b) When the FRA has reason to believe that a person has knowingly committed an act which is a violation of any provision of subchapter B or C of chapter I, subtitle B of this title for which the FRA exercises enforcement responsibility or any waiver or order issued thereunder, it may conduct a proceeding to assess a civil penalty.

[42 FR 56742, Oct. 28, 1977, as amended at 61 FR 38646, July 25, 1996]

§ 209.103 Minimum and maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous materials transportation laws, an order issued thereunder, subchapter A or C of chapter I, subtitle B, of this title, or a special permit or approval issued under subchapter A or C of chapter I, subtitle B, of this title is liable for a civil penalty of not more than $75,000 for each violation, except that—

(1) The maximum civil penalty for a violation is $175,000 if the violation results in death, serious illness, or severe injury to any person, or substantial destruction of property and

(2) A minimum $450 civil penalty applies to a violation related to training.

(b) When the violation is a continuing one, each day of the violation constitutes a separate offense. 49 U.S.C. 5123.

(c) The maximum and minimum civil penalties described in paragraph (a) of this section apply to violations occurring on or after October 1, 2012.

[78 FR 9846, Feb. 12, 2013]

§ 209.105 Notice of probable violation.

(a) FRA, through the Chief Counsel, begins a civil penalty proceeding by serving a notice of probable violation on a person charging him or her with having violated one or more provisions of subchapter A or C of chapter I, subtitle B of this title. Appendix B to this part contains guidelines used by the chief counsel in making initial penalty assessments.

(b) A notice of probable violation issued under this section includes:

(1) A statement of the provision(s) which the respondent is believed to have violated;

(2) A statement of the factual allegations upon which the proposed civil penalty is being sought;

(3) Notice of the maximum amount of civil penalty for which the respondent may be liable;

(4) Notice of the amount of the civil penalty proposed to be assessed;

(5) A description of the manner in which the respondent should make payment of any money to the United States;

(6) A statement of the respondent's right to present written explanations, information or any materials in answer to the charges or in mitigation of the penalty; and

(7) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

(c) The FRA may amend the notice of probable violation at any time prior to the entry of an order assessing a civil penalty. If the amendment contains

any new material allegation of fact, the respondant is given an opportunity to respond. In an amended notice, FRA may change the civil penalty amount proposed to be assessed up to and including the maximum penalty amount of $75,000 for each violation, except that if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, FRA may change the penalty amount proposed to be assessed up to and including the maximum penalty amount of $175,000.

[42 FR 56742, Oct. 28, 1977, as amended at 61 FR 38646, July 25, 1996; 69 FR 30591, May 28, 2004; 71 FR 77295, Dec. 26, 2006; 75 FR 43842, July 27, 2010; 78 FR 9846, Feb. 12, 2013]

§ 209.107 Reply.

(a) Within thirty (30) days of the service of a notice of probable violation issued under § 209.105, the respondent may—

(1) Pay as provided in § 209.109(a) and thereby close the case;

(2) Make an informal response as provided in § 209.111; or

(3) Request a hearing as provided in § 209.113.

(b) The Chief Counsel may extend the thirty (30) days period for good cause shown.

(c) Failure of the respondent to reply by taking one of the three actions described in paragraph (a) of this section within the period provided constitutes a waiver of his or her right to appear and contest the allegations and authorizes the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and to assess an appropriate civil penalty.

§ 209.109 Payment of penalty; compromise.

(a) Payment of a civil penalty may be made by certified check, money order, or credit card. Payments made by certified check or money order should be made payable to the Federal Railroad Administration and sent to DOT/FRA, Mike Monroney Aero Center, General Accounting Division, AMZ–300, P.O. Box 25082, Oklahoma City, OK 73125. Overnight express payments may be sent to DOT/FRA, Mike Monroney Aero Center, General Accounting Division, AMZ–300, 6500 South MacArthur Blvd. Headquarters Building, Room 176, Oklahoma City, OK 73169. Payment by credit card must be made via the Internet at *https://www.pay.gov/paygov/*. Instructions for online payment are found on the Web site.

(b) At any time before an order assessing a penalty is referred to the Attorney General for collection, the respondent may offer to compromise for a specific amount by contracting the Chief Counsel.

[42 FR 56742, Oct. 28, 1977, as amended at 71 FR 77295, Dec. 26, 2006]

§ 209.111 Informal response and assessment.

(a) If a respondent elects to make an informal response to a notice of probable violation, respondent shall submit to the Chief Counsel such written explanations, information or other materials as respondent may desire in answer to the charges or in mitigation of the proposed penalty.

(b) The respondent may include in his or her informal written response a request for a conference. Upon receipt of such a request, the Chief Counsel arranges for a conference as soon as practicable at a time and place of mutual convenience.

(c) Written explanations, information or materials, submitted by the respondent and relevant information presented during any conference held under this section are considered by the Chief Counsel in reviewing the notice of proposed violation and determining the fact of violation and the amount of any penalty to be assessed.

(d) After consideration of an informal response, including any relevant information presented at a conference, the Chief Counsel may dismiss the notice of probable violation in whole or in part. If he or she does not dismiss it in whole, he or she may issue an order assessing a civil penalty.

§ 209.113 Request for hearing.

(a) If a respondent elects to request a hearing, he or she must submit a written request to the Chief Counsel referring to the case number which appeared on the notice of the probable violation. The request must—

(1) State the name and address of the respondent and of the person signing the request if different from the respondent;

(2) State with respect to each allegation whether it is admitted or denied; and

(3) State with particularity the issues to be raised by the respondent at the hearing.

(b) After a request for hearing which complies with the requirements of paragraph (a) of this section, the Chief Counsel schedules a hearing for the earliest practicable date.

(c) The Chief Counsel or the hearing officer appointed under § 209.115 may grant extensions of the time of the commencement of the hearing for good cause shown.

§ 209.115 Hearing.

(a) When a hearing is requested and scheduled under § 209.113, a hearing officer designated by the Chief Counsel convenes and presides over the hearing. If requested by respondent and if practicable, the hearing is held in the general vicinity of the place where the alleged violation occurred, or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) The presiding official may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 209.7;

(3) Adopt procedures for the submission of evidence in written form;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, and adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues or any other proper purpose; and

(9) Take any other action authorized by or consistent with the provisions of this subpart pertaining to civil penalties and permitted by law which may expedite the hearing or aid in the disposition of an issue raised, therein.

(c) The Chief Counsel has the burden of providing the facts alleged in the notice of proposed violation and may offer such relevant information as may be necessary fully to inform the presiding officer as to the matter concerned.

(d) The respondent may appear and be heard on his or her own behalf or through counsel of his or her choice. The respondent or his or her counsel may offer relevant information including testimony which he or she believes should be considered in defense of the allegations or which may bear on the penalty proposed to be assessed and conduct such cross-examination as may be required for a full disclosure of the material facts.

(e) At the conclusion of the hearing or as soon thereafter as the hearing officer shall provide, the parties may file proposed findings and conclusions, together with supporting reasons.

[42 FR 56742, Oct. 28, 1977; 42 FR 59755, Nov. 21, 1977]

§ 209.117 Presiding officer's decision.

(a) After consideration of the evidence of record, the presiding officer may dismiss the notice of probable violation in whole or in part. If the presiding officer does not dismiss it in whole, he or she will issue and serve on the respondent an order assessing a civil penalty. The decision of the presiding officer will include a statement of findings and conclusions as well as the reasons therefor on all material issues of fact, law, and discretion.

(b) If, within twenty (20) days after service of an order assessing a civil penalty, the respondent does not pay the civil penalty or file an appeal as provided in § 209.121, the case may be referred to the Attorney General with a request that an action to collect the penalty be brought in the appropriate United States District Court.

§ 209.119 Assessment considerations.

The assessment of a civil penalty under § 209.117 is made only after considering:

(a) The nature and circumstances of the violation;

(b) The extent and gravity of the violation;

(c) The degree of the respondent's culpabilty;

(d) The respondent's history of prior offenses;

(e) The respondent's ability to pay;

(f) The effect on the respondent's ability to continue in business; and

(g) Such other matters as justice may require.

§ 209.121 Appeal.

(a) Any party aggrieved by a presiding officer's decision or order issued under § 209.117 assessing a civil penalty may file an appeal with the Administrator. The appeal must be filed within twenty (20) days of service of the presiding officer's order.

(b) Prior to rendering a final determination on an appeal, the Administrator may remand the case for further proceedings before the hearing officer.

(c) In the case of an appeal by a respondent, if the Administrator affirms the assessment and the respondent does not pay the civil penalty within twenty (20) days after service of the Administrator's decision on appeal, the matter may be referred to the Attorney General with a request that an action to collect the penalty be brought in the appropriate United States District Court.

CRIMINAL PENALTIES

§ 209.131 Criminal penalties generally.

A person who knowingly violates 49 U.S.C. 5104(b) or § 171.2(l) of this title or willfully or recklessly violates a requirement of the Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to any person.

[71 FR 77295, Dec. 26, 2006]

§ 209.133 Referral for prosecution.

If an inspector, including a certified state inspector under part 212 of this chapter, or another employee of FRA becomes aware of a possible knowing violation of 49 U.S.C. 5104(b) or a willful or reckless violation of the Federal hazardous materials transportation law or a regulation issued under those laws for which FRA exercises enforcement responsibility, he or she shall report it to the Chief Counsel. If evidence exists tending to establish a prima facie case, and if it appears that assessment of a civil penalty would not be an adequate deterrent to future violations, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

[61 FR 38647, July 25, 1996, as amended at 71 FR 77295, Dec. 26, 2006]

Subpart C—Compliance Orders

§ 209.201 Compliance orders generally.

(a) This subpart prescribes rules of procedure leading to the issuance of compliance orders pursuant to the Federal railroad safety laws at 49 U.S.C. 5121(a) and/or 20111(b).

(b) The FRA may commence a proceeding under this subpart when FRA has reason to believe that a person is engaging in conduct or a pattern of conduct that involves one or more violations of the Federal railroad safety laws or any regulation or order issued under those laws for which FRA exercises enforcement authority.

[61 FR 38647, July 25, 1996]

§ 209.203 Notice of investigation.

(a) FRA begins a compliance order proceeding by serving a notice of investigation on the respondent.

(b) The notice of investigation contains:

(1) A statement of the legal authority for the proceeding;

(2) A statement of the factual allegations upon which the remedial action is being sought; and

(3) A statement of the remedial action being sought in the form of a proposed compliance order.

(c) The FRA may amend the notice of investigation at any time prior to the entry of a final compliance order. If an amendment includes any new material allegation of fact or seeks new or additional remedial action, the respondent is given an opportunity to respond.

§ 209.205 Reply.

(a) Within thirty (30) days of service of a notice of investigation, the respondent may file a reply with the FRA. The Chief Counsel may extend the time for filing for good cause shown.

(b) The reply must be in writing, signed by the person filing it, and state with respect to each factual allegation whether it is admitted or denied. Even though formally denied, a factual allegation set forth in a notice of investigation is considered to be admitted for purposes of the proceeding unless:

(1) Opposed by the affidavit of an individual having personal knowledge of the subject matter;

(2) Challenged as defective on its face together with a supporting explanation as to why it is believed to be defective; or

(3) Otherwise actively put at issue through the submission of relevant evidence.

(c) The reply must set forth any affirmative defenses and include a statement of the form and nature of proof by which those defenses are to be established.

(d) If it is necessary to respond to an amendment to the notice of investigation, the respondent may amend the reply concerning the substance of matters contained in the amendment to the notice at any time before the issuance of an order under § 209.211.

(e) If the respondent elects not to contest one or more factual allegations, he or she should so state in the reply. An election not to contest a factual allegation is an admission of that allegation solely for the purpose of issuing a compliance order. That election constitutes a waiver of hearing as to that allegation but does not, by itself, constitute a waiver of the right to be heard on other issues. In connection with a statement of election not to contest a factual allegation, the respondent may propose an appropriate order for issuance by the Administrator or propose the negotiation of a consent order.

(f) Failure of the respondent to file a reply within the period provided constitutes a waiver of his or her right to appear and contest the allegation and authorizes the Administrator, without further notice to the respondent, to find the facts to be as alleged in the notice of proposed violation and to issue an appropriate order directing compliance.

§ 209.207 Consent order.

(a) At any time before the issuance of an order under § 209.211, the Chief Counsel and the respondent may execute an agreement proposing the entry by consent of an order directing compliance. The Administrator may accept the proposed order by signing it. If the Administrator rejects the proposed order, he or she directs that the proceeding continue.

(b) An agreement submitted to the Administrator under this section must include:

(1) A proposed compliance order suitable for the Administrator's signature;

(2) An admission of all jurisdictional facts;

(3) An express waiver of further procedural steps and of all right to seek judicial review or otherwise challenge or contest the validity of the order; and

(4) An acknowledgment that the notice of investigation may be used to construe the terms of the order.

§ 209.209 Hearing.

(a) When a respondent files a reply contesting allegations in a notice of investigation issued under § 209.203 or when the FRA and the respondent fail to agree upon an acceptable consent order, the hearing officer designated by the Chief Counsel convenes and presides over a hearing on the proposed compliance order.

(b) The presiding official may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 209.7;

(3) Adopt procedures for the submission of evidence;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues or any other proper purpose; and

(9) Take any other action authorized by or consistent with the provisions of this subpart pertaining to compliance orders and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The Chief Counsel has the burden of providing the facts alleged in the notice of investigation and may offer such relevant information as may be necessary fully to inform the presiding officer as to the matter concerned.

(d) The respondent may appear and be heard on his or her own behalf or through counsel of his or her choice. The respondent or his or her counsel may offer relevant information, including testimony which he or she believes should be considered in defense of the allegations or which may bear on the remedial action being sought, and conduct such cross-examination as may be required for a full disclosure of the material facts.

(e) At the conclusion of the hearing or as soon thereafter as the hearing officer shall provide, the parties may file proposed findings and conclusions, together with supporting reasons therefor.

§ 209.211 Presiding officer's decision.

(a) After consideration of evidence, the presiding officer may dismiss the notice of investigation or issue a compliance order. The decision of the presiding officer will include a statement of findings and conclusions as well as the reasons therefor on all material issues of fact, law, and discretion.

(b) A compliance order issued under this section is effective twenty (20) days from service on the respondent unless otherwise provided therein.

§ 209.213 Appeal.

(a) Any party aggrieved by a presiding officer's decision may file an appeal with the Administrator. The appeal must be filed within twenty (20) days after service of the presiding officer's decision.

(b) Prior to rendering a final determination on an appeal, the Administrator may remand the case for further proceedings before the hearing officer.

(c) The filing of an appeal does not stay the effectiveness of a compliance order unless the Administrator expressly so provides.

§ 209.215 Time limitation.

A proceeding for the issuance of a compliance order under the Federal Railroad Safety Act of 1970, as amended, shall be completed within twelve (12) months after issuance of the notice of investigation.

Subpart D—Disqualification Procedures

SOURCE: 54 FR 42907, Oct. 18, 1989, unless otherwise noted.

§ 209.301 Purpose and scope.

(a) This subpart prescribes the rules of practice for administrative proceedings relating to the determination of an individual's fitness for performing safety-sensitive functions under the Federal railroad safety laws at 49 U.S.C. 20111(c).

(b) The purpose of this subpart is to prevent accidents and casualties in railroad operations that result from the presence in the work force of railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in § 209.303 by violating any rule, regulation, order or standard prescribed by FRA. Employees and agents who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.

(c) This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under this subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.

[54 FR 42907, Oct. 18, 1989, as amended at 74 FR 23334, May 19, 2009]

§ 209.303 Coverage.

This subpart applies to the following individuals:

(a) Railroad employees who are assigned to perform service subject to the Hours of Service Act (49 U.S.C. Chapt. 211) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(b) Railroad employees or agents who:

(1) Inspect, install, repair, or maintain track and roadbed;

(2) Inspect, repair or maintain, locomotives, passenger cars, and freight cars;

(3) Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or

(4) Perform service subject to the Transportation of Hazardous Materials laws (49 U.S.C. Ch. 51), or any regulation or order prescribed thereunder;

(c) Railroad managers, supervisors, or agents when they:

(1) Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;

(2) Supervise and otherwise direct the performance of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or

(3) Are in a position to direct the commission of violations of any of the requirements of parts 213 through 241 of this title, or any of the requirements of 49 U.S.C. Ch. 51, or any regulation or order prescribed thereunder.

[74 FR 23334, May 19, 2009]

§ 209.305 Notice of proposed disqualification.

(a) FRA, through the Chief Counsel, begins a disqualification proceeding by serving a notice of proposed disqualification on the respondent charging him or her with having violated one or more rules, regulations, orders, or standards promulgated by FRA, which render the respondent unfit to perform safety-sensitive functions described in § 209.303.

(b) The notice of proposed disqualification issued under this section shall contain:

(1) A statement of the rule(s), regulation(s), order(s), or standard(s) that the respondent is alleged to have violated;

(2) A statement of the factual allegations that form the basis of the initial determination that the respondent is not fit to perform safety-sensitive functions;

(3) A statement of the effective date, duration, and other conditions, if any, of the disqualification order;

(4) A statement of the respondent's right to answer the charges in writing and furnish affidavits and any other documentary evidence in support of the answer;

(5) A statement of the respondent's right to make an informal response to the Chief Counsel;

(6) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing;

(7) A statement of the respondent's right to counsel or other designated representative; and

(8) Notice of the consequences of the respondent's failure to take any of the actions described in § 209.307(a).

(c) The Chief Counsel shall enclose with the notice of proposed disqualification a copy of the material that is relied on in support of the charges. Nothing in this section precludes the Chief Counsel from presenting at a subsequent hearing under § 209.321 any evidence of the charges set forth in the notice that the Chief Counsel acquires after service thereof on the respondent. The Chief Counsel, however, shall serve a copy of any such evidence on the respondent at or before the prehearing conference required under § 209.319. Failure to furnish such evidence to respondent at or before the prehearing conference bars its introduction at the hearing.

(d) The Chief Counsel shall provide a copy of the notice of proposed disqualification to the railroad that employs the respondent.

§ 209.307 Reply.

(a) Within 30 days after receipt of the notice of proposed disqualification issued under § 209.305, the respondent shall reply in writing to the charges. The respondent may furnish affidavits and any other documentary evidence in

support of the reply. Further, the respondent may elect to—

(1) Stipulate to the charges and consent to the imposition of the disqualification order under the conditions set forth in the notice;

(2) Make an informal response as provided in § 209.309; or

(3) Request a hearing as provided in § 209.311.

(b) The Chief Counsel may extend the reply period for good cause shown, provided the request for extension is served before the expiration of the period provided in paragraph (a) of this section.

(c) Failure of the respondent to reply to the notice of proposed disqualification within the period provided in paragraph (a) of this section or an extension thereto provided under paragraph (b) of this section constitutes a waiver of the respondent's right to appear and contest the charges or the proposed disqualification. Respondent's failure to reply authorizes the Chief Counsel, without further notice to the respondent, to find the respondent unfit for the performance of the safety-sensitive functions described in § 209.303 and to order the respondent disqualified from performing them for the period and under the other conditions described in the notice of proposed disqualification. The Chief Counsel shall serve respondent with the disqualification order and provide a copy of the order to the railroad by which the respondent is employed.

§ 209.309 Informal response.

(a) If the respondent elects to make an informal response to a notice of proposed disqualification, he or she shall submit to the Chief Counsel such written explanations, information, or other materials as respondent may desire in answer to the charges or in mitigation of the proposed disqualification.

(b) The respondent may include in an informal written response a request for a conference. Upon receipt of such a request, the Chief Counsel shall arrange for a conference at a time and place designated by the Chief Counsel.

(c) Written explanations, information, or materials submitted by the respondent and relevant information presented during any conference held under this section shall be considered by the Chief Counsel in reviewing the notice of proposed disqualification, including the question of the respondent's fitness and the conditions of any disqualification that may be imposed.

(d) After consideration of an informal response, including any relevant information presented at a conference, the Chief Counsel shall take one of the following actions:

(1) Dismiss all the charges and terminate the notice of proposed disqualification;

(2) Dismiss some of the charges and mitigate the proposed disqualification;

(3) Mitigate the proposed disqualification; or

(4) Sustain the charges and proposed disqualification.

(e) Should the Chief Counsel sustain, in whole or in part, the charges and proposed disqualification and reach settlement with the respondent, the Chief Counsel shall issue an appropriate disqualification order reflecting the settlement and shall provide a copy of that order to the railroad by which the respondent is employed. The duration of the disqualification period may be less than, but shall be no greater than, the period set forth in the notice. Any settlement reached shall be evidenced by a written agreement, which shall include declarations from the respondent stipulating to the charges contained in the disqualification order, consenting to the imposition of the disqualification under the conditions set forth in the disqualification order, and waiving his or her right to a hearing.

(f) If settlement of the charges against the respondent is not achieved, the Chief Counsel shall terminate settlement discussions no later than 30 days from service of the informal response upon the Chief Counsel by serving respondent written notice of termination of settlement negotiations.

(g) By electing to make an informal response to a notice of proposed disqualification, the respondent does not waive the right to a hearing. However, the respondent must submit the hearing request required by § 209.311(a)

within 10 days after receipt of the notice of termination of settlement negotiations from the Chief Counsel. Failure to submit such a request constitutes a waiver of the respondent's right to appear and contest the charges or the proposed disqualification.

(h) The Chief Counsel may extend the period for requesting a hearing for good cause shown, provided the request for extension is served before the expiration of the period provided in paragraph (g) of this section.

§ 209.311 Request for hearing.

(a) If the respondent elects to request a hearing, he or she must submit a written request within the time periods specified in § 209.307(a) or § 209.309(g) to the Chief Counsel referring to the case number that appears on the notice of proposed disqualification. The request must contain the following:

(1) The name, address, and telephone number of the respondent and of the respondent's designated representative, if any;

(2) A specific response admitting, denying, or explaining each allegation of the notice of disqualification order.

(3) A description of the claims and defenses to be raised by the respondent at the hearing; and

(4) The signature of the respondent or the representative, if any.

(b) Upon receipt of a request for a hearing complying with the requirements of paragraph (a) of this section, the Chief Counsel shall arrange for the appointment of a presiding officer and transmit the disqualification file to the presiding officer, who shall schedule the hearing for the earliest practicable date within the time period set by § 209.321(a) of this subpart.

(c) Upon assignment of a presiding officer, further matters in the proceeding generally are conducted by and through the presiding officer, except that the Chief Counsel and respondent may settle or voluntarily dismiss the case without order of the presiding officer. The Chief Counsel shall promptly notify the presiding officer of any settlement or dismissal of the case.

§ 209.313 Discovery.

(a) Disqualification proceedings shall be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed for preparation of the party's case. These regulations are intended to provide a simple, timely, and relatively economical system for discovery. They shall be interpreted and applied so as to avoid delay and facilitate adjudication of the case.

(b) Discovery may be obtained by requests for admission under § 209.6, requests for production of documentary or other tangible evidence under § 209.7, and depositions under § 209.8.

(c) A party may initiate the methods of discovery permitted under paragraph (b) of this section at any time after respondent requests a hearing under § 209.311.

(d) Discovery shall be completed within 90 days after receipt of respondent's request for a hearing under § 209.311. Upon motion for good cause shown, the presiding officer may extend this time period for an additional 30 days. The presiding officer may grant an additional 30 day extension only when the party requesting the extension shows by clear and convincing evidence that the party was unable to complete discovery within the prescribed time period through no fault or lack of due diligence of such party, and that denial of the request would result in irreparable prejudice.

(e) If a party fails to comply with a discovery order or an order to compel, the presiding officer may:

(1) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order;

(2) Prohibit the party failing to comply with such order from introducing evidence relating to the information sought;

(3) Draw an inference in favor of the requesting party with regard to the information sought; and

(4) Permit the requesting party to introduce secondary evidence concerning the information sought.

§ 209.315 Subpoenas.

Once a notice of proposed disqualification has been issued in a particular matter, only the presiding officer may

issue, deny, quash, or modify subpoenas under this subpart in accordance with § 209.7.

§ 209.317 Official record.

The notice of proposed disqualification, respondent's reply, exhibits, and verbatim record of testimony, if a hearing is held, and all pleadings, stipulations, and admissions filed and rulings and orders entered in the course of the proceeding shall constitute the exclusive and official record.

§ 209.319 Prehearing conference.

(a) The parties shall confer with the presiding officer, either in person or by telephone, for a conference at least 10 days before the hearing to consider:

(1) Formulation and simplification of the issues;

(2) Stipulations, admissions of fact, and admissions of the contents and authenticity of documents;

(3) Advance rulings from the presiding officer on the admissibility of evidence;

(4) Identification of witnesses, including the scope of their testimony, and of hearing exhibits;

(5) Possibility of settlement; and

(6) Such other matters as the presiding officer deems necessary to expedite the disposition of the proceeding.

(b) The record shall show the matters disposed of by order and by agreement in such a prehearing conference. The subsequent course of the hearing shall be controlled by such action.

(c) The prehearing conference shall be held within 150 days after receipt of respondent's request for a hearing under § 209.311.

§ 209.321 Hearing.

(a) Upon receipt of a hearing request complying with § 209.311, an administrative hearing for review of a notice of proposed disqualification shall be conducted by a presiding officer, who can be any person authorized by the FRA Administrator, including an administrative law judge. The hearing shall begin within 180 days from receipt of respondent's hearing request. Notice of the time and place of the hearing shall be given to the parties at least 20 days before the hearing. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim. The hearing shall be open to the public, unless the presiding official determines that it would be in the best interests of the respondent, a witness, or other affected persons, to close all or any part of it. If the presiding official makes such a determination, an appropriate order, which sets forth the reasons therefor, shall be entered.

(b) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 209.7;

(3) Adopt procedures for the submission of evidence in written form;

(4) Take or cause depositions to be taken as provided in § 209.8;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn, and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and

(9) Take any other action authorized by or consistent with the provisions of this subpart and permitted by law that may expedite the hearing or aid in the disposition of an issue raised therein.

(c) FRA has the burden of proof, by a preponderance of the evidence, as to the facts alleged in the notice of proposed disqualification, the reasonableness of the conditions of the qualification proposed, and, except as provided in § 209.329(a), the respondent's lack of fitness to perform safety-sensitive functions. The Chief Counsel may offer relevant evidence, including testimony, in support of the allegations contained in the notice of proposed disqualification and conduct such cross-examination as may be required for a full disclosure of the material facts.

(d) The respondent may appear and be heard on respondent's own behalf or through respondent's designated representative. The respondent may offer relevant evidence, including testimony, in defense of the allegations or in mitigation of the proposed disqualification and conduct such cross-examination as may be required for a full disclosure of the material facts. Respondent has the burden of proof, by a

preponderance of the evidence, as to any affirmative defense, including that respondent's actions were in obedience to the direct order of a railroad supervisor or higher level official.

(e) The record shall be closed at the conclusion of the hearing, unless the parties request the opportunity to submit proposed findings and conclusions. When the presiding officer allows the parties to submit proposed findings and conclusions, documents previously identified for introduction into evidence, briefs, or other posthearing submissions the record shall be left open for such time as the presiding officer grants for that purpose.

[54 FR 42907, Oct. 18, 1989, as amended at 60 FR 53136, Oct. 12, 1995]

§ 209.323 Initial decision.

(a) The presiding officer shall prepare an initial decision after the closing of the record. The initial decision may dismiss the notice of proposed disqualification, in whole or in part, sustain the charges and proposed disqualification, or sustain the charges and mitigate the proposed disqualification.

(b) If the presiding officer sustains the charges and the proposed disqualification, dismisses some of the charges, or mitigates the proposed disqualification, the presiding officer shall issue and serve an appropriate order disqualifying respondent from engaging in the safety-sensitive functions described in § 209.303. If the presiding officer dismisses all of the charges set forth in notice of proposed disqualification, a dismissal order shall be issued and served.

(c) Each initial decision shall contain:

(1) Findings of fact and conclusions of law, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;

(2) An order, as described in paragraph (b) of this section;

(3) The dates any disqualification is to begin and end and other conditions, if any, that the respondent must satisfy before the disqualification order is discharged;

(4) The date upon which the decision will become final, as prescribed in § 209.325; and

(5) Notice of the parties' appeal rights, as prescribed in § 209.327.

(d) The decision shall be served upon the FRA Chief Counsel and the respondent. The Chief Counsel shall provide a copy of the disqualification order to the railroad by which the respondent is employed.

§ 209.325 Finality of decision.

(a) The initial decision of the presiding officer shall become final 35 days after issuance. Such decisions are not precedent.

(b) *Exception.* The initial decision shall not become final if, within 35 days after issuance of the decision, any party files an appeal under § 209.327. The timely filing of such an appeal shall stay the order in the initial decision.

§ 209.327 Appeal.

(a) Any party aggrieved by an initial decision issued under § 209.323 may file an appeal. The appeal must be filed within 35 days of issuance of the initial decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the initial decision, supported by reference to applicable laws and regulations, and with specific reference to the record. If the Administrator has played any role in investigating, prosecuting, or deciding to prosecute the particular case, the Administrator shall recuse him or herself and delegate his or her authority under this section to a person not so involved.

(b) A party may file a reply to an appeal within 25 days of service of the appeal. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided the written request for extension is served before the expiration of the applicable period provided in paragraph (a) or (b) of this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or upon written motion by

any party, the Administrator may determine that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(e) The Administrator may affirm, reverse, alter, or modify the decision of the presiding officer, or may remand the case for further proceedings before the presiding officer. The Administrator shall inform the parties and the presiding officer of his or her decision.

(f) The decision of the Administrator is final, constitutes final agency action, and is not subject to further administrative review.

[54 FR 42907, Oct. 18, 1989, as amended at 74 FR 25171, May 27, 2009; 74 FR 23334, May 19, 2009]

§ 209.329 Assessment considerations.

(a) Proof of a respondent's willful violation of one of the requirements of parts 213 through 241 (excluding parts 225, 228, and 233) of this title, or of one of the requirements of 49 U.S.C. Chapt. 51, or any regulation or order prescribed thereunder, establishes a rebuttable presumption that the respondent is unfit to perform the safety-sensitive functions described in § 209.303. Where such presumption arises, the respondent has the burden of establishing that, taking account of the factors in paragraph (b) of this section, he or she is fit to perform the foregoing safety-sensitive functions for the period and under the other conditions, if any, proposed in the notice of proposed disqualification.

(b) In determining respondent's lack of fitness to perform safety-sensitive functions and the duration and other conditions, if any, of appropriate disqualification orders under §§ 209.309, 209.323, and 209.327, the factors to be considered, to the extent each is pertinent to the respondent's case, include but are not limited to the following:

(1) The nature and circumstances of the violation, including whether the violation was intentional, technical, or inadvertent, was committed willfully, or was frequently repeated;

(2) The adverse impact or the potentially adverse impact of the violation on the health and safety of persons and the safety of property;

(3) The employing railroad's operating rules, safety rules, and repair and maintenance standards;

(4) Repair and maintenance standards adopted by the railroad industry;

(5) The consistency of the conditions of the proposed disqualification with disqualification orders issued against other employees of the employing railroad for the same or similar violations;

(6) Whether the respondent was on notice of any safety regulations that were violated or whether the respondent had been warned about the conduct in question;

(7) The respondent's past record of committing violations of safety regulations, including previous FRA warnings issued, disqualifications imposed, civil penalties assessed, railroad disciplinary actions, and criminal convictions therefor;

(8) The civil penalty scheduled for the violation of the safety regulation in question;

(9) Mitigating circumstances surrounding the violation, such as the existence of an emergency situation endangering persons or property and the need for the respondent to take immediate action; and

(10) Such other factors as may be warranted in the public interest.

[74 FR 23334, May 19, 2009]

§ 209.331 Enforcement of disqualification order.

(a) A railroad that employs or formerly employed an individual serving under a disqualification order shall inform prospective or actual employers of the terms and conditions of the order upon receiving notice that the disqualified employee is being considered for employment with or is employed by another railroad to perform any of the safety-sensitive functions described in § 209.303.

(b) A railroad that is considering hiring an individual to perform the safety-sensitive functions described in § 209.303 shall ascertain from the individual's previous employer, if such employer was a railroad, whether the individual is subject to a disqualification order.

(c) An individual subject to a disqualification order shall inform his or her employer of the order and provide a copy thereof within 5 days after receipt

of the order. Such an individual shall likewise inform any prospective employer who is considering hiring the individual to perform any of the safety-sensitive functions described in § 209.303 of the order and provide a copy thereof within 5 days after receipt of the order or upon application for the position, whichever first occurs.

§ 209.333 Prohibitions.

(a) An individual subject to a disqualification order shall not work for any railroad in any manner inconsistent with the order.

(b) A railroad shall not employ any individual subject to a disqualification order in any manner inconsistent with the order.

§ 209.335 Penalties.

(a) Any individual who violates § 209.331(c) or § 209.333(a) may be permanently disqualified from performing the safety-sensitive functions described in § 209.303. Any individual who willfully violates § 209.331(c) or § 209.333(a) may also be assessed a civil penalty of at least $1,000 and not more than $5,000 per violation.

(b) Any railroad that violates § 209.331 (a) or (b) or § 209.333(b) may be assessed a civil penalty of at least $5,000 and not more than $11,000 per violation.

(c) Each day a violation continues shall constitute a separate offense.

[54 FR 42907, Oct. 18, 1989, as amended at 63 FR 11619, Mar. 10, 1998]

§ 209.337 Information collection.

The information collection requirements in § 209.331 of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130–0529.

[56 FR 66791, Dec. 26, 1991]

Subpart E—Reporting of Remedial Actions

SOURCE: 59 FR 43676, Aug. 24, 1994, unless otherwise noted.

§ 209.401 Purpose and scope.

(a) The purpose of this subpart is to prevent accidents and casualties arising from the operation of a railroad that result from a railroad's failure to remedy certain violations of the Federal railroad safety laws for which assessment of a civil penalty has been recommended.

(b) To achieve this purpose, this subpart requires that if an FRA Safety Inspector notifies a railroad both that assessment of a civil penalty will be recommended for its failure to comply with a provision of the Federal railroad safety laws and that a remedial actions report must be submitted, the railroad shall report to the FRA Safety Inspector, within 30 days after the end of the calendar month in which such notification is received, actions taken to remedy that failure.

(c) This subpart does not relieve the railroad of the underlying responsibility to comply with a provision of the Federal railroad safety laws. The 30-day period after the end of the calendar month in which notification is received is intended merely to provide the railroad with an opportunity to prepare its report to FRA, and does not excuse continued noncompliance.

(d) This subpart requires the submission of remedial actions reports for the general categories of physical defects, recordkeeping and reporting violations, and filing violations, where the railroad can literally and specifically correct a failure to comply with a provision of the Federal railroad safety laws, as reasonably determined by the FRA Safety Inspector. No railroad is required to submit a report for a failure involving either a completed or past transaction or a transaction that it can no longer remedy.

§ 209.403 Applicability.

This subpart applies to any railroad that receives written notification from an FRA Safety Inspector both (i) that assessment of a civil penalty will be recommended for its failure to comply with a provision of the Federal railroad safety laws and (ii) that it must submit a remedial actions report.

§ 209.405 Reporting of remedial actions.

(a) Except as provided in § 209.407, each railroad that has received written notification on Form FRA F 6180.96

from an FRA Safety Inspector both that assessment of a civil penalty will be recommended for the railroad's failure to comply with a provision of the Federal railroad safety laws and that it must submit a remedial actions report, shall report on this form all actions that it takes to remedy that failure. The railroad shall submit the completed form to the FRA Safety Inspector within 30 days after the end of the calendar month in which the notification is received.

(1) *Date of receipt of notification.* If the FRA Safety Inspector provides written notification to the railroad by first class mail, then for purposes of determining the calendar month in which notification is received, the railroad shall be presumed to have received the notification five business days following the date of mailing.

(2) *Completion of Form FRA F 6180.96, including selection of railroad remedial action code.* Each railroad shall complete the remedial actions report in the manner prescribed on the report form. The railroad shall select the one remedial action code on the reporting form that most accurately reflects the action or actions that it took to remedy the failure, such as, repair or replacement of a defective component without movement, movement of a locomotive or car for repair (where permitted) and its subsequent repair, completion of a required test or inspection, removal of a noncomplying item from service but not for repair (where permitted), reduction of operating speed (where sufficient to achieve compliance), or any combination of actions appropriate to remedy the noncompliance cited. Any railroad selecting the remedial action code ''other remedial actions'' shall also furnish FRA with a brief narrative description of the action or actions taken.

(3) *Submission of Form FRA F 6180.96.* The railroad shall return the form by first class mail to the FRA Safety Inspector whose name and address appear on the form.

(b) Any railroad concluding that the violation alleged on the inspection report may not have occurred may submit the remedial actions report with an appropriate written explanation. Failure to raise all pertinent defenses does not foreclose the railroad from doing so in response to a penalty demand.

§ 209.407 Delayed reports.

(a) If a railroad cannot initiate or complete remedial actions within 30 days after the end of the calendar month in which the notification is received, it shall—

(1) Prepare, in writing, an explanation of the reasons for such delay and a good faith estimate of the date by which it will complete the remedial actions, stating the name and job title of the preparer and including either:

(i) A photocopy of both sides of the Form FRA F 6180.96 on which the railroad received notification; or

(ii) The following information:

(A) The inspection report number;

(B) The inspection date; and

(C) The item number; and

(2) Sign, date, and submit such written explanation and estimate, by first class mail, to the FRA Safety Inspector whose name and address appear on the notification, within 30 days after the end of the calendar month in which the notification is received.

(b) Within 30 days after the end of the calendar month in which all such remedial actions are completed, the railroad shall report in accordance with the remedial action code procedures referenced in § 209.405(a). The additional time provided by this section for a railroad to submit a delayed report shall not excuse it from liability for any continuing violation of a provision of the Federal railroad safety laws.

§ 209.409 Penalties.

Any person who violates any requirement of this subpart or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $105,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. A person may also be subject to

the criminal penalties provided for in 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)) for knowingly and willfully falsifying reports required by this subpart.

[59 FR 43676, Aug. 24, 1994, as amended at 63 FR 11619, Mar. 10, 1998; 69 FR 30592, May 28, 2004; 72 FR 51196, Sept. 6, 2007; 74 FR 79700, Dec. 30, 2008; 77 FR 24418, Apr. 24, 2012]

Subpart F—Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions Pursuant to 49 CFR § 172.820

§ 209.501 Review of rail transportation safety and security route analysis.

(a) *Review of route analysis.* If the Associate Administrator for Safety determines that a railroad carrier's route selection, analysis and documentation pursuant to § 172.820 of chapter I of this title is deficient and fails to establish that the route chosen by the carrier poses the least overall safety and security risk, the Associate Administrator shall issue a written notice of review (''Notice'') to the railroad carrier. The Notice shall specifically address each deficiency found in the railroad carrier's route analysis. The Notice may also include suggested mitigation measures that the railroad carrier may take to remedy the deficiencies found, including selection of an alternative commercially feasible routing.

(b) *Conference to resolve deficiencies.* After issuing the Notice, the Associate Administrator conferences with the railroad carrier for a thirty (30)-day period, or such longer period as provided by the Associate Administrator, to resolve the deficiencies identified in the Notice. The Associate Administrator keeps a record of all written correspondence with the railroad carrier and a summary of each meeting and telephone conversation with the railroad carrier that pertains to the Notice.

(c) *Consultation with and comment from other agencies.* If, after the close of the conference period, the Associate Administrator concludes that the issues identified have not been satisfactorily resolved, the Associate Administrator:

(1) Consults with the Transportation Security Administration (''TSA'') and the Pipeline and Hazardous Materials Safety Administration (PHMSA) regarding the safety and security of the route proposed by the railroad carrier and any alternative route(s) over which the carrier is authorized to operate that are being considered by the Associate Administrator and prepares a written summary of the recommendations from TSA and PHMSA;

(2) Obtains the comments of the Surface Transportation Board (''STB'') regarding whether the alternative route(s) being considered by the Associate Administrator would be commercially practicable; and

(3) Fully considers the input of TSA, PHMSA and the STB and renders a decision pursuant to paragraph (d) of this section which shall be administratively final.

(d) *Decision.* (1) If the Associate Administrator finds that the route analysis and documentation provided by the railroad carrier are sufficient to support the route selected by the carrier or that valid issues of commercial practicability preclude an alternative route, the Associate Administrator concludes the review without further action and so notifies the railroad carrier in writing.

(2) If the Associate Administrator concludes that the railroad carrier's route analysis does not support the railroad carrier's original selected route, that safety and security considerations establish a significant preference for an alternative route, and that the alternative route is commercially practicable, the Associate Administrator issues a second written notice (2nd Notice) to the railroad carrier that:

(i) Specifically identifies deficiencies found in the railroad carrier's route analysis, including a clear description of the risks on the selected route that have not been satisfactorily mitigated;

(ii) Explains why the available data and reasonable inferences indicate that a commercially practicable alternative route poses fewer overall safety and security risks than the route selected by the railroad carrier; and

(iii) Directs the railroad carrier, beginning within twenty (20) days of the issuance date of the 2nd Notice on the railroad carrier, to temporarily use the

alternative route that the Associate Administrator determines poses the least overall safety and security risk until such time as the railroad carrier has adequately mitigated the risks identified by the Associate Administrator on the original route selected by the carrier.

(e) *Actions following 2nd Notice and rerouting directive*. When issuing a 2nd Notice that directs the use of an alternative route, the Associate Administrator shall make available to the railroad carrier the administrative record relied upon by the Associate Administrator in issuing the 2nd Notice, including the recommendations of TSA, PHMSA and STB to FRA made pursuant to paragraphs (c)(1) and (2) of this section. Within twenty (20) days of the issuance date of the Associate Administrator's 2nd Notice, the railroad carrier may:

(1) Comply with the Associate Administrator's directive to use an alternative route while the carrier works to address the deficiencies in its route analysis identified by the Associate Administrator; or

(2) File a petition for judicial review of the Associate Administrator's 2nd Notice, pursuant to paragraph (g) of this section.

(f) *Review and decision by Associate Administrator on revised route analysis submitted in response to 2nd Notice*. Upon submission of a revised route analysis containing an adequate showing by the railroad carrier that its original selected route poses the least overall safety and security risk, the Associate Administrator notifies the carrier in writing that the carrier may use its original selected route.

(g) *Appellate review*. If a railroad carrier is aggrieved by final agency action, it may petition for review of the final decision in the appropriate United States court of appeals as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency action unless the Associate Administrator or the Court orders otherwise.

(h) *Time*. In computing any period of time prescribed by this part, the day of any act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

[73 FR 72199, Nov. 26, 2008]

APPENDIX A TO PART 209—STATEMENT OF AGENCY POLICY CONCERNING ENFORCEMENT OF THE FEDERAL RAILROAD SAFETY LAWS

The Federal Railroad Administration (''FRA'') enforces the Federal railroad safety statutes under delegation from the Secretary of Transportation. See 49 CFR 1.49(c), (d), (f), (g), (m), and (oo). Those statutes include 49 U.S.C. ch. 201–213 and uncodified provisions of the Rail Safety Improvement Act of 2008 (Pub. L. 110–432, Div. A, 122 Stat. 4848). On July 4, 1994, the day before the enactment of Public Law 103–272, 108 Stat. 745, the Federal railroad safety statutes included the Federal Railroad Safety Act of 1970 (''Safety Act'') (then codified at 45 U.S.C. 421 *et seq.*), and a group of statutes enacted prior to 1970 referred to collectively herein as the ''older safety statutes'': the Safety Appliance Acts (then codified at 45 U.S.C. 1–16); the Locomotive Inspection Act (then codified at 45 U.S.C. 22–34); the Accident Reports Act (then codified at 45 U.S.C. 38–43); the Hours of Service Act (then codified at 45 U.S.C. 61–64b); and the Signal Inspection Act (then codified at 49 App. U.S.C. 26). Effective July 5, 1994, Public Law 103–272 repealed certain general and permanent laws related to transportation, including these rail safety laws (the Safety Act and the older safety statutes), and reenacted them as revised by that law but without substantive change in title 49 of the U.S. Code, ch. 201–213. Regulations implementing the Federal rail safety laws are found at 49 CFR parts 209–244. The Rail Safety Improvement Act of 1988 (Pub. L. 100–342, enacted June 22, 1988) (''RSIA'') raised the maximum civil penalties available under the railroad safety laws and made individuals liable for willful violations of those laws. FRA also enforces the hazardous materials transportation laws (49 U.S.C. ch. 51 and uncodified provisions) (formerly the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, which was also repealed by Public Law 103–272, July 5, 1994, and reenacted as revised but without substantive change) as it pertains to the shipment or transportation of hazardous materials by rail.

THE CIVIL PENALTY PROCESS

The front lines in the civil penalty process are the FRA safety inspectors: FRA employs

over 300 inspectors, and their work is supplemented by approximately 100 inspectors from states participating in enforcement of the federal rail safety laws. These inspectors routinely inspect the equipment, track, and signal systems and observe the operations of the nation's railroads. They also investigate hundreds of complaints filed annually by those alleging noncompliance with the laws. When inspection or complaint investigation reveals noncompliance with the laws, each noncomplying condition or action is listed on an inspection report. Where the inspector determines that the best method of promoting compliance is to assess a civil penalty, he or she prepares a violation report, which is essentially a recommendation to the FRA Office of Chief Counsel to assess a penalty based on the evidence provided in or with the report.

In determining which instances of noncompliance merit penalty recommendations, the inspector considers:

(1) The inherent seriousness of the condition or action;

(2) The kind and degree of potential safety hazard the condition or action poses in light of the immediate factual situation;

(3) Any actual harm to persons or property already caused by the condition or action;

(4) The offending person's (i.e., railroad's or individual's) general level of current compliance as revealed by the inspection as a whole;

(5) The person's recent history of compliance with the relevant set of regulations, especially at the specific location or division of the railroad involved;

(6) Whether a remedy other than a civil penalty (ranging from a warning on up to an emergency order) is more appropriate under all of the facts; and

(7) Such other factors as the immediate circumstances make relevant.

The civil penalty recommendation is reviewed at the regional level by a specialist in the subject matter involved, who requires correction of any technical flaws and determines whether the recommendation is consistent with national enforcement policy in similar circumstances. Guidance on that policy in close cases is sometimes sought from Office of Safety headquarters. Violation reports that are technically and legally sufficient and in accord with FRA policy are sent from the regional office to the Office of Chief Counsel.

The exercise of this discretion at the field and regional levels is a vital part of the enforcement process, ensuring that the exacting and time-consuming civil penalty process is used to address those situations most in need of the deterrent effect of penalties. FRA exercises that discretion with regard to individual violators in the same manner it does with respect to railroads.

The Office of Chief Counsel's Safety Division reviews each violation report it receives from the regional offices for legal sufficiency and assesses penalties based on those allegations that survive that review. Historically, the Division has returned to the regional offices less than five percent of the reports submitted in a given year, often with a request for further work and resubmission.

Where the violation was committed by a railroad, penalties are assessed by issuance of a penalty demand letter that summarizes the claims, encloses the violation report with a copy of all evidence on which FRA is relying in making its initial charge, and explains that the railroad may pay in full or submit, orally or in writing, information concerning any defenses or mitigating factors. The railroad safety statutes, in conjunction with the Federal Claims Collection Act, authorize FRA to adjust or compromise the initial penalty claims based on a wide variety of mitigating factors. This system permits the efficient collection of civil penalties in amounts that fit the actual offense without resort to time-consuming and expensive litigation. Over its history, FRA has had to request that the Attorney General bring suit to collect a penalty on only a very few occasions.

Once penalties have been assessed, the railroad is given a reasonable amount of time to investigate the charges. Larger railroads usually make their case before FRA in an informal conference covering a number of case files that have been issued and investigated since the previous conference. Thus, in terms of the negotiating time of both sides, economies of scale are achieved that would be impossible if each case were negotiated separately. The settlement conferences, held either in Washington or another mutually agreed on location, include technical experts from both FRA and the railroad as well as lawyers for both parties. In addition to allowing the two sides to make their cases for the relative merits of the various claims, these conferences also provide a forum for addressing current compliance problems. Smaller railroads usually prefer to handle negotiations through the mail or over the telephone, often on a single case at a time. Once the two sides have agreed to an amount on each case, that agreement is put in writing and a check is submitted to FRA's accounting division covering the full amount agreed on.

Cases brought under the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, are, due to certain statutory requirements, handled under more formal administrative procedures. See 49 CFR part 209, subpart B.

CIVIL PENALTIES AGAINST INDIVIDUALS

The RSIA amended the penalty provisions of the railroad safety statutes to make them

applicable to any ''person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad)'' who fails to comply with the regulations or statutes. E.g., section 3 of the RSIA, amending section 209 of the Safety Act. However, the RSIA also provided that civil penalties may be assessed against individuals ''only for willful violations.''

Thus, any individual meeting the statutory description of ''person'' is liable for a civil penalty for a willful violation of, or for willfully causing the violation of, the safety statutes or regulations. Of course, as has traditionally been the case with respect to acts of noncompliance by railroads, the FRA field inspector exercises discretion in deciding which situations call for a civil penalty assessment as the best method of ensuring compliance. The inspector has a range of options, including an informal warning, a more formal warning letter issued by the Safety Division of the Office of Chief Counsel, recommendation of a civil penalty assessment, recommendation of disqualification or suspension from safety-sensitive service, or, under the most extreme circumstances, recommendation of emergency action.

The threshold question in any alleged violation by an individual will be whether that violation was ''willful.'' (Note that section 3(a) of the RSIA, which authorizes suspension or disqualification of a person whose violation of the safety laws has shown him or her to be unfit for safety-sensitive service, does not require a showing of willfulness. Regulations implementing that provision are found at 49 CFR part 209, subpart D.) FRA proposed this standard of liability when, in 1987, it originally proposed a statutory revision authorizing civil penalties against individuals. FRA believed then that it would be too harsh a system to collect fines from individuals on a strict liability basis, as the safety statutes permit FRA to do with respect to railroads. FRA also believed that even a reasonable care standard (e.g., the Hazardous Materials Transportation Act's standard for civil penalty liability, 49 U.S.C. 1809(a)) would subject individuals to civil penalties in more situations than the record warranted. Instead, FRA wanted the authority to penalize those who violate the safety laws through a purposeful act of free will.

Thus, FRA considers a ''willful'' violation to be one that is an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law. Accordingly, neither a showing of evil purpose (as is sometimes required in certain criminal cases) nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated. *See Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111 (1985); *Brock* v. *Morello Bros. Constr., Inc.* 809 F.2d 161 (1st Cir. 1987); and *Donovan* v. *Williams Enterprises, Inc.,* 744 F.2d 170 (D.C. Cir. 1984).

Reckless disregard for the requirements of the law can be demonstrated in many ways. Evidence that a person was trained on or made aware of the specific rule involved—or, as is more likely, its corresponding industry equivalent—would suffice. Moreover, certain requirements are so obviously fundamental to safe railroading (e.g., the prohibition against disabling an automatic train control device) that any violation of them, regardless of whether the person was actually aware of the prohibition, should be seen as reckless disregard of the law. *See Brock, supra,* 809 F.2d 164. Thus, a lack of subjective knowledge of the law is no impediment to a finding of willfulness. If it were, a mere denial of the content of the particular regulation would provide a defense. Having proposed use of the word ''willful,'' FRA believes it was not intended to insulate from liability those who simply claim—contrary to the established facts of the case—they had no reason to believe their conduct was wrongful.

A willful violation entails knowledge of the facts constituting the violation, but actual, subjective knowledge need not be demonstrated. It will suffice to show objectively what the alleged violator must have known of the facts based on reasonable inferences drawn from the circumstances. For example, a person shown to have been responsible for performing an initial terminal air brake test that was not in fact performed would not be able to defend against a charge of a willful violation simply by claiming subjective ignorance of the fact that the test was not performed. If the facts, taken as a whole, demonstrated that the person was responsible for doing the test and had no reason to believe it was performed by others, and if that person was shown to have acted with actual knowledge of or reckless disregard for the law requiring such a test, he or she would be subject to a civil penalty.

This definition of ''willful'' fits squarely within the parameters for willful acts laid out by Congress in the RSIA and its legislative history. Section 3(a) of the RSIA amends the Safety Act to provide:

For purposes of this section, an individual shall be deemed not to have committed a willful violation where such individual has acted pursuant to the direct order of a railroad official or supervisor, under protest communicated to the supervisor. Such individual shall have the right to document such protest.

As FRA made clear when it recommended legislation granting individual penalty authority, a railroad employee should not have

to choose between liability for a civil penalty or insubordination charges by the railroad. Where an employee (or even a supervisor) violates the law under a direct order from a supervisor, he or she does not do so of his or her free will. Thus, the act is not a voluntary one and, therefore, not willful under FRA's definition of the word. Instead, the action of the person who has directly ordered the commission of the violation is itself a willful violation subjecting that person to a civil penalty. As one of the primary sponsors of the RSIA said on the Senate floor:

This amendment also seeks to clarify that the purpose of imposing civil penalties against individuals is to deter those who, of their free will, decide to violate the safety laws. The purpose is not to penalize those who are ordered to commit violations by those above them in the railroad chain of command. Rather, in such cases, the railroad official or supervisor who orders the others to violate the law would be liable for any violations his order caused to occur. One example is the movement of railroad cars or locomotives that are actually known to contain certain defective conditions. A train crew member who was ordered to move such equipment would not be liable for a civil penalty, and his participation in such movements could not be used against him in any disqualification proceeding brought by FRA.

133 Cong. Rec. S.15899 (daily ed. Nov. 5, 1987) (remarks of Senator Exon).

It should be noted that FRA will apply the same definition of ''willful'' to corporate acts as is set out here with regard to individual violations. Although railroads are strictly liable for violations of the railroad safety laws and deemed to have knowledge of those laws, FRA's penalty schedules contain, for each regulation, a separate amount earmarked as the initial assessment for willful violations. Where FRA seeks such an extraordinary penalty from a railroad, it will apply the definition of ''willful'' set forth above. In such cases—as in all civil penalty cases brought by FRA—the aggregate knowledge and actions of the railroad's managers, supervisors, employees, and other agents will be imputed to the railroad. Thus, in situations that FRA decides warrant a civil penalty based on a willful violation, FRA will have the option of citing the railroad and/or one or more of the individuals involved. In cases against railroads other than those in which FRA alleges willfulness or in which a particular regulation imposes a special standard, the principles of strict liability and presumed knowledge of the law will continue to apply.

The RSIA gives individuals the right to protest a direct order to violate the law and to document the protest. FRA will consider such protests and supporting documentation in deciding whether and against whom to cite civil penalties in a particular situation. Where such a direct order has been shown to have been given as alleged, and where such a protest is shown to have been communicated to the supervisor, the person or persons communicating it will have demonstrated their lack of willfulness. Any documentation of the protest will be considered along with all other evidence in determining whether the alleged order to violate was in fact given.

However, the absence of such a protest will not be viewed as warranting a presumption of willfulness on the part of the employee who might have communicated it. The statute says that a person who communicates such a protest shall be deemed not to have acted willfully; it does not say that a person who does not communicate such a protest will be deemed to have acted willfully. FRA would have to prove from all the pertinent facts that the employee willfully violated the law. Moreover, the absence of a protest would not be dispositive with regard to the willfulness of a supervisor who issued a direct order to violate the law. That is, the supervisor who allegedly issued an order to violate will not be able to rely on the employee's failure to protest the order as a complete defense. Rather, the issue will be whether, in view of all pertinent facts, the supervisor intentionally and voluntarily ordered the employee to commit an act that the supervisor knew would violate the law or acted with reckless disregard for whether it violated the law.

FRA exercises the civil penalty authority over individuals through informal procedures very similar to those used with respect to railroad violations. However, FRA varies those procedures somewhat to account for differences that may exist between the railroad's ability to defend itself against a civil penalty charge and an individual's ability to do so. First, when the field inspector decides that an individual's actions warrant a civil penalty recommendation and drafts a violation report, the inspector or the regional director informs the individual in writing of his or her intention to seek assessment of a civil penalty and the fact that a violation report has been transmitted to the Office of Chief Counsel. This ensures that the individual has the opportunity to seek counsel, preserve documents, or take any other necessary steps to aid his or her defense at the earliest possible time.

Second, if the Office of Chief Counsel concludes that the case is meritorious and issues a penalty demand letter, that letter makes clear that FRA encourages discussion, through the mail, over the telephone or in person, of any defenses or mitigating factors the individual may wish to raise. That letter also advises the individual that he or she may wish to obtain representation by an attorney and/or labor representative. During

the negotiation stage, FRA considers each case individually on its merits and gives due weight to whatever information the alleged violator provides.

Finally, in the unlikely event that a settlement cannot be reached, FRA sends the individual a letter warning of its intention to request that the Attorney General sue for the initially proposed amount and giving the person a sufficient interval (e.g., 30 days) to decide if that is the only alternative.

FRA believes that the intent of Congress would be violated if individuals who agree to pay a civil penalty or are ordered to do so by a court are indemnified for that penalty by the railroad or another institution (such as a labor organization). Congress intended that the penalties have a deterrent effect on individual behavior that would be lessened, if not eliminated, by such indemnification.

Although informal, face-to-face meetings are encouraged during the negotiation of a civil penalty charge, the RSIA does not require that FRA give individuals or railroads the opportunity for a formal, trial-type administrative hearing as part of the civil penalty process. FRA does not provide that opportunity because such administrative hearings would be likely to add significantly to the costs an individual would have to bear in defense of a safety claim (and also to FRA's enforcement expenses) without shedding any more light on what resolution of the matter is fair than would the informal procedures set forth here. Of course, should an individual or railroad decide not to settle, that person would be entitled to a trial de novo when FRA, through the Attorney General, sued to collect the penalty in the appropriate United States district court.

PENALTY SCHEDULES; ASSESSMENT OF MAXIMUM PENALTIES

As recommended by the Department of Transportation in its initial proposal for rail safety legislative revisions in 1987, the RSIA raised the maximum civil penalties for violations of the Federal rail safety laws, regulations, or orders. *Id.*, secs. 3, 13–15, 17. Pursuant to sec. 16 of RSIA, the penalty for a violation of the Hours of Service Act was changed from a flat $500 to a penalty of ''up to $1,000, as the Secretary of Transportation deems reasonable.'' Under all the other statutes, and regulations and orders under those statutes, the maximum penalty was raised from $2,500 to $10,000 per violation, except that ''where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury,'' the penalty was raised to a maximum of $20,000 per violation (''the aggravated maximum penalty'').

The Rail Safety Enforcement and Review Act (RSERA), Public Law 102–365, 106 Stat. 972, enacted in 1992, increased the maximum penalty from $1,000 to $10,000, and provided for an aggravated maximum penalty of $20,000 for a violation of the Hours of Service Act, making these penalty amounts uniform with those of FRA's other safety laws, regulations, and orders. RSERA also increased the minimum civil monetary penalty from $250 to $500 for all of FRA's safety regulatory provisions and orders. *Id.*, sec. 4(a).

The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 104 Stat. 890, note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–373, April 26, 1996) (Inflation Act) required that agencies adjust by regulation each minimum and maximum civil monetary penalty within the agency's jurisdiction for inflation and make subsequent adjustments once every four years after the initial adjustment. Accordingly, FRA's minimum and maximum civil monetary penalties have been periodically adjusted, pursuant to the Inflation Act, through rulemaking.

The Rail Safety Improvement Act of 2008 (''RSIA of 2008''), enacted October 16, 2008, raised FRA's civil monetary ordinary and aggravated maximum penalties to $25,000 and $100,000 respectively. FRA amended the civil penalty provisions in its regulations so as to make $25,000 the ordinary maximum penalty per violation and $100,000 the aggravated maximum penalty per violation, as authorized by the RSIA of 2008, in a final rule published on December 30, 2008 in the FEDERAL REGISTER. 73 FR 79700. The December 30, 2008 final rule also adjusted the minimum civil penalty from $550 to $650 pursuant to Inflation Act requirements. *Id.* A correcting amendment to the civil penalty provisions in 49 CFR part 232 was published on April 6, 2009. 74 FR 15388.

Effective June 25, 2012, the aggravated maximum penalty was raised from $100,000 to $105,000 pursuant to the Inflation Act.

FRA's traditional practice has been to issue penalty schedules assigning to each particular regulation or order specific dollar amounts for initial penalty assessments. The schedule (except where issued after notice and an opportunity for comment) constitutes a statement of agency policy, and is ordinarily issued as an appendix to the relevant part of the Code of Federal Regulations. For each regulation or order, the schedule shows two amounts within the $650 to $25,000 range in separate columns, the first for ordinary violations, the second for willful violations (whether committed by railroads or individuals). In one instance—part 231—the schedule refers to sections of the relevant FRA defect code rather than to sections of the CFR text. Of course, the defect code, which is simply a reorganized version of the CFR text used by FRA to facilitate computerization of inspection data, is substantively identical to the CFR text.

The schedule amounts are meant to provide guidance as to FRA's policy in predictable situations, not to bind FRA from using the full range of penalty authority where extraordinary circumstances warrant. The Senate report on the bill that became the RSIA stated:

It is expected that the Secretary would act expeditiously to set penalty levels commensurate with the severity of the violations, with imposition of the maximum penalty reserved for violation of any regulation where warranted by exceptional circumstances. S. Rep. No. 100–153, 10th Cong., 2d Sess. 8 (1987).

Accordingly, under each of the schedules (ordinarily in a footnote), and regardless of the fact that a lesser amount might be shown in both columns of the schedule, FRA reserves the right to assess the statutory maximum penalty of up to $105,000 per violation where a pattern of repeated violations or a grossly negligent violation has created an imminent hazard of death or injury or has caused death or injury. This authority to assess a penalty for a single violation above $25,000 and up to $105,000 is used only in very exceptional cases to penalize egregious behavior. FRA indicates in the penalty demand letter when it uses the higher penalty amount instead of the penalty amount listed in the schedule.

THE EXTENT AND EXERCISE OF FRA'S SAFETY JURISDICTION

The Safety Act and, as amended by the RSIA, the older safety statutes apply to ''railroads.'' Section 202(e) of the Safety Act defines railroad as follows:

The term ''railroad'' as used in this title means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Prior to 1988, the older safety statutes had applied only to common carriers engaged in interstate or foreign commerce by rail. The Safety Act, by contrast, was intended to reach as far as the Commerce Clause of the Constitution (i.e., to all railroads that affect interstate commerce) rather than be limited to common carriers actually engaged in interstate commerce. In reporting out the bill that became the 1970 Safety Act, the House Committee on Interstate and Foreign Commerce stated:

The Secretary's authority to regulate extends to all areas of railroad safety. This legislation is intended to encompass all those means of rail transportation as are commonly included within the term. Thus, ''railroad'' is not limited to the confines of ''common carrier by railroad'' as that language is defined in the Interstate Commerce Act.

H.R. Rep. No. 91–1194, 91st Cong., 2d Sess. at 16 (1970).

FRA's jurisdiction was bifurcated until, in 1988, the RSIA amended the older safety statutes to make them coextensive with the Safety Act by making them applicable to railroads and incorporating the Safety Act's definition of the term (e.g.,45 U.S.C. 16, as amended). The RSIA also made clear that FRA's safety jurisdiction is not confined to entities using traditional railroad technology. The new definition of ''railroad'' emphasized that all non-highway high speed ground transportation systems—regardless of technology used—would be considered railroads.

Thus, with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use. For policy reasons, however, FRA does not exercise jurisdiction under all of its regulations to the full extent permitted by statute. Based on its knowledge of where the safety problems were occurring at the time of its regulatory action and its assessment of the practical limitations on its role, FRA has, in each regulatory context, decided that the best option was to regulate something less than the total universe of railroads.

For example, all of FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation (i.e., ''plant railroads''), such as those in steel mills that do not go beyond the plant's boundaries. E.g., 49 CFR 225.3(a)(1) (accident reporting regulations). Some rules exclude passenger operations that are not part of the general railroad system (such as some tourist railroads) only if they meet the definition of ''insular.'' E.g., 49 CFR 225.3(a)(3) (accident reporting) and 234.3(c) (grade crossing signal safety). Other regulations exclude not only plant railroads but all other railroads that are not operated as a part of, or over the lines of, the general railroad system of transportation. E.g., 49 CFR 214.3 (railroad workplace safety).

By ''general railroad system of transportation,'' FRA refers to the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas. Much of

this network is interconnected, so that a rail vehicle can travel across the nation without leaving the system. However, mere physical connection to the system does not bring trackage within it. For example, trackage within an industrial installation that is connected to the network only by a switch for the receipt of shipments over the system is not a part of the system.

Moreover, portions of the network may lack a physical connection but still be part of the system by virtue of the nature of operations that take place there. For example, the Alaska Railroad is not physically connected to the rest of the general system but is part of it. The Alaska Railroad exchanges freight cars with other railroads by car float and exchanges passengers with interstate carriers as part of the general flow of interstate commerce. Similarly, an intercity high speed rail system with its own right of way would be part of the general system although not physically connected to it. The presence on a rail line of any of these types of railroad operations is a sure indication that such trackage is part of the general system: the movement of freight cars in trains outside the confines of an industrial installation, the movement of intercity passenger trains, or the movement of commuter trains within a metropolitan or suburban area. Urban rapid transit operations are ordinarily not part of the general system, but may have sufficient connections to that system to warrant exercise of FRA's jurisdiction (see discussion of passenger operations, below). Tourist railroad operations are not inherently part of the general system and, unless operated over the lines of that system, are subject to few of FRA's regulations.

The boundaries of the general system are not static. For example, a portion of the system may be purchased for the exclusive use of a single private entity and all connections, save perhaps a switch for receiving shipments, severed. Depending on the nature of the operations, this could remove that portion from the general system. The system may also grow, as with the establishment of intercity service on a brand new line. However, the same trackage cannot be both inside and outside of the general system depending upon the time of day. If trackage is part of the general system, restricting a certain type of traffic over that trackage to a particular portion of the day does not change the nature of the line—it remains the general system.

Of course, even where a railroad operates outside the general system, other railroads that are definitely part of that system may have occasion to enter the first railroad's property (e.g., a major railroad goes into a chemical or auto plant to pick up or set out cars). In such cases, the railroad that is part of the general system remains part of that system while inside the installation; thus, all of its activities are covered by FRA's regulations during that period. The plant railroad itself, however, does not get swept into the general system by virtue of the other railroad's activity, except to the extent it is liable, as the track owner, for the condition of its track over which the other railroad operates during its incursion into the plant. Of course, in the opposite situation, where the plant railroad itself operates beyond the plant boundaries on the general system, it becomes a railroad with respect to those particular operations, during which its equipment, crew, and practices would be subject to FRA's regulations.

In some cases, the plant railroad leases track immediately adjacent to its plant from the general system railroad. Assuming such a lease provides for, and actual practice entails, the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant, the lease would remove the plant railroad's operations on that trackage from the general system for purposes of FRA's regulations, as it would make that trackage part and parcel of the industrial installation. (As explained above, however, the track itself would have to meet FRA's standards if a general system railroad operated over it. See 49 CFR 213.5 for the rules on how an owner of track may assign responsibility for it.) A lease or practice that permitted other types of movements by general system railroads on that trackage would, of course, bring it back into the general system, as would operations by the plant railroad indicating it was moving cars on such trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire).

FRA exercises jurisdiction over tourist, scenic, and excursion railroad operations whether or not they are conducted on the general railroad system. There are two exceptions: (1) operations of less than 24-inch gage (which, historically, have never been considered railroads under the Federal railroad safety laws); and (2) operations that are off the general system and ''insular'' (defined below).

Insularity is an issue only with regard to tourist operations over trackage outside of the general system used exclusively for such operations. FRA considers a tourist operation to be insular if its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public'except a business guest, a licensee of the tourist operation or an affiliated entity, or a trespasser'would be affected by the operation. A tourist operation will not be considered insular if one or more of the following exists on its line:

•A public highway-rail crossing that is in use;

•An at-grade rail crossing that is in use;

•A bridge over a public road or waters used for commercial navigation; or

•A common corridor with a railroad, i.e., its operations are within 30 feet of those of any railroad.

When tourist operations are conducted on the general system, FRA exercises jurisdiction over them, and all of FRA's pertinent regulations apply to those operations unless a waiver is granted or a rule specifically excepts such operations (e.g., the passenger equipment safety standards contain an exception for these operations, 49 CFR 238.3(c)(3), even if conducted on the general system). When a tourist operation is conducted only on track used exclusively for that purpose it is not part of the general system. The fact that a tourist operation has a switch that connects it to the general system does not make the tourist operation part of the general system if the tourist trains do not enter the general system and the general system railroad does not use the tourist operation's trackage for any purpose other than delivering or picking up shipments to or from the tourist operation itself.

If a tourist operation off the general system is insular, FRA does not exercise jurisdiction over it, and none of FRA's rules apply. If, however, such an operation is not insular, FRA exercises jurisdiction over the operation, and some of FRA's rules (i.e., those that specifically apply beyond the general system to such operations) will apply. For example, FRA's rules on accident reporting, steam locomotives, and grade crossing signals apply to these non-insular tourist operations (see 49 CFR 225.3, 230.2 amd 234.3), as do all of FRA's procedural rules (49 CFR parts 209, 211, and 216) and the Federal railroad safety statutes themselves.

In drafting safety rules, FRA has a specific obligation to consider financial, operational, or other factors that may be unique to tourist operations. 49 U.S.C. 20103(f). Accordingly, FRA is careful to consider those factors in determining whether any particular rule will apply to tourist operations. Therefore, although FRA asserts jurisdiction quite broadly over these operations, we work to ensure that the rules we issue are appropriate to their somewhat special circumstances.

It is important to note that FRA's exercise of its regulatory authority on a given matter does not preclude it from subsequently amending its regulations on that subject to bring in railroads originally excluded. More important, the self-imposed restrictions on FRA's exercise of regulatory authority in no way constrain its exercise of emergency order authority under section 203 of the Safety Act. That authority was designed to deal with imminent hazards not dealt with by existing regulations and/or so dangerous as to require immediate, ex parte action on the government's part. Thus, a railroad excluded from the reach of any of FRA's regulations is fully within the reach of FRA's emergency order authority, which is coextensive with FRA's statutory jurisdiction over all railroads.

FRA'S POLICY ON JURISDICTION OVER PASSENGER OPERATIONS

Under the Federal railroad safety laws, FRA has jurisdiction over all railroads except ''rapid transit operations in an urban area that are not connected to the general railroad system of transportation.'' 49 U.S.C. 20102. Within the limits imposed by this authority, FRA exercises jurisdiction over all railroad passenger operations, regardless of the equipment they use, unless FRA has specifically stated below an exception to its exercise of jurisdiction for a particular type of operation. This policy is stated in general terms and does not change the reach of any particular regulation under its applicability section. That is, while FRA may generally assert jurisdiction over a type of operation here, a particular regulation may exclude that kind of operation from its reach. Therefore, this statement should be read in conjunction with the applicability sections of all of FRA's regulations.

INTERCITY PASSENGER OPERATIONS

FRA exercises jurisdiction over all intercity passenger operations. Because of the nature of the service they provide, standard gage intercity operations are all considered part of the general railroad system, even if not physically connected to other portions of the system. Other intercity passenger operations that are not standard gage (such as a magnetic levitation system) are within FRA's jurisdiction even though not part of the general system.

COMMUTER OPERATIONS

FRA exercises jurisdiction over all commuter operations. Congress apparently intended that FRA do so when it enacted the Federal Railroad Safety Act of 1970, and made that intention very clear in the 1982 and 1988 amendments to that act. FRA has attempted to follow that mandate consistently. A commuter system's connection to other railroads is not relevant under the rail safety statutes. In fact, FRA considers commuter railroads to be part of the general railroad system regardless of such connections.

FRA will presume that an operation is a commuter railroad if there is a statutory determination that Congress considers a particular service to be commuter rail. For example, in the Northeast Rail Service Act of 1981, 45 U.S.C. 1104(3), Congress listed specific commuter authorities. If that presumption does not apply, and the operation does not

meet the description of a system that is presumptively urban rapid transit (see below), FRA will determine whether a system is commuter or urban rapid transit by analyzing all of the system's pertinent facts. FRA is likely to consider an operation to be a commuter railroad if:

•The system serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area,

•The system's primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function, and

•The vast bulk of the system's trains are operated in the morning and evening peak periods with few trains at other hours.

Examples of commuter railroads include Metra and the Northern Indiana Commuter Transportation District in the Chicago area; Virginia Railway Express and MARC in the Washington area; and Metro-North, the Long Island Railroad, New Jersey Transit, and the Port Authority Trans Hudson (PATH) in the New York area.

OTHER SHORT HAUL PASSENGER SERVICE

The federal railroad safety statutes give FRA authority over ''commuter or other short-haul railroad passenger service in a metropolitan or suburban area.'' 49 U.S.C. 20102. This means that, in addition to commuter service, there are other short-haul types of service that Congress intended that FRA reach. For example, a passenger system designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area, would be one that does not have the transportation of commuters within a metropolitan area as its primary purpose. FRA would ordinarily exercise jurisdiction over such a system as ''other short-haul service'' unless it meets the definition of urban rapid transit and is not connected in a significant way to the general system.

URBAN RAPID TRANSIT OPERATIONS

One type of short-haul passenger service requires special treatment under the safety statutes: ''rapid transit operations in an urban area.'' Only these operations are excluded from FRA's jurisdiction, and only if they are ''not connected to the general railroad system.'' FRA will presume that an operation is an urban rapid transit operation if the system is not presumptively a commuter railroad (see discussion above) the operation is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area, and moves passengers from station to station within the urban area as one of its major functions.

Where neither the commuter railroad nor urban rapid transit presumptions applies, FRA will look at all of the facts pertinent to a particular operation to determine its proper characterization. FRA is likely to consider an operation to be urban rapid transit if:

•The operation serves an urban area (and may also serve its suburbs),

•Moving passengers from station to station within the urban boundaries is a major function of the system and there are multiple station stops within the city for that purpose (such an operation could still have the transportation of commuters as one of its major functions without being considered a commuter railroad), and

•The system provides frequent train service even outside the morning and evening peak periods.

Examples of urban rapid transit systems include the Metro in the Washington, D.C. area, CTA in Chicago, and the subway systems in New York, Boston, and Philadelphia. The type of equipment used by such a system is not determinative of its status. However, the kinds of vehicles ordinarily associated with street railways, trolleys, subways, and elevated railways are the types of vehicles most often used for urban rapid transit operations.

FRA can exercise jurisdiction over a rapid transit operation only if it is connected to the general railroad system, but need not exercise jurisdiction over every such operation that is so connected. FRA is aware of several different ways that rapid transit operations can be connected to the general system. Our policy on the exercise of jurisdiction will depend upon the nature of the connection(s). In general, a connection that involves operation of transit equipment as a part of, or over the lines of, the general system will trigger FRA's exercise of jurisdiction. Below, we review some of the more common types of connections and their effect on the agency's exercise of jurisdiction. This is not meant to be an exhaustive list of connections.

RAPID TRANSIT CONNECTIONS SUFFICIENT TO TRIGGER FRA'S EXERCISE OF JURISDICTION

Certain types of connections to the general railroad system will cause FRA to exercise jurisdiction over the rapid transit line *to the extent it is connected*. FRA will exercise jurisdiction over the portion of a rapid transit operation that is conducted as a part of or over the lines of the general system. For example, rapid transit operations are conducted on the lines of the general system where the rapid transit operation and other railroad use the same track. FRA will exercise its jurisdiction over the operations conducted on the general system. In situations involving

joint use of the same track, it does not matter that the rapid transit operation occupies the track only at times when the freight, commuter, or intercity passenger railroad that shares the track is not operating. While such time separation could provide the basis for waiver of certain of FRA's rules (see 49 CFR part 211), it does not mean that FRA will not exercise jurisdiction. However, FRA will exercise jurisdiction over only the portions of the rapid transit operation that are conducted on the general system. For example, a rapid transit line that operates over the general system for a portion of its length but has significant portions of street railway that are not used by conventional railroads would be subject to FRA's rules only with respect to the general system portion. The remaining portions would not be subject to FRA's rules. If the non-general system portions of the rapid transit line are considered a ''rail fixed guideway system'' under 49 CFR part 659, those rules, issued by the Federal Transit Administration (FTA), would apply to them.

Another connection to the general system sufficient to warrant FRA's exercise of jurisdiction is a railroad crossing at grade where the rapid transit operation and other railroad cross each other's tracks. In this situation, FRA will exercise its jurisdiction sufficiently to assure safe operations over the at-grade railroad crossing. FRA will also exercise jurisdiction to a limited extent over a rapid transit operation that, while not operated on the same tracks as the conventional railroad, is connected to the general system by virtue of operating in a shared right-of-way involving joint control of trains. For example, if a rapid transit line and freight railroad were to operate over a movable bridge and were subject to the same authority concerning its use (e.g., the same tower operator controls trains of both operations), FRA will exercise jurisdiction in a manner sufficient to ensure safety at this point of connection. Also, where transit operations share highway-rail grade crossings with conventional railroads, FRA expects both systems to observe its signal rules. For example, FRA expects both railroads to observe the provision of its rule on grade crossing signals that requires prompt reports of warning system malfunctions. See 49 CFR part 234. FRA believes these connections present sufficient intermingling of the rapid transit and general system operations to pose significant hazards to one or both operations and, in the case of highway-rail grade crossings, to the motoring public. The safety of highway users of highway-rail grade crossings can best be protected if they get the same signals concerning the presence of any rail vehicles at the crossing and if they can react the same way to all rail vehicles.

RAPID TRANSIT CONNECTIONS NOT SUFFICIENT TO TRIGGER FRA'S EXERCISE OF JURISDICTION

Although FRA could exercise jurisdiction over a rapid transit operation based on any connection it has to the general railroad system, FRA believes there are certain connections that are too minimal to warrant the exercise of its jurisdiction. For example, a rapid transit system that has a switch for receiving shipments from the general system railroad is not one over which FRA would assert jurisdiction. This assumes that the switch is used only for that purpose. In that case, any entry onto the rapid transit line by the freight railroad would be for a very short distance and solely for the purpose of dropping off or picking up cars. In this situation, the rapid transit line is in the same situation as any shipper or consignee; without this sort of connection, it cannot receive or offer goods by rail.

Mere use of a common right-of-way or corridor in which the conventional railroad and rapid transit operation do not share any means of train control, have a rail crossing at grade, or operate over the same highway-rail grade crossings would not trigger FRA's exercise of jurisdiction. In this context, the presence of intrusion detection devices to alert one or both carriers to incursions by the other one would not be considered a means of common train control. These common rights of way are often designed so that the two systems function completely independently of each other. FRA and FTA will coordinate with rapid transit agencies and railroads wherever there are concerns about sufficient intrusion detection and related safety measures designed to avoid a collision between rapid transit trains and conventional equipment.

Where these very minimal connections exist, FRA will not exercise jurisdiction unless and until an emergency situation arises involving such a connection, which is a very unlikely event. However, if such a system is properly considered a rail fixed guideway system, FTA's rules (49 CFR part 659) will apply to it.

COORDINATION OF THE FRA AND FTA PROGRAMS

FTA's rules on rail fixed guideway systems (49 CFR part 659) apply to any rapid transit systems or portions thereof not subject to FRA's rules. On rapid transit systems that are not sufficiently connected to the general railroad system to warrant FRA's exercise of jurisdiction (as explained above), FTA's rules will apply exclusively. On those rapid transit systems that are connected to the general system in such a way as warrant exercise of FRA's jurisdiction, only those portions of the rapid transit system that are connected to the general system will generally be subject to FRA's rules.

A rapid transit railroad may apply to FRA for a waiver of any FRA regulations. See 49 CFR part 211. FRA will seek FTA's views whenever a rapid transit operation petitions FRA for a waiver of its safety rules. In granting or denying any such waiver, FRA will make clear whether its rules do not apply to any segments of the operation so that it is clear where FTA's rules do apply.

EXTRAORDINARY REMEDIES

While civil penalties are the primary enforcement tool under the federal railroad safety laws, more extreme measures are available under certain circumstances. FRA has authority to issue orders directing compliance with the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, the older safety statutes, or regulations issued under any of those statutes. See 45 U.S.C. 437(a) and (d), and 49 App. U.S.C. 1808(a). Such an order may issue only after notice and opportunity for a hearing in accordance with the procedures set forth in 49 CFR part 209, subpart C. FRA inspectors also have the authority to issue a special notice requiring repairs where a locomotive or freight car is unsafe for further service or where a segment of track does not meet the standards for the class at which the track is being operated. Such a special notice may be appealed to the regional director and the FRA Administrator. See 49 CFR part 216, subpart B.

FRA may, through the Attorney General, also seek injunctive relief in federal district court to restrain violations or enforce rules issued under the railroad safety laws. See 45 U.S.C. 439 and 49 App. U.S.C. 1810.

FRA also has the authority to issue, after notice and an opportunity for a hearing, an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period. This disqualification authority is exercised under procedures found at 49 CFR part 209, subpart D.

Criminal penalties are available for knowing violations of 49 U.S.C. 5104(b), or for willful or reckless violations of the Federal hazardous materials transportation law or a regulation issued under that law. See 49 U.S.C. Chapter 51, and 49 CFR 209.131, 133. The Accident Reports Act, 45 U.S.C. 39, also contains criminal penalties.

Perhaps FRA's most sweeping enforcement tool is its authority to issue emergency safety orders ''where an unsafe condition or practice, or a combination of unsafe conditions or practices, or both, create an emergency situation involving a hazard of death or injury to persons * * *'' 45 U.S.C. 432(a). After its issuance, such an order may be reviewed in a trial-type hearing. See 49 CFR 211.47 and 216.21 through 216.27. The emergency order authority is unique because it can be used to address unsafe conditions and practices whether or not they contravene an existing regulatory or statutory requirement. Given its extraordinary nature, FRA has used the emergency order authority sparingly.

[53 FR 52920, Dec. 29, 1988, as amended at 63 FR 11619, Mar. 10, 1998; 64 FR 62864, Nov. 17, 1999; 65 FR 42544, July 10, 2000; 69 FR 30592, May 28, 2004; 71 FR 77295, Dec. 26, 2006; 72 FR 51196, Sept. 6, 2007; 73 FR 79701, Dec. 30, 2008; 77 FR 24418, Apr. 24, 2012]

APPENDIX B TO PART 209—FEDERAL RAILROAD ADMINISTRATION GUIDELINES FOR INITIAL HAZARDOUS MATERIALS ASSESSMENTS

These guidelines establish benchmarks to be used in determining initial civil penalty assessments for violations of the Hazardous Materials Regulations (HMR). The guideline penalty amounts reflect the best judgment of the FRA Office of Safety Assurance and Compliance (RRS) and of the Safety Law Division of the Office of Chief Counsel (RCC) on the relative severity of the various violations routinely encountered by FRA inspectors on a scale of amounts up to the maximum $75,000 penalty, except the maximum civil penalty is $175,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, and a minimum $450 penalty applies to a violation related to training. (49 U.S.C. 5123) Unless otherwise specified, the guideline amounts refer to average violations, that is, violations involving a hazardous material with a medium level of hazard, and a violator with an average compliance history. In an ''average violation,'' the respondent has committed the acts due to a failure to exercise reasonable care under the circumstances (''knowingly''). For some sections, the guidelines contain a breakdown according to relative severity of the violation, for example, the guidelines for shipping paper violations at 49 CFR §§172.200–.203. *All* penalties in these guidelines are subject to change depending upon the circumstances of the particular case. The general duty sections, for example §§173.1 and 174.7, are not ordinarily cited as separate violations; they are primarily used as explanatory citations to demonstrate applicability of a more specific section where applicability is otherwise unclear.

FRA believes that infractions of the regulations that lead to personal injury are especially serious; this is directly in line with Department of Transportation policy that hazardous materials are only safe for transportation when they are securely sealed in a proper package. (Some few containers, such as tank cars of carbon dioxide, are designed to vent off excess internal pressure. They are exceptions to the ''securely sealed'' rule.) ''Personal injury'' has become somewhat of a

term of art, especially in the fields of occupational safety and of accident reporting. To avoid confusion, these penalty guidelines use the notion of ''human contact'' to trigger penalty aggravation. In essence, *any* contact by a hazardous material on a person during transportation is a per se injury and proof will not be required regarding the extent of the physical contact or its consequences. When a violation of the Federal hazardous material transportation law, an order issued thereunder, the Hazardous Materials Regulations or a special permit, approval, or order issued under those regulations results in death, serious illness or severe injury to any person, or substantial destruction of property, a maximum penalty of at least $75,000 and up to and including $175,000 shall always be assessed initially.

These guidelines are a preliminary assessment tool for FRA's use. They create no rights in any party. FRA is free to vary from them when it deems appropriate and may amend them from time to time without prior notice. Moreover, FRA is not bound by any amount it initially proposes should litigation become necessary. In fact, FRA reserves the express authority to amend the NOPV to seek a penalty of up to $75,000 for each violation, and up to $175,000 for any violation resulting in death, serious illness or severe injury to any person, or substantial destruction of property, at any time prior to issuance of an order. FRA periodically makes minor updates and revisions to these guidelines, and the most current version may be found on FRA's Web site at *http://www.fra.dot.gov*.

CIVIL PENALTY ASSESSMENT GUIDELINES

[As of December 26, 2006]

Emergency orders		Guideline amount [1]
EO16	Penalties for violations of EO16 vary depending on the circumstances	Varies.
EO17	Penalties for violations of EO17 vary depending on the circumstances	Varies.
	Failure to file annual report	$5,000.
EO23	Penalties for violations of EO23 vary depending on the circumstances	Varies.

[1] Any person who violates an emergency order issued under the authority of 49 U.S.C. Ch. 201 is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused a death or injury, a penalty not to exceed $105,000 per violation may be assessed. Each day that the violation continues is a separate offense. 49 U.S.C. 21301; 28 U.S.C. 2461, note.

49 CFR section	Description	Guideline amount [2]
PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES		
107.608	Failure to register or to renew registration. (Note: registration—or renewal—is mitigation.).	1,500.
107.620(d)	Failure to show records on proper request	2,000.
	Deliberate attempt to hide records-considerable aggravation possible.	Varies.
PART 171—GENERAL REGULATIONS		
171.2(a), (b), (c), (e), (f)	General duty sections—may be cited in support of another, more specific citation to the actual regulatory section violated.	
171.2(d)	Offering or accepting a hazardous material (hazmat or HM) without being registered.	1,500.
171.2(g)	Representing (marking, certifying, selling, or offering) a packaging as meeting regulatory specification when it does not.	8,000.
171.2(i)	Certifying that a hazardous material is offered for transportation in commerce in accordance with the regulations (packaged, marked, labeled, etc.) when it is not. A more specific citation to the actual underlying regulation violated should be used instead of this section, or accompanying this section, if possible.	5,000.
171.2(j)	Representing (by marking or otherwise) that a container or package for transportation of a hazardous material is safe, certified, or in compliance with the regulations when it is not.	8,000.
171.2(k)	Representing, marking, etc. for the presence of HM when no HM is present. (Mitigation required for shipments smaller than a carload, e.g., single drum penalty is $1,000.)	2,000.

49 CFR section	Description	Guideline amount [2]
171.2(l)	Tampering with (altering, removing, defacing, or destroying) any marking, label, placard, or description on a document required by hazmat law or regulations; unlawfully tampering with a package, container, motor vehicle, rail car, aircraft, or vessel used for the transportation of hazardous materials.	Varies—considerable aggravation possible.
171.2(m)	Falsifying or altering an exemption, approval, registration, or other grant of authority issued under hazmat regulations. Offering or transporting a hazmat under an altered exemption, approval, registration, or other grant of authority without the consent of the issuing authority. Representing, marking, certifying, or selling a packaging or container under an altered exemption, approval, registration, or other grant of authority.	Varies—considerable aggravation possible.
171.12	Import shipments—Importer not providing shipper and forwarding agent with U.S. requirements. Cannot be based on inference.	4,000.
	Import shipments—Failure to certify by shipper or forwarding agent.	2,000.
171.15	Failure to provide immediate notice of certain hazardous materials incidents.	6,000.
171.16	Failure to file incident report (form DOT 5800.1). (Multiple failures will aggravate the penalty.).	4,000.
	PART 172—SHIPPING PAPERS	
172.200–.203	Offering hazardous materials for transportation when the material is not properly described on the shipping paper as required by §§ 172.200—.203. (The ''shipping paper'' is the document tendered by the shipper/offeror to the carrier. The original shipping paper contains the shipper's certification at § 172.204.) Considerable aggravation of penalties under these sections is possible, particularly in case involving undeclared hazmat.	
	—Undeclared shipment: offering a hazardous material without shipping papers, package markings, labels, or placards (see also §§ 172.300, 172.400, 172.500 for specific requirements).	15,000.
	—Information on the shipping paper is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000.
	—Total lack of hazardous materials information on shipping paper. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but there may be such dangerous products that aggravation needs to be considered.).	7,500.
	—Some information is present, but the missing or improper description could cause mishandling by the carrier or a delay or error in emergency response.	5,000.
	—When the improper description is not likely to cause serious problem (technical defect).	2,000.
	—Shipping paper includes a hazardous material description and no hazardous material is present. (Technically, this is also a violation of § 171.2(k); it is presented here as a convenience.).	7,500.
	Failure to include emergency response information is covered at §§ 172.600–604; while the normal unit of violation for shipping papers is the whole document, failure to provide emergency response information is a separate violation.	
172.201(d)	Failure to put emergency response telephone number on shipping paper.	4,000.
172.201(e)	Failure to retain shipping paper for required period (1 year if carrier, 2 years if offeror).	7,500.
172.204	Offeror's failure to certify	2,000.

49 CFR section	Description	Guideline amount [2]
172.205	Hazardous waste manifest. (Applies only to defects in the Hazardous Waste Manifest form [EPA Form 8700–22 and 8700–22A]; shipping paper defects are cited and penalized under § 172.200–.203.).	Parallel the penalties for §§ 172.200–.203, depending on circumstances.
Marking:		
172.301	Failure to mark a non-bulk package as required (e.g., no commodity name on a 55-gallon drum). (Shipment is the unit of violation.).	1,000.
172.302	Failure to follow standards for marking bulk packaging.	2,000.
172.302(a)	ID number missing or in improper location. (The guideline is for a portable tank; for smaller bulk packages, the guideline should be mitigated downward.)	2,500.
172.302(b)	Failure to use the correct *size* of markings. (Note: If § 172.326(a) is also cited, it takes precedence and § 172.302(b) is not cited. Note also: the guideline is for a gross violation of marking size—½″ where 2″ is required—and mitigation should be considered for markings approaching the required size.)	2,000.
172.302(c)	Failure to place exemption number markings on bulk package.	2,000.
172.303	Prohibited marking. (Package is marked for a hazardous material and contains either another hazardous material or no hazardous material.)	
	—The marking is wrong and caused or contributed to a wrong emergency response.	10,000.
	—Use of a tank car stenciled for one commodity to transport another.	5,000.
	—Inconsistent marking; e.g., shipping name and ID number do not agree.	5,000.
	—Marked as a hazardous material when package does not contain a hazardous material.	2,000.
172.304	Obscured marking	2,000.
172.313	''Inhalation Hazard'' not marked	2,500.
172.322	Failure to mark for MARINE POLLUTANT where required.	1,500.
172.325(a)	Improper, or missing, HOT mark for elevated temperature material.	1,500.
172.325(b)	Improper or missing commodity stencil	2,500.
172.326(a)	Failure to mark a portable tank with the commodity name.	2,500.
	Failure to have commodity name visible (''legible'') when portable tank is loaded on intermodal equipment.	2,500.
172.326(b)	Owner's/lessee's name not displayed	500.
172.326(c)	Failure to mark portable tank with ID number	2,500.
	Failure to have ID number visible when portable tank is loaded on intermodal equipment.	2,500.
172.330(a)(1)(i)	Offering/transporting hazardous material in a tank car that does not have the required ID number displayed on the car.	2,500.
172.330(a)(1)(ii)	Offering/transporting hazardous material in a tank car that does not have the required shipping name or common name stenciled on the car. This section ''lists'' the materials that require such markings on the tank. For tank car marking requirements for molten aluminum and molten sulfur, see § 172.325(b).	2,500.
172.330(c)	Failing to mark tank car as NON-ODORIZED or NOT ODORIZED when offering/transporting tank car or multi-unit tank car containing unodorized LPG.	2,500.
172.331(b)	Offering bulk packaging other than a portable tank, cargo tank, or tank car (e.g., a hopper car) not marked with ID number. (E.g., a hopper car carrying a hazardous substance, where a placard is not required).	2,500.

49 CFR section	Description	Guideline amount [2]
172.332	Improper display of identification number markings. Citation of this section and §§ 172.326(c) (portable tanks), 172.328 (cargo tanks), or 172.330 (tank cars) does not create two separate violations.	2,000.
172.334(a)	Displaying ID numbers on a RADIOACTIVE, EXPLOSIVES 1.1, 1.2, 1.3, 1.4, 1.5, or 1.6, or DANGEROUS, or subsidiary hazard placard.	4,000.
172.334(b)	—Improper display of ID number that caused or contributed to a wrong emergency response.	15,000.
	—Improper display of ID number that could cause carrier mishandling or minor error in emergency response.	5,000.
	—Technical error	2,000.
172.334(f)	Displaying ID number on orange panel not in proximity to the placard.	1,500.
Labeling:		
172.400–.406	Failure to label properly. (See also § 172.301 regarding the marking of packages.).	2,500.
Placarding:		
172.502	—Placarded as hazardous material when car does not contain a hazardous material.	2,000.
	—Hazardous material is present, but the placard does not represent hazard of the contents.	4,000.
	—Display of sign or device that could be confused with regulatory placard. Photograph or good, clear description necessary.	2,000.
172.503	Improper display of ID number on placards	See § 172.334.
172.504(a)	Failure to placard; affixing or displaying wrong placard. (See also §§ 172.502(a), 172.504(a), 172.505, 172.512, 172.516, 174.33, 174.59, 174.69; all applicable sections should be cited, but the penalty should be set at the amount for the violation most directly in point.) (Generally, the car is the unit of violation, and penalties vary with the number of errors, typically at the rate of $1,000 per placard.)	
	—Complete failure to placard	7,500.
	—One placard missing (add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000.
	—Complete failure to placard, but only two (2) placards are required (e.g., intermediate bulk containers [IBCs]).	2,500.
172.504(b)	Improper use of DANGEROUS placard for mixed loads.	5,000.
172.504(c)	Placarded for wrong hazard class when no placard was required due to "1,001 pound" exemption.	2,000.
172.504(e)	Use of placard other than as specified in the table:	
	—Improper placard caused or contributed to improper reaction by emergency response forces or caused or contributed to improper handling by carrier that led to a product release.	15,000.
	—Improper placard that could cause improper emergency response or handling by carrier.	5,000.
	—Technical violation	2,500.
172.505	Improper application of placards for subsidiary hazards. (This is in addition to any violation on the primary hazard placards.)	5,000.

49 CFR section	Description	Guideline amount [2]
172.508(a)	Offering hazardous material for rail transportation without affixing placards. (The preferred section for a total failure to placard is § 172.504(a); only one section should be cited to avoid a dual penalty.) (Note also: Persons offering hazardous material for rail movement must *affix* placards; if offering for highway movement, the placards must be *tendered* to the carrier. § 172.506.)	7,500.
	One placard missing (per car). (Add $1,000 per missing placard up to a total of three; if all placards are missing, the guideline above applies.)	1,000.
	Placards OK, except they were International Maritime Dangerous Goods (IMDG) labels instead of 10″ placards. (Unit of violation is the packaging, usually a portable tank.)	500.
	Placards on Container on Flatcar/Trailer on Flatcar (TOFC/COFC) units not readily visible. (§ 172.516 should be cited).	See § 172.516.
172.508(b)	Accepting hazardous material for rail transportation without placards affixed.	5,000.
172.510(a)	EXPLOSIVES 1.1, EXPLOSIVES 1.2, POISON GAS, (Division 2.3, Hazard Zone A), POISON, (Division 6.1, Packing Group I, Hazard Zone A), or a Division 2.1 material transported in a Class DOT 113 tank car, placards displayed without square background.	5,000.
172.512(a)	Improper placarding of freight containers	Follow § 172.504 guidelines.
172.514	Improper placarding of bulk packaging other than a tank car: For the ''exception'' packages in 174.514(c). Use the regular placarding sections for the guideline amounts for larger bulk packages.	2,000.
172.516	Placard not readily visible, improperly located or displayed, or deteriorated. Placard is the unit of violation.	1,000.
	—When placards on an intermodal container are not visible, for instance, because the container is in a well car. Container is the unit of violation, and, as a matter of enforcement policy, FRA accepts the lack of visibility of the end placards.	2,000.
	—Note that, while placards on freight containers, portable tanks, or TOFC vehicles may be used in lieu of placards on the rail cars, if both are placarded, each must be done properly. Thus, for instance, EXPLOSIVES 1.1 placards on intermodal containers do not require white square backgrounds, but if the rail car carrying such a container is placarded, the white square background is required on the rail car.	
172.519(b)(4)	Improper display of hazard class on placard—primary hazard.	2,500.
	Improper display of hazard class on placard—secondary hazard.	2,500.
Emergency Response Information	Violations of §§ 172.600–.604 are in addition to shipping paper violations. In citing a carrier, if the railroad's practice is to carry an emergency response (E/R) book or to put the E/R information as an attachment to the consist, the unit of violation is generally the train (or the consist). ''Telephone number'' violations are generally best cited against the shipper; if against a railroad, there should be proof that the number was given to the railroad; that is, the number was on the original shipping document. Considerable aggravation of the penalties under these sections is possible.	
172.600–.602	Where improper emergency response information has caused an improper reaction from emergency forces and the improper response has aggravated the situation.	15,000.
	Bad, missing, or improper emergency response information that could cause a significant difference in response.	5,000.
	Bad, missing, or improper emergency response information not likely to cause a significant difference in response.	2,500.

49 CFR section	Description	Guideline amount [2]
172.602(c)	Failure to have emergency response information ''immediately accessible,'' resulting in delay or confusion in emergency response.	15,000.
	Failure to have emergency response information ''immediately accessible'' with no negative effect on emergency response.	7,500.
172.604	Emergency response telephone number.	
	—Failure to include emergency response telephone number on a shipping paper.	4,000.
	—Listing an unauthorized, incorrect, non-working, or unmonitored (24 hrs. a day) emergency response telephone number on a shipping paper.	4,000.
Training	NOTE: The statutory minimum penalty for training violations is $450.	
172.702(a)	General failure to train hazardous material employees.	7,500.
172.702(b)	Hazardous material employee performing covered function without training. (Unit of violation is the employee.)	1,000.
172.704(a)	—Failure to train in a required area: —General awareness/familiarization; —Function-specific; —Safety; —Security awareness; —In-depth security training. (Unit of violation is the ''area,'' per employee. For a total failure to train, § 172.702(a) applies.)	2,500.
172.704(c)	Initial and recurrent training. (This section should be cited with the relevant substantive section, e.g., § 172.702(a), and use penalty provided there.)	Varies.
172.704(d)	Failure to maintain record of training. (Unit of violation is the employee.)	2,500.
	There is some evidence of training, but no (or inadequate) records and the employee demonstrates no or very little knowledge or skills in doing the job.	4,000.
Security:		
172.800	Total failure to develop security plan. Factors to consider are the size of the entity (is it a small business?); the type of hazmat handled; and the quantities of hazmat handled. Aggravation should be considered, for example, if it is a large entity that handles significant quantities of chlorine or other toxic inhalation hazard (TIH) material.	5,000 to 10,000.
	Failure to adhere to the developed security plan—considerable aggravation possible. Factors to consider include size of entity, quantities and types of hazmat handled, number of security plan components not complied with.	1,000 to 10,000.
172.802(a)	Failure to include each required component in plan: —Personnel security; —Unauthorized access; —En route security. (Unit of violation is the ''area.'' For a total failure to have a security plan, cite § 172.800 and use that penalty instead of § 172.802.)	2,000.
172.802(b)	Failure to have security plan (or appropriate portions of it) available to implementing employees. (A failure to have the plan ''in writing'' is treated as a violation of the requirement to have a plan and cited under § 172.800, using that penalty.)	5,000.

49 CFR section	Description	Guideline amount [2]
	Failure to revise/update the plan. (The requirement to revise/update is based on ''changing circumstances.'' Specific, clear, and detailed explanations of the circumstances that changed will be necessary.)	5,000.
	Failure to update all copies of the plan to the current level (i.e. all copies should be identical). (As in the tank car quality control area, the requirement to conform copies applies only to the ''official'' copies of the plan. Uncontrolled (and non-updated) copies of the security plan are not a violation if the uncontrolled copies are clearly marked as such.)	5,000.
172.820(a)–(e)	General failure to perform safety and security route analysis. *Factors to consider are the size of the railroad carrier, and the quantities of hazmat transported.*	5,000 to 10,000
172.820(a)–(e)	Partial failure to complete route analysis; failure to complete a component of the route analysis. —Compilation of security-sensitive commodity data. —Identification of practicable alternative routes. —Consultation with State, local, and tribal officials, as appropriate regarding security risks to high-consequence targets along or in proximity to a route used by the carrier to transport security-sensitive materials. —Safety and security route analysis of route used. —Safety and security alternative route analysis.	5,000
172.820(f)	Failure to complete route analyses within the prescribed time frame.	2,000
172.820(g)	Failure to include one of the following components in safety and security plan. —Procedure for consultation with offerors and consignees to minimize storage of security-sensitive materials incidental to movement. —Measures to limit unauthorized access to the materials during storage or delays in transit. —Measures to mitigate risk to population centers associated with in-transit storage of the materials. —Measures to be taken in the event of escalating threat levels for the materials stored in transit. (*Unit of violation is the component. For a total failure to have a security plan, cite § 172.800 and use the penalties provided for that section.*).	2,000
172.820(h)	Failure to maintain records and make available to DOT and DHS authorized officials.	2,000
172.820(i)	Failure to use route designated by FRA Associate Administrator for Safety.	10,000
PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGES		
General:		
173.1	General duty section applicable to shippers; also includes subparagraph (b), the requirement to train employees about applicable regulations. (Cite the appropriate section in the 172.700–704 series for training violations.).	2,000.
173.9(a)	Early delivery of transport vehicle that has been fumigated. (48 hours must have elapsed since fumigation.).	5,000.

49 CFR section	Description	Guideline amount [2]
173.9(b)	Failure to display fumigation placard. (Ordinarily cited against shipper only, not against railroad.).	1,000.
173.10	Delivery requirements for gases and for flammable liquids. See also §§ 174.204 and 174.304.	3,000.
Preparation of Hazardous Materials for Transportation:		
173.22	Shipper responsibility: This general duty section should ordinarily be cited only to support a more specific charge.	See specific section.
173.22a	Improper use of packagings authorized under exemption.	2,500.
	Failure to maintain copy of exemption as required.	1,000.
173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii).	Securing closures: These subsections are the general ''no leak'' standard for all packagings. Sec. 173.24(b) deals primarily with *packaging* as a whole, while § 173.24(f) focuses on *closures.* Use § 173.31(d) for tank cars, when possible. Cite the sections accordingly, using both the leak/non-leak criteria and the package size considerations to reach the appropriate penalty. *Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $75,000, and up to $175,000 if the violation results in death, serious illness or injury or substantial destruction of property. For intermodal (IM) portable tanks and other tanks of that size range, use the tank car penalty amounts, as stated in § 173.31.*	
	—Small bottle or box	1,000
	—55-gallon drum	2,500
	—Larger container, e.g., IBC; *not* portable tank or tank car..	5,000
	—IM portable tank, cite § 173.24(f) and use the penalty amounts for tank cars: Residue, generally, § 173.29(a) and, loaded, § 173.31(d).	
	—Residue adhering to outside of package (i.e., portable tanks, tank cars, etc.)..	5,000
	—Residue adhering to outside of package (i.e., portable tanks, tank cars, etc.).	5,000.
173.24(c)	Use of package not meeting specifications, including required stencils and markings. The most specific section for the package involved should be cited (see below). The penalty guideline should be adjusted for the size of the container. *Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $75,000, and up to $175,000 if the violation results in death, serious illness or injury or substantial destruction of property.*	
	—Small bottle or box.	1,000
	—55-gallon drum.	2,500
	—Larger container, e.g., IBC; *not* portable tank or tank car, *but* this section is applicable to a hopper car..	5,000
	For more specific sections: Tank cars–§ 173.31(a), portable tanks–§ 173.32, and IM portable tanks–§§ 173.32a, 173.32b, and 173.32c.	
	—Larger container, e.g., IBC; not portable tank or tank car, but this section is applicable to a hopper car.	5,000.
	For more specific sections: Tank cars—§ 173.31(a), portable tanks—§ 173.32, and IM portable tanks—§§ 173.32a,173.32b, and 173.32c.	
173.24a(a)(3)	Non-bulk packagings: Failure to secure and cushion inner packagings.	1,000.
	—Causes leak	5,000.
	—Leak with any contact between product and any human being.	15,000.
173.24a(b) and (d)	Non-bulk packagings: Exceeding filling limits	1,000.
	—Causes leak	5,000.
	—Leak with any contact between product and any human being.	15,000.
173.24b(a)	Insufficient outage:	
	—<1%	3,000.
	—Causes leak	5,000.
	Outage <5% on PIH material	5,000.
	—Causes leak	7,500.

49 CFR section	Description	Guideline amount [2]
	—Leak with any contact between product and any human being.	15,000.
173.24b(d)(2)	Overloaded to exceed the maximum weight of lading marked on the specification plate.	5,000.
173.26	Loaded beyond gross weight or capacity as stated in specification. (Applies only if quantity limitations do not appear in packaging requirements of part 173.) (For tank cars, see § 179.13.) For gross weight and capacity requirements, see § 179.13. § 173.26 should be the citation for the violation and civil penalty; § 179.13 can be cited as a reference section.	5,000.
173.28	Improper reuse, reconditioning, or remanufacture of packagings.	1,000.
173.29(a)	Offering residue tank car for transportation when openings are not tightly closed (§ 173.31(d) is also applicable for tank cars). The regulation requires offering ''in the same manner as when'' loaded and may be cited when a car not meeting specifications (see § 173.31(a)(1)) is released back into transportation after unloading; same guideline amount. Guidelines vary with the type of commodity involved. In addition to the vapor pressure factor cited below, the RQ (reportable quantity) is a fair measure of the danger of a commodity to the environment. For RQ values ≤10, consider aggravating the penalties below by no less than 50 percent.	
	—Hazardous material with insignificant vapor pressure and without classification as ''poison'' or ''inhalation hazard.''.	2,000.
	—With actual leak	5,000.
	—With leak allowing the product to contact any human being.	15,000.
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as ''poison'' or ''inhalation hazard.''.	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being. (In the case of fumes, the ''contact'' must be substantial.).	15,000.
	—Where only violation is failure to secure a protective housing, e.g., the covering for the gaging device.	1,000.
173.30	A general duty section that should be cited with the explicit statement of the duty.	
173.31(a)(1)	Use of a tank car not meeting specifications and the ''Bulk packaging'' authorization in Column 8 of the § 172.101 Hazardous Materials Table reference is:	
	§ 173.240	1,000.
	§ 173.241	2,500.
	§ 173.242	5,000.
	§ 173.243	5,000.
	§ 173.244	7,500.
	§ 173.245	7,500.
	§ 173.247	1,000.
	§ 173.249	7,500.
	§ 173.314	5,000.
	§ 173.315	5,000.
	§ 173.319	5,000.
	§ 173.320	5,000
	§ 173.323	7,500.
	—Minor defect not affecting the ability of the package to contain a hazardous material, e.g., no chain on a bottom outlet closure plug.	500.
	—Defect of greater importance, e.g., safety valve tested, but test date not stenciled on valve.	1,000.
	—Tank meets specification, but specification is not stenciled on car. § 179.1(e) implies that only the builder has the duty here, but it is the presence of the stencil that gives the shipper the right to rely on the builder. (See § 173.22(a)(3).).	1,000.

49 CFR section	Description	Guideline amount [2]
	—Tank car not stenciled according to Appendix C of the Tank Car Manual. The sub-reference is to § 179.22 which requires each tank car to be marked in accordance with Appendix C of the Tank Car Manual. For example, Appendix 3.03(a)(5), requires marking of the tank "NOT FOR FLAMMABLE LIQUIDS" or "NOT FOR FLAMMABLE OR POISONOUS LIQUIDS.".	2,500.
173.31(a)(2)	Tank cars and appurtenances used for a material not authorized on the certificate of construction (or by addendum on Association of American Railroads (AAR) form R–1).	7,500.
173.31(a)(3)	Filling a tank car overdue for a periodic inspection with a hazardous material and then offering it for transportation. (Note: Offering a residue car, overdue for inspection, is not a violation; neither is filling the car—so long as it is not offered for transportation.) (Adjust penalty if less than one month or more than one year overdue.).	7,500.
173.31(a)(4)	Use of tank car without air brake support attachments welded to pads..	5,000.
173.31(a)(5)	Use of a tank car with a self-energized manway located below the liquid level of the lading.	15,000.
173.31(b)(1)	Use of DOT-specification tank car, or any tank car used for transportation of a hazardous material, without shelf couplers.	10,000.
	—Against a carrier, cite § 174.3 and this section.	6,000.
173.31(b)(2)	Tank car with nonreclosing pressure relief device used to transport Class 2 gases, Class 3 or 4 liquids, or Division 6.1 liquids, PG I or II.	7,500.
	Tank car has a nonreclosing pressure relief device and the wrong pressure is stenciled on the tank. Cite this section where the standard in § 179.22(a) is not met and the respondent is other than the builder or manufacturer.	1,000.
	Where either the rupture disc is unmarked for pressure or manufacturer name or is marked but is of the wrong pressure. Cite this section for a violation of § 179.156(h) against other than the builder or manufacturer.	5,000.
173.31(b)(3)	Use of a tank car for the transportation of a hazardous material without the required tank-head protection. See paragraphs (b)(3)(iii) and (iv) for compliance periods.	
	—Class 2	10,000.
	—Tank car constructed from aluminum or nickel plate.	7,500.
	—Against a carrier, cite § 174.3 and this section	6,000.
173.31(b)(4)	Use of a tank car for the transportation of a Class 2 material without the required thermal protection. See paragraphs (b)(4)(i) for compliance periods.	10,000.
173.31(b)(5)	Use of a tank car for the transportation of a hazardous material without the required bottom-discontinuity protection. See the paragraph for compliance periods.	5,000.
173.31(b)(6)	Failure to submit a progress report to the FRA ...	2,500.
173.31(c)	Use of a tank car with an incorrect tank test pressure.	10,000.

49 CFR section	Description	Guideline amount [2]
173.31(d)	Offering a tank car for transportation with a hazardous material, or a residue of a hazardous material, that is not in proper condition or that is unsafe for transportation. Sections 173.24(b) and (f) establish a ''no-leak'' design standard, and 173.31 imposes that standard on operations. In addition to the vapor pressure factor cited below, the RQ (reportable quantity) is a fair measure of the danger of a commodity to the environment. For RQ values ≤10, consider aggravating the penalties below by no less than 50 percent. The unit of violation is the car, aggravated if necessary for truly egregious condition.	5,000.
	Loaded car:	
	—Failure to inspect the tank car, service equipment, or markings prior to offering the car for transportation.: If the failure to inspect resulted in a release of product, the appropriate penalty amount below applies.	5,000.
	—With actual leak of product	10,000.
	—With actual leak allowing the product (or fumes or vapors) to contact any human being. (With safety vent, be careful because carrier might be at fault).	15,000.
	—Minor violation, e.g., bottom outlet cap loose on tank car of molten sulfur (because product is a solid when shipped).	1,000.
	Residue car: (The penalties are the same as in 173.29(a).)	
	Offering residue tank car for transportation when openings are not tightly closed (§ 173.29(a) is also applicable for tank cars) Guidelines vary with the type of commodity involved:	
	—Hazardous material with insignificant vapor pressure and without classification as ''poison'' or ''inhalation hazard.''.	2,000.
	—With actual leak	5,000.
	—With leak allowing the product to contact any human being.	15,000.
	—Hazardous material with vapor pressure (esentially any gas or compressed gas) and/or with classification as ''poison'' or ''inhalation hazard.''.	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being. (In the case of ''fumes,'' the ''contact'' must be substantial.).	15,000.
	Whether loaded or residue:	
	—Where the only violation is the failure to secure a protective housing, e.g., the covering for the gaging device.	1,000.
	—Where ''other conditions'' than a loose closure make a tank car not ''in proper condition for transportation'' (e.g., loose ladders, seals thrown into safety valves, etc.).	2,500 (Varies to account for seriousness).
173.31(e)(1)	Tank car with interior heating coils used to transport Division 2.3 or Division 6.1, PG I, based on inhalation toxicity.	7,500.
173.31(e)(2)	Use of a tank car for a material poisonous by inhalation that does not meet the minimum specification i.e., 300 pound tank test pressure, head protection, and a metal jacket.) See the paragraph for the compliance dates.	10,000.

49 CFR section	Description	Guideline amount [2]
173.31(f)	Use of a tank car for a ''listed'' hazardous substance that does not meet the minimum specification (i.e., 200 pound tank test pressure, head protection, and a metal jacket.): See the paragraph for the compliance dates and § 173.31(f)(2) for the list of hazardous substances.	5,000.
173.31(g)(1)	Unloading a tank car without securing access to the track to prevent entry by other rail equipment. Derails, lined and blocked switches, or other equipment that provides equivalent level of security is acceptable.	4,000.
173.31(g)(2)	Unloading a tank car without caution signs properly displayed. (See Part 218, Subpart B).	2,000.
173.31(g)(3)	Unloading without brakes set and/or wheels blocked. (The enforcement standard, as per 1995 Hazardous Materials Technical Resolution Committee, is that sufficient handbrakes must be applied on one or more cars to prevent movement and each car with a handbrake set must be blocked in both directions. The unloading facility must make a determination on how many brakes to set.).	
	—No brakes set, no wheels blocked, or fewer brakes set/wheels blocked than facility's operating plan.	5,000.
	—No brakes set, but wheels blocked	3,000.
	—Brakes set, but wheels not blocked	4,000.
173.32(a)(1)	Using a portable tank for transportation of hazardous materials, when tank does not meet regulatory requirements. (For loose closures or leaks on portable tanks use 173.24.).	5,000.
173.32(a)(2)	Filling and offering portable tank when periodic test or inspection overdue.	5,000.
Gases; Preparation and Packaging:		
173.314(c)	Compressed gas loaded in excess of filling density (same basic concept as insufficient outage).	6,000.
173.314(e) through (o)	Failure to comply with a special requirement for a compressed gas.	5,000.
	PART 174—CARRIAGE BY RAIL	
General Requirements:		
174.3	Acceptance of improperly prepared shipment. This general duty section shall be accompanied by a citation to the specific section violated.	
174.9	Failure to properly inspect a rail car containing a hazardous material when accepted for transportation or placed in a train: The carrier shall inspect the rail car, at ground level, for required markings, labels, placards, securement of closures and leakage. The inspection may be performed in conjunction with the inspections required under parts 215 and 232. This requirement will not ''trigger'' an inspection and thereby require a train to be stopped. For example, in run-through train operations, the train crew of the receiving railroad simply assumes responsibility for the train from the delivering crew. Acceptance of responsibility includes the right to receive a penalty action for transporting a rail car with a non-complying condition. Note also that the presence of a non-complying condition by itself does not prove that there was a failure to inspect. See also § 174.50 for violations against the carrier for loose (visible from ground level) closures on cars.	For loaded car 5,000. For residue car 2,000.
174.14	Failure to expedite: Violation of ''48-hour rule.''	2,500.

49 CFR section	Description	Guideline amount [2]
General Operating Requirements	This subpart (subpart B) of part 174 has two sections referring to shipment documentation: § 174.24 relating to *accepting* documents, and § 174.26 relating to movement documents in the *possession* of the train crew. Only the most relevant section should be cited. In most cases, the unit of violation is the shipment, although where a unified consist is used to give notice to the crew, there is some justification for making it the train, especially where the discrepancy was generated using automated data processing and the error is repetitious.	
174.24(a)	Accepting hazardous material shipment without properly prepared shipping paper. (The carrier's duty extends only to the document received, that is, a shipment of hazardous material in a non-placarded transport vehicle with a shipping paper showing other than a hazardous material is not a violation against the carrier unless knowledge of the contents of the vehicle is proved. Likewise, receipt of a tank car placarded for Class 3 with a shipping paper indicating a flammable liquid does not create a carrier violation if the car, in fact, contains a corrosive. On the other hand, receipt of a placarded trailer with a shipping paper listing only FAK (''freight-all-kinds''), imposes a duty on the carrier to inquire further and to reject the shipment if it is improperly billed.)	
	—Improper hazardous material information that could cause delay or error in emergency response.	7,500.
	—Total absence of hazardous material information.	5,000.
	—Technical errors, not likely to cause problems, especially with emergency response.	1,000.
	—Minor errors not relating to hazardous material emergency response, e.g., not listing an exemption number and the exemption is not one affecting emergency response.	500.
	Failure to include emergency response information is covered at §§ 172.600–172.604; while the normal unit of violation for movement documents is the whole document, failure to provide emergency response information is a separate violation.	
174.24(b)	Failure to retain shipping papers for one year. (Variation over a wide range is not unusual, depending upon circumstances.).	7,500.
174.26(a)	Train crew does not have a document indicating position in train of each rail car containing a hazardous material. Routinely aggravate by 50% for Poison Gas, 2.3, and Explosives, 1.1 and 1.2. (Train is the unit of violation—this is generally going to be the consist list for a train.).	6,000.
	Train crew has documents described above but they have not updated the document to account for delivery or pickup of car or cars. Penalty amount may vary depending on the number of cars not listed or out of place, the number of places the cars are off, the type of commodity in the car, and the potential effects on safe handling of the cars or emergency response. (Each failure to update is a separate unit of violation—if the crew picked up one cut of cars and failed to update the document, that would be one unit of violation. The ''update'' requirement only matures when the crew has placed the cars into the train—or removed them from the train—re-laced the air hoses, and are ready to depart.).	2,000 to 4,000.

49 CFR section	Description	Guideline amount [2]
174.26(b)	Improper paperwork in possession of train crew. (Shipment is unit of violation, although there is justification for making it the train if a unified consist [e.g. one that shows both train car order and hazmat information] is used to carry this information and the violation is a pattern one throughout all, or almost all, of the hazardous material shipments. For intermodal traffic, ''shipment'' can mean the container or trailer—e.g., a UPS trailer with several non-disclosed hazardous material packages would be one unit.)	
	—Information on the document possessed by the train crew is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000.
	—Information is present and wrong, but without adverse emergency response effect (e.g. insignificant error in shipping name for the hazmat; name is incorrect but the emergency response would be the same).	3,000.
	—Total lack of hazardous material information on movement document. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but there may be such dangerous products that aggravation needs to be considered.).	7,500.
	—Some information is present but the error(s) could cause mishandling by the carrier or a delay or error in emergency response. Includes missing RESIDUE description required by § 172.203(e)(2).	5,000.
	—Improper information, but the hazardous material are small shipments (e.g., UPS moves) and PG III (e.g., the ''low hazard'' material allowed in TOFC/COFC service without an exemption since HM–197).	3,000.
	—Lack of emergency response phone number ...	4,000.
	—Technical defect or minor error not likely to cause delay or error in emergency response or carrier handling.	500–1,000.
174.50	Forwarding a bulk packaging (e.g. a tank car) that no longer conforms to the hazmat regulations without first repairing the defect. This includes such non-conforming conditions as loose closures visible from ground level (e.g. loose bottom outlet caps), improper stenciling or marking.	For loaded car 5,000. For residue car 2,000.
	—Forwarding a leaking, or non-conforming non-bulk package containing a hazardous material without repair or over-packing.	5,000.
	—Forwarding a leaking bulk package beyond the movement ''as necessary to reduce or to eliminate an immediate threat * * *.'' Consider mitigation for low hazard HM (e.g., HOT) and for bulk packages smaller than tank cars.	10,000.
	—Loss of product resulted in human contact because of improper carrier handling.	15,000.
	—Failure to obtain movement approval from the FRA for the transportation of a bulk packaging that no longer conforms to the regulations.	7,500.
	—Failure to follow directives in a movement approval.	5,000.
	—Failure to report corrective actions (or any other reporting requirement in the movement approval).	5,000.
General Handling and Loading Requirements:		

49 CFR section	Description	Guideline amount [2]
174.55	Failure to block and brace as prescribed. (See also §§ 174.61, 174.63, 174.101, 174.112, 174.115; where these more specific sections apply, cite them.) Note: The regulatory requirement is that hazardous material packages be loaded and securely blocked and braced to prevent the packages from changing position, falling or sliding into each other. If the load is tight and secure, pieces of lumber or other material may not be necessary to achieve the ''tight load'' requirement.	
	—General failure to block and brace	5,000.
	—Inadequate blocking and bracing (an attempt was made but blocking/bracing was insufficient).	2,500.
	—Inadequate blocking and bracing leading to a leak.	7,500.
	—Inadequate blocking and bracing leading to a leak and human being contact.	15,000.
174.59	Other specific placarding and marking sections may also be applicable. Marking and placarding. A railroad's placarding duties are to *not* accept a car without placards [§ 172.508(b)], and to *not* transport a car without placards [§ 174.59]. At each inspection point, a railroad must determine that all placards are in place. [§ 174.9]. The ''next inspection point'' replacement requirement in this section refers to placards that disappear *between* inspection points. A car at an inspection point must be placarded because it is ''in transportation'' [49 U.S.C. 5102(12)], even if held up at that point. Because the statute creates civil penalty liability only if a violation is ''knowing,'' that is, ''a reasonable person knew or should have known that an act performed by him was in violation of the HMR,'' and because railroads are not under a duty to inspect hazardous material cars merely standing in a yard, *violations written for unplacarded cars in yards must include proof that the railroad knew about the unplacarded cars and took no corrective action within a reasonable time.* (Note also that the real problem with unplacarded cars in a railyard may be a lack of emergency response information, §§ 172.600–172.604, and investigation may reveal that those sections should be cited instead of this one.)	
	—Complete failure to placard or to replace missing placards.	7,500.
	—One placard missing (per car). (Add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000.
	For other placarding violations, see §§ 172.500–.560 and determine if one of them more correctly states the violation. For marking violations, see §§ 172.300–.338 and determine if one of them more correctly states the violation. Note that marking violations, except for the UN number, are generally applicable to the shipper/offeror.	
174.61	Improper transportation of transport vehicle or freight container on flat car. (If improper lading restraint is the violation, see § 174.55; if improper restraint of a bulk packaging inside a closed transport vehicle is the violation, see § 174.63(b).).	3,000.
174.63(a) and (c)	—Improper transportation of portable tank or other bulk packaging in TOFC/COFC service.	3,000.
	—Portable tank double stacked with container above or below. (§ 174.63(c)(5)(i).).	5,000.
	—Portable tank transported in a well car with its outlet valve facing inward. (§ 174.63(c)(5)(ii).).	3,000.
	—Portable tank transported without securement fittings engaged and locked or void filling devices not properly deployed.	5,000.
	—Improper transportation leading to a release of product.	7,500.
	—Improper transportation leading to a release and human being contact.	15,000.
174.63(b)	Improper securement of bulk packaging inside enclosed transport vehicle or freight container.	
	—General failure to secure	5,000.
	—Inadequate securement (an attempt to secure was made but the means of securement were inadequate).	2,500.
	—Inadequate securement leading to a leak	7,500.

49 CFR section	Description	Guideline amount [2]
	—Inadequate securement leading to a leak and human being contact.	15,000.
174.63(e)	Transportation of cargo tank or multi-unit tank car tank in TOFC or COFC service without authorization and in the absence of an emergency.	7,500.
174.67(a)(1)	Tank car transloading operations performed by persons not properly instructed (case cannot be based on inference). (Note: for all transloading requirements, there must be clear evidence that the hazmat shipment is continuing in transportation by another mode. For example, shipping papers show another destination than the one where the tank car is being unloaded/transloaded, and the contents of the tank car are being transloaded into a highway tank truck. Otherwise, the tank car unloading requirements contained in section 173.31(g) apply).	5,000.
174.67(a)(2)	Unloading/transloading hazmat without brakes set and/or wheels blocked. (The enforcement standard, as per 1995 Hazardous Materials Technical Resolution Committee, is that sufficient handbrakes must be applied on one or more cars to prevent movement and each car with a handbrake set must be blocked in both directions. The unloading facility must make a determination on how many brakes to set.)	
	—No brakes set, no wheels blocked, or fewer brakes set/wheels blocked than facility's operating plan.	5,000.
	—No brakes set, but wheels blocked	3,000.
	—Brakes set, but wheels not blocked	4,000.
174.67(a)(3)	Unloading/transloading without securing access to the track to prevent entry by other rail equipment. Derails, lined and blocked switches, or other equipment that provides equivalent level of security is acceptable.	4,000.
174.67(a)(4)	Unloading/transloading without caution signs properly displayed. (See Part 218, Subpart B).	2,000.
174.67(a)(5)	Failure of transloading facility to maintain written safety procedures (such as those it may already be required to maintain pursuant to the Department of Labor's Occupational Safety and Health Administration requirements in 29 CFR 1910.119 and 1910.120) in a location where they are immediately available to hazmat employees responsible for the transloading operation.	2,500.
174.67(c)(2)	Failure to use non-metallic block to prop manway cover open while unloading through bottom outlet.	
	—Flammable or combustible liquid, or other product with a vapor flash point hazard.	3,000.
	—Material with no vapor flammability hazard	500.
174.67(h)	Insecure unloading connections, resulting in actual leak of product.	10,000.
	Insecure unloading connections, no leak of product.	5,000.
174.67(i)	Unattended/unmonitored unloading. Tank car must be attended by a designated employee or monitored by a signaling system.	5,000.
174.67(j)	Noncompliance with piping requirements	2,000.
174.67(k)	Failure to comply with requirements for leaving tank car unloading connections attached.	
	—Hazardous material with insignificant vapor pressure and without classification as ''poison'' or ''inhalation hazard.'' (One count can be assessed for each element not followed. May also assess per tank car if more than one is involved in violation)..	2,000.
	—With actual leak	5,000.

49 CFR section	Description	Guideline amount [2]
	—With leak allowing the product to contact any human being.	15,000.
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as ''poison'' or ''inhalation hazard.''.	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being). Contact with ''fumes'' must be substantial.	15,000.
174.67(l)	Failure to remove connections, tighten all valves with a ''suitable tool'' and tighten all other closures once unloading is complete.	2,000.
174.81	—Failure to obey segregation requirements for materials forbidden to be stored or transported together. (''X'' in the table).	6,000.
	—Failure to obey segregation requirements for materials that must be separated to prevent commingling in the event of a leak. (''O'' in the table).	4,000.
Handling of Placarded Rail Cars, Transport Vehicles and Freight Containers:		
174.83(a)	Improper switching of placarded rail cars	5,000.
174.83(b)	Improper switching of loaded rail car containing Division 1.1/1.2, 2.3 PG I Zone A, or Division 6.1 PG I Zone A, or DOT 113 tank car placarded for 2.1.	8,000.
174.83(c)–(e)	Improper switching of placarded flatcar	5,000.
174.83(f)	Switching Division 1.1/1.2 without a buffer car or placement of Division 1.1/1.2 car under a bridge or alongside a passenger train or platform.	8,000.
174.84	Improper handling of Division 1.1/1.2, 2.3 PG I Zone A, 6.1 PG I Zone A in relation to guard or escort cars.	4,000.
174.85	Improper Train Placement (The unit of violation under this section is the car. Where more than one placarded car is involved, e.g., if two (2) placarded cars are too close to the engine, both are violations. Where both have a similar violation, e.g., a Division 1.1 car next to a loaded tank car of a Class 3 material, each car gets the appropriate penalty as listed below)	
	RESIDUE car without at least 1 buffer from engine or occupied caboose.	3,000.
	Placard Group 1—Division 1.1/1.2 materials (Class A explosive) See chart at § 174.85.	
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	8,000.
	—As above but with at least one (1) buffer	7,000.
	—No buffer at all (where train length doesn't permit five (5) cars).	8,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	7,000.
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	6,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	7,000.
	Placard Group 2—Division 1.3/1.4/1.5 (Class B and C explosives); Division 2.1/2.2 (compressed gas, other than Division 2.3, PG 1 Zone A; Class 3 (flammable liquids); Class 4 (flammable solid); Class 5 (oxidizing materials); Class 6 (poisonous liquids), except 6.1 PG 1 Zone A; Class 8 (corrosive materials). See chart at § 174.85.	
	For tank cars:	

49 CFR section	Description	Guideline amount [2]
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	6,000.
	—As above but with at least one (1) buffer	5,000.
	No buffer at all (where train length doesn't permit five (5)).	6,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	5,000.
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	5,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	5,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000.
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000.
	Placard Group 3—Divisions 2.3 (PG 1 Zone A; poisonous gases) and 6.1 (PG 1 Zone A; poisonous materials).	
	For tank cars:	
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	8,000.
	—As above but with at least one (1) buffer	7,000.
	No buffer at all (where train length doesn't permit five (5)).	8,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	7,000.
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	6,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	7,000.
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000.
	Placard Group 4—Class 7 (radioactive) materials	
	For rail cars:	
	—Next to locomotive or occupied caboose	8,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000.
	—Next to carload of undeveloped film	3,000.
174.86	Exceeding maximum allowable operating speed (15 mph) while transporting molten metals or molten glass.	3,000.
Class 1 (Explosive) Materials:		
174.101(o)(4)	Failure to have proper explosives placards on flatcar carrying trailers/containers placarded for Class 1. (Except for a complete failure to placard, the unit of violation is the placard.)	
	—Complete failure to placard	7,500.
	—One placard missing (add $1,000 per missing placard up to a total of three, then use the guideline above).	1,000.

49 CFR section	Description	Guideline amount [2]
174.104(b)	Car used to transport Division 1.1 or 1.2 materials does not meet requirements. (Aggravation to be considered, and may be considerable, for multiple failures to meet requirements.).	5,000.
174.104(c)	Failure to inspect and certify car before placing for loading with Division 1.1 or 1.2 materials.	7,500.
174.104(e)	Failure to supervise the loading and securement of a container (of Division 1.1 or 1.2 materials) on a flat car and failure to certify the car. (Unit of violation is the container.).	5,000.
174.104(f)	Failure to retain car certificates at ''forwarding station.''.	1,000.
	Failure to attach car certificates to car. (Unit of violation is the certificate, two (2) are required.)	1,000.
Detailed Requirements for Class 2 (Gases) Materials:		
174.204	Improper tank car delivery of gases (Class 2 materials).	3,000.
Detailed Requirements for Class 3 (Flammable Liquid) Materials:		
174.304	Improper tank car delivery of flammable liquids (Class 3 materials).	3,000.
Detailed Requirements for Division 6.1 (Poisonous) Materials:		
174.600	Improper tank car delivery of materials extremely poisonous by inhalation (Division 2.3 Zone A or 6.1 Zone A materials).	5,000.
PART 178—SPECIFICATIONS FOR PACKAGINGS		
178.2(b)	Package not constructed according to specifications—also cite specific section not complied with.	
	—Bulk packages, including portable tanks	8,000.
	—55-gallon drum	2,500.
	—Smaller package	1,000.
PART 179—SPECIFICATIONS FOR TANK CARS		
179.1(e)	Tank car not constructed according to specifications—also cite section not complied with. (Part 179 violations are against the builder or repairer. Sections in this Part are often cited in conjunction with violations of §§172.330 and 173.31(a) and (b) by shippers. In such cases, the part 179 sections are cited as references, not as separate alleged violations.).	8,000.
179.3	Constructing tank car without securing approval from Tank Car Committee.	10,000.
179.5(a)	Failure to furnish a Certificate of Construction before tank car is placed in service.	7,500.
179.6	Repair procedures not in compliance with Appendix R of the Tank Car Manual.	10,000.
179.7	Section 179.7 requires that each tank car facility have a quality assurance (QA) program that encompasses at least the elements in §179.7(b). A tank car facility is an entity that manufactures, repairs, inspects, tests, qualifies, or maintains a tank car to ensure that the tank car conforms to parts 179 and 180, or alters the certificate of construction of the car. As a rule, a facility ''qualifies'' a tank by ''inspecting'' it and then ''representing'' it as meeting the standard. In addition to the following penalty amounts, the agency may ''recall'' all tanks qualified by the tank car facility during the period the facility failed to comply with the quality assurance requirements. See, for example, §180.509(b)(4).	
	Total failure to have a quality assurance program	15,000.

49 CFR section	Description	Guideline amount [2]
	Failure to perform activities as a tank car facility other than in accordance with the quality assurance program. See 180.509(l) for applicability to tank car maintenance activities. Note that failures to perform ministerial activities such as updating the pages in a quality assurance manual or calibrating an instrument carry a lesser penalty (e.g. $2,500), unless they are the cause of a release or an injury or death.	10,000.
	The quality assurance program does not contain one or more of the elements in § 179.7(b). (The ''element'' is the unit of violation.).	7,500.
	Failure to provide written procedures to its employees.	7,500.
	Use of an employee to perform nondestructive testing on a tank when that employee does not have the qualifications for that type of nondestructive testing.	10,000.
179.11	Use of an employee to perform welding on a tank when that employee does not have the qualifications for that type of welding procedure. Note: also reference §§ 179.100–9, 179.200–10, 179.220–10, 179.300–9, and 179.400–11 as appropriate.	10,000.
179.13	Tank cars may not be built or converted to exceed 34,500 gallons capacity or 263,000 pounds gross weight on rail. This is the building specification only; for tank cars loaded beyond capacity or gross weight see 173.26.	Varies. See 173.26 for overloaded cars.
179.15	Pressure relief device (e.g. rupture disc) that does not conform to the requirements (loaded car). May also cite 173.31(d).	5,000.
179.201–3(a)	Failure to properly line a rubber-lined tank car	7,500.
179.201–3(b)	Three possible violations under this section: (1) Failure to produce report certifying that tank car and its equipment have been brought into compliance with specification. Must occur prior to lining tank car with rubber or rubber compound. (2) Failure of tank car liner to provide copy of report and certification that tank has been lined in compliance with specs to tank car owner. (3) Failure of tank car owner to retain reports of latest lining application until next re-lining has been accomplished and recorded.	5,000.
PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS		
180	Part 180 prescribes the requirements applicable to any person that manufactures, fabricates, marks, maintains, repairs, inspects, or services tank cars to ensure that the tank cars are in proper condition for transportation. In addition to the following penalty amounts, the agency may ''recall'' all tanks qualified by the tank car facility during the period the facility failed to comply with the quality assurance requirements. See, for example, § 180.509(b)(4).	
180.505	This section brings the quality assurance requirements of § 179.7 (car construction) into the tank car maintenance arena. See § 179.7 for penalty guidelines, cite this section and reference the applicable paragraph(s) or subparagraph(s). No dual penalty will apply. (Part 180 applies the construction standards of Part 179 to service life maintenance and requalification of tank cars.)	
Tank car specific provisions:		
180.509(a)	Failure to comply with requirements for inspection and test.	
	—Failure to mark a car passing a periodic inspection and test.	See § 180.515.
	—Failure to prepare written report for inspection and test performed under this section.	See § 180.517.
180.509(b)	Failure to perform inspection and test when at least one of the qualifying conditions has been met.	5,000.
180.509(c)	Failure to perform inspection and test at specified interval.	5,000.

49 CFR section	Description	Guideline amount [2]
180.509(d)	Failure to properly perform visual inspection	7,500.
180.509(e)	Failure to properly perform structural integrity inspection and test.	10,000.
180.509(f)	Failure to properly perform thickness test	10,000.
180.509(h)	Failure to properly inspect safety systems	7,500.
180.509(i)	Failure to properly perform lining and coating inspection and test.	10,000.
180.509(j)	Failure to properly perform leakage pressure test	7,500.
180.509(l)	Failure to perform inspection and test in accordance with the quality assurance program. (Applies to all non-DOT specification tank cars as of July 1, 2000, but see § 180.509(l)(3) for ''20-year'' cars. See also § 179.7(f).).	10,000.
180.513	Failure to repair the tank according to Appendix R of the AAR Tank Car Manual.	10,000.
	Use of an employee to perform welding on a tank when that employee does not have the qualifications for that type of welding procedure.	10,000.
180.515	Failure to mark the tank as required	7,500.
180.517	Failure to report, record, and retain required documentation.	7,500.
Provisions for tank cars other than single unit tank car tanks:		
180.519(a)	Failure to retest at required interval	Cite 180.519(b)(5).
180.519(b)(1)	Failure to perform hydrostatic pressure/expansion test as required.	7,500.
180.519(b)(2)	Failure to perform interior air pressure test as required.	7,500.
180.519(b)(3)	Failure to test pressure relief valves as required	7,500.
180.519(b)(4)	Failure to remove and inspect frangible discs and fusible plugs.	5,000.
180.519(b)(5)	Failure to retest at required interval	3,000.
180.519(b)(6)	Failure to stamp tank as required	5,000.
180.519(c)	Failure to visually inspect as required	5,000.
	Failure to use competent persons to perform visual inspection.	5,000.
180.519(d)	Failure to record and retain documentation. Mitigate/aggravate depending on the extent of the violation.	7,500.

[2] A person who knowingly violates the hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder, is subject to a civil penalty of up to $75,000 for each violation, except that the maximum civil penalty for a violation is $175,000 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property; and a minimum $450 civil penalty applies to a violation related to training. Each day that the violation continues is a separate offense. 49 U.S.C. 5123; 28 U.S.C. 2461, note.

[61 FR 38647, July 25, 1996, as amended at 69 FR 30591, May 28, 2004; 71 FR 77295, Dec. 26, 2006; 73 FR 72200, Nov. 26, 2008; 73 FR 79701, Dec. 30, 2008; 75 FR 43842, July 27, 2010; 77 FR 24419, Apr. 24, 2012; 78 FR 9847, Feb. 12, 2013]

APPENDIX C TO PART 209—FRA'S POLICY STATEMENT CONCERNING SMALL ENTITIES

This policy statement required by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) explains FRA's communication and enforcement policies concerning small entities subject to the federal railroad safety laws. These policies have been developed to take into account the unique concerns and operations of small businesses in the administration of the national railroad safety program, and will continue to evolve to meet the needs of the railroad industry. For purposes of this policy statement, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and the ''excessive demand'' provisions of the Equal Justice Act (5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D)), Class III railroads, contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 CFR 1201.1–1, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less constitute the class of organizations considered ''small entities'' or ''small businesses.''

FRA understands that small entities in the railroad industry have significantly different characteristics than larger carriers and shippers. FRA believes that these differences necessitate careful consideration in order to

ensure that those entities receive appropriate treatment on compliance and enforcement matters, and enhance the safety of railroad operations. Therefore, FRA has developed programs to respond to compliance-related inquiries of small entities, and to ensure proper handling of civil penalty and other enforcement actions against small businesses.

SMALL ENTITY COMMUNICATION POLICY

It is FRA's policy that all agency personnel respond in a timely and comprehensive fashion to the inquiries of small entities concerning rail safety statutes, safety regulations, and interpretations of these statutes and regulations. Also, FRA personnel provide guidance to small entities, as needed, in applying the law to specific facts and situations that arise in the course of railroad operations. These agency communications take many forms, and are tailored to meet the needs of the requesting party.

FRA inspectors provide training on the requirements of all railroad safety statutes and regulations for new and existing small businesses upon request. Also, FRA inspectors often provide impromptu training sessions in the normal course of their inspection duties. FRA believes that this sort of preventive, rather than punitive, communication greatly enhances railroad safety. FRA's Office of Safety and Office of Chief Counsel regularly provide oral and written responses to questions raised by small entities concerning the plain meaning of the railroad safety standards, statutory requirements, and interpretations of the law. As required by the SBREFA, when FRA issues a final rule that has a significant impact on a substantial number of small entities, FRA will also issue a compliance guide for small entities concerning that rule.

It is FRA's policy to maintain frequent and open communications with the national representatives of the primary small entity associations and to consult with these organizations before embarking on new policies that may impact the interests of small businesses. In some regions of the country where the concentration of small entities is particularly high, FRA Regional Administrators have established programs in which all small entities in the region meet with FRA regional specialists on a regular basis to discuss new regulations, persistent safety concerns, emerging technology, and compliance issues. Also, FRA regional offices hold periodic conferences, in which specific blocks of time are set aside to meet with small businesses and hear their concerns.

In addition to these communication practices, FRA has instituted an innovative partnership program that expands the extent to which small entities participate in the development of policy and process. The Railroad Safety Advisory Committee (RSAC) has been established to advise the agency on the development and revision of railroad safety standards. The committee consists of a wide range of industry representatives, including organizations that represent the interests of small business. The small entity representative groups that sit on the RSAC may appoint members of their choice to participate in the development of new safety standards. This reflects FRA's policy that small business interests must be heard and considered in the development of new standards to ensure that FRA does not impose unnecessary economic burdens on small businesses, and to create more effective standards. Finally, FRA's Web site (*http://www.fra.dot.gov*) makes pertinent agency information available instantly to the public.

FRA's longstanding policy of open communication with small entities is apparent in these practices. FRA will make every effort to develop new and equally responsive communication procedures as is warranted by new developments in the railroad industry.

SMALL ENTITY ENFORCEMENT POLICY

FRA has adopted an enforcement policy that addresses the unique nature of small entities in the imposition of civil penalties and resolution of those assessments. Pursuant to FRA's statutory authority, and as described in Appendix A to 49 CFR part 209, it is FRA's policy to consider a variety of factors in determining whether to take enforcement action against persons, including small entities, who have violated the safety laws and regulations. In addition to the seriousness of the violation and the person's history of compliance, FRA inspectors consider ''such other factors as the immediate circumstances make relevant.'' In the context of violations by small entities, those factors include whether the violations were made in good faith e.g., based on an honest misunderstanding of the law), and whether the small entity has moved quickly and thoroughly to remedy the violation(s). In general, the presence of both good faith and prompt remedial action militates against taking a civil penalty action, especially if the violations are isolated events. On the other hand, violations involving willful actions and/or posing serious health, safety, or environmental threats should ordinarily result in enforcement actions, regardless of the entity's size.

Once FRA has assessed a civil penalty, it is authorized to adjust or compromise the initial penalty claims based on a wide variety of mitigating factors, unless FRA must terminate the claim for some reason. FRA has the discretion to reduce the penalty as it deems fit, but not below the statutory minimums. The mitigating criteria FRA evaluates are found in the railroad safety statutes and SBREFA: The severity of the safety or

health risk presented; the existence of alternative methods of eliminating the safety hazard; the entity's culpability; the entity's compliance history; the entity's ability to pay the assessment; the impacts an assessment might exact on the entity's continued business; and evidence that the entity acted in good faith. FRA staff attorneys regularly invite small entities to present any information related to these factors, and reduce civil penalty assessments based on the value and integrity of the information presented. Staff attorneys conduct conference calls or meet with small entities to discuss pending violations, and explain FRA's view on the merits of any defenses or mitigating factors presented that may have resulted or failed to result in penalty reductions. Among the ''other factors'' FRA considers at this stage is the promptness and thoroughness of the entity's remedial action to correct the violations and prevent a recurrence. Small entities should be sure to address these factors in communications with FRA concerning civil penalty cases. Long-term solutions to compliance problems will be given great weight in FRA's determinations of a final settlement offer.

Finally, under FRA's Safety Assurance and Compliance Program (SACP), FRA identifies systemic safety hazards that continue to occur in a carrier or shipper operation, and in cooperation with the subject business, develops an improvement plan to eliminate those safety concerns. Often, the plan provides small entities with a reasonable time frame in which to make improvements without the threat of civil penalty. If FRA determines that the entity has failed to comply with the improvement plan, however, enforcement action is initiated.

FRA's small entity enforcement policy is flexible and comprehensive. FRA's first priority in its compliance and enforcement activities is public and employee safety. However, FRA is committed to obtaining compliance and enhancing safety with reasoned, fair methods that do not inflict undue hardship on small entities.

[68 FR 24894, May 9, 2003]

PART 210—RAILROAD NOISE EMISSION COMPLIANCE REGULATIONS

Subpart A—General Provisions

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210.1 Scope of part.
210.3 Applicability.
210.5 Definitions.
210.7 Responsibility for noise defective railroad equipment.
210.9 Movement of a noise defective locomotive, rail car, or consist of a locomotive and rail cars.
210.11 Waivers.
210.13 Penalty.

Subpart B—Inspection and Testing

210.21 Scope of subpart.
210.23 Authorization.
210.25 Measurement criteria and procedures.
210.27 New locomotive certification.
210.29 Operation standards (moving locomotives and rail cars).
210.31 Operation standards (stationary locomotives at 30 meters).
210.33 Operation standards (switcher locomotives, load cell test stands, car coupling operations, and retarders).

APPENDIX A TO PART 210—SUMMARY OF NOISE STANDARDS, 40 CFR PART 201
APPENDIX B TO PART 210—SWITCHER LOCOMOTIVE ENFORCEMENT POLICY

AUTHORITY: Sec. 17, Pub. L. 92–574, 86 Stat. 1234 (42 U.S.C. 4916); sec. 1.49(o) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(o).

SOURCE: 48 FR 56758, Dec. 23, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 210.1 Scope of part.

This part prescribes minimum compliance regulations for enforcement of the Railroad Noise Emission Standards established by the Environmental Protection Agency in 40 CFR part 201.

§ 210.3 Applicability.

(a) Except as provided in paragraph (b) of this section, the provisions of this part apply to the total sound emitted by moving rail cars and locomotives (including the sound produced by refrigeration and air conditioning units that are an integral element of such equipment), active retarders, switcher locomotives, car coupling operations, and load cell test stands, operated by a railroad as defined in 45 U.S.C. 22, under the conditions described in this part and in 40 CFR part 201.

(b) The provisions of this part do not apply to—

(1) Steam locomotives;

(2) Street, suburban, or interurban electric railways unless operated as a part of the general railroad system of transportation;