



U.S. Department  
of Transportation  
**Federal Railroad  
Administration**



# **THE PENALTY PROCESS FOR HAZARDOUS MATERIAL VIOLATIONS**

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# SOURCES OF AUTHORITY

- The Hazardous Materials Transportation Act is the principal federal law regulating the transportation of hazardous materials. Codified at 49 U.S.C. chapter 51
- Gives the Secretary of Transportation general regulatory authority. 49 U.S.C. § 5103
- Provides for civil (§ 5123) and criminal (§ 5124) penalties



# SOURCES OF AUTHORITY

- The Hazardous Materials Regulations (HMR) are promulgated under delegation by the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 C.F.R. parts 171-180
- Enforcement is delegated to each Department of Transportation (DOT) modal administration including the Federal Railroad Administration (FRA)
- The civil penalty guidelines are listed separately at 49 C.F.R. part 209 app. B



# ENFORCEMENT

- FRA enforces these statutes and implementing regulations primarily with regard to shipments by rail
- Enforcement is conducted by FRA inspectors based nationwide and grouped into 8 regions
- There are also state inspectors who may enforce the HMR through FRA's State Participation Program
- FRA has prosecutorial discretion
  - Inspectors can take no action, take a defect, or recommend a civil penalty
  - The purpose of civil penalties is remedial, not punitive or fiscal





# PROSECUTORIAL DISCRETION

- The criteria guiding the exercise of this discretion is laid out in FRA's State of Agency Policy Concerning Enforcement in 49 C.F.R. part 209 app. A
  - "The inherent seriousness of the condition or action;
  - The kind and degree of potential safety hazard the condition or action poses in light of the immediate factual situation;
  - Any actual harm to persons or property already caused by the condition or action;
  - The offending person's (i.e., railroad's or individual's) general level of current compliance as revealed by the inspection as a whole;
  - The person's recent history of compliance with the relevant set of regulations, especially at the specific location or division of the railroad involved;
  - 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
  - Such other factors as the immediate circumstances make relevant."



# PROSECUTORIAL DISCRETION

- In the majority of circumstances, inspectors choose to simply provide the railroad or shipper with the inspection report, discuss the noncompliance found, and attempt to obtain commitments to improve compliance
- Where an inspector decides that enforcement action is necessary, he or she drafts a violation report which summarizes the factual circumstances of the violation and includes supporting materials necessary to substantiate the violation
- Violation reports are sent to the regional office where a specialist reviews them



# DETERMINING A VIOLATION

- Under 49 U.S.C. § 5123 a person must “knowingly” violate the HMR, meaning:
  - “the person has actual knowledge of the facts giving rise to the violation; or
  - a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge”
- Generally there has to be a triggering action such as the offering, accepting, or transporting of a hazmat shipment
  - Or the failure to do something



# DETERMINING A VIOLATION

- Did a violation occur?
  - Must include each element of the violation
  - Need sufficient evidence to substantiate the claims
    - Narrative of what the inspector witnessed, photos, shipping papers, travel histories, etc.
    - Photos aren't necessary to support a violation





# CIVIL PENALTIES

- Penalties up to \$78,376 except where the violation results in “death, serious illness, or severe injury to any person or substantial destruction of property” when the maximum penalty is \$182,877. 49 C.F.R. § 209.103(a)
- There is no minimum civil penalty, except for a minimum of \$471 for a violation relating to training. 49 C.F.R. § 209.103(a)
- These numbers are subject to periodic adjust pursuant to a separate statute (the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015)



# CIVIL PENALTIES

- Daily penalties
  - When the violation is a continuing one, each day of the violation constitutes a separate offense. 49 C.F.R. § 209.103(b)
  - FRA uses discretion in deciding how many days to assess
  - Existence of the violation on each day can be inferred by the violation not being remedied



# CIVIL PENALTIES

- Ordinary Maximum Penalties (OMP)
  - Current maximum of \$78,376
  - Why is the violation extraordinary?
    - 1) seriousness of the condition; 2) potential safety hazard posed; 3) actual harm caused; 4) current level of compliance on the whole; 5) compliance history; and 6) other relevant factors
- Aggravated Maximum Penalties (AMP)
  - Current maximum of \$182,877
  - Same as the OMP but violation must also result in “death, serious illness, or severe injury to any person or substantial destruction of property”



# COUNSEL'S ROLE

- FRA's Office of Chief Counsel (RCC) supports FRA's safety enforcement program primarily through its Safety Law Division
- Safety law attorneys are each assigned to a Class 1 railroad and a letter(s) for shippers and smaller railroads
- Violation reports are transmitted from the inspectors to RCC where the cases are generated and assigned to the safety law attorneys



# COUNSEL'S ROLE

- Attorneys review each violation for several factors including:
  - Correct citations, dates, names, etc.
  - Legal sufficiency, conflicts, potential defenses
  - Aggravating and mitigating circumstances
  - Assessment of appropriate penalty amount
  - Removal of inappropriate material
  - Policy or interpretive questions
  - Situations demanding special handling
- Violations are then either transmitted to the respondent, declined, or asked to be edited





# COUNSEL'S ROLE

- When a case is transmitted the respondents are issued a Notice of Probable Violation (NOPV) that includes a summary of the alleged violations and the proposed civil penalty
- The inspector's violation report is attached
- Respondents also receive an explanation of their options as laid out in 49 C.F.R. part 209 subpart B



# RESPONDENT'S OPTIONS

- Respondents may:
  - Pay the total proposed penalty, thereby closing the case
  - Respond informally by submitting a written explanation and information in answer to, or in mitigation of, the charges and/or request an informal conference to discuss the penalty
    - After considering all information presented, RCC will issue an order assessing the proposed (or a lesser) penalty or dismissing the penalty in whole or in part
  - Request a formal hearing before a hearing officer designated by RCC
    - May be requested following a written response or informal conference that proves unsatisfactory



# RESPONDENT'S OPTIONS

- Failure to respond in one of the above ways within 30 days of the date of issuance of the NOPV constitutes a waiver of any right to appear and contest the merits of the allegations or the amount of the proposed penalty before FRA or any court and authorizes RCC to find the facts as alleged and assess a penalty in the amount originally proposed
- Cases with shippers and smaller railroads are handled on an ad hoc basis
- Class 1 railroads have annual settlement conferences given the number of violations they receive in a year



# INFORMAL CONFERENCES

- Vast majority of cases are resolved informally
- RCC considers many factors
  - Nature and circumstance of the violation
  - Extent and gravity of the violation
  - Whether violation reflect a systemic problem
  - Strength of the violation report
  - Remedial actions and mitigation
  - Compliance history
  - Respondent's size and ability to pay
  - Impact on respondent's ability to stay in business



# SMALL ENTITIES

- FRA's Policy Statement Concerning Small Entities can be found at 49 C.F.R. part 209 app. C
- “Class III railroads, contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 C.F.R. 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 is required by the Small Business Regulatory Enforcement Fairness Act of 1996 to differently address enforcement matters with small entities. FRA therefore has a wider latitude to adjust or compromise the initial penalty claims for civil penalties assessed on small entities.





# FRA HAZMAT VIOLATION REPORTS 2017

- All hazmat violation reports received by RCC in 2017:  
**889**
- All hazmat violation reports transmitted by RCC in 2017:  
**1041**
- All hazmat violation reports closed in 2017 with  
payment of a civil penalty: **1007**



# OTHER ENFORCEMENT METHODS

- Individual liabilities
- Criminal penalties
- Compliance orders and agreements
- Railworthiness directives
- Emergency orders
- Injunctions



# INDIVIDUAL LIABILITIES

- Warning letters to individuals from the Office of Railroad Safety or RCC
- Civil penalties against individuals
- Disqualification from safety-sensitive service. 49 C.F.R. part 209 subpart D
  - Requires notice and the opportunity for a hearing



# CRIMINAL PENALTIES

- Violations of the HMR that are done “willfully or recklessly” can result in up to 5 years of imprisonment (10 if involving a hazmat release that results in death or bodily injury). 49 U.S.C. § 5124
  - “A person acts willfully when
    - (1) the person has knowledge of the facts giving rise to the violation; and
    - (2) the person has knowledge that the conduct was unlawful.”
  - “A person acts recklessly when the person displays a deliberate indifference or conscious disregard to the consequences of that person's conduct.”
- FRA refers potentially criminal cases to DOT’s Office of the Inspector General (OIG)



# COMPLIANCE ORDERS AND AGREEMENTS

- Compliance orders. 49 C.F.R. part 209 subpart C
  - The Administrator may issue an order directing compliance after providing notice and opportunity for a hearing
- Compliance agreements. 49 C.F.R. part 209 subpart C
  - FRA may enter into compliance agreements with an entity in which the entity promises specific remedial actions and, should it fail to deliver, agrees to the imposition of a compliance order, emergency order, or fines





# RAILWORTHINESS DIRECTIVES

- Used to address safety issues and defects in tank cars by requiring inspections and testing
- 49 C.F.R. § 180.509(b)
  - “Without regard to the qualification compliance date requirements of any paragraph of this section, an owner of a tank car or an internal coating or lining must ensure an appropriate inspection and test according to the type of defect and the type of maintenance or repair performed if:
  - The Associate Administrator for Railroad Safety, FRA, requires it based on the existence of an objectively reasonable and articulable belief that a tank car or a class or design of tank cars may be in an unsafe operating condition.”



# EMERGENCY ORDERS AND INJUNCTIONS

- Emergency Orders
  - If the Administrator determines that unsafe conditions/practices cause an emergency situation involving a hazard of death, personal injury, or significant harm to the environment the Administrator may order restrictions or prohibitions necessary to abate the situation without prior notice or opportunity to comment. 49 U.S.C. § 20104
- Injunctions
  - May request that the Attorney General bring a civil action in U.S. district court for a temporary or permanent injunction. 49 U.S.C. § 5122



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# QUESTIONS?

- Questions for RCC:
- [FRALegal@dot.gov](mailto:FRALegal@dot.gov)