

FRA's Enforcement Process

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Summary of Discussion Topics

- Organizational Overview of FRA and the Office of Chief Counsel
- Federal Safety Statutes Enforced by FRA
- Enforcement Process
- FRA Dollar Recovery Levels from Civil Penalty Claims
- Tips for Writing Effective Violation Reports
- Common Problems Arising from Inspections and Investigations

Organizational Overview of FRA and the Office of Chief Counsel

FRA is Organized into 6 Offices

1. Office of the Administrator (ROA)
2. Office of Railroad Safety (RRS)
3. Office of Chief Counsel (RCC)
4. Office of Railroad Policy and Development (RPD)
5. Office of Financial Management (RFM)
6. Office of Administration (RAD)

FTP Summary Total: 8 On-board: 8 Vacancies: 0

ROA-1 4/4/0 Administrator J. Szabo

ROA-2 2/2/0 Deputy Administrator K. Hedlund
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ROA-3 2/2/0 Executive Director S. Cummings

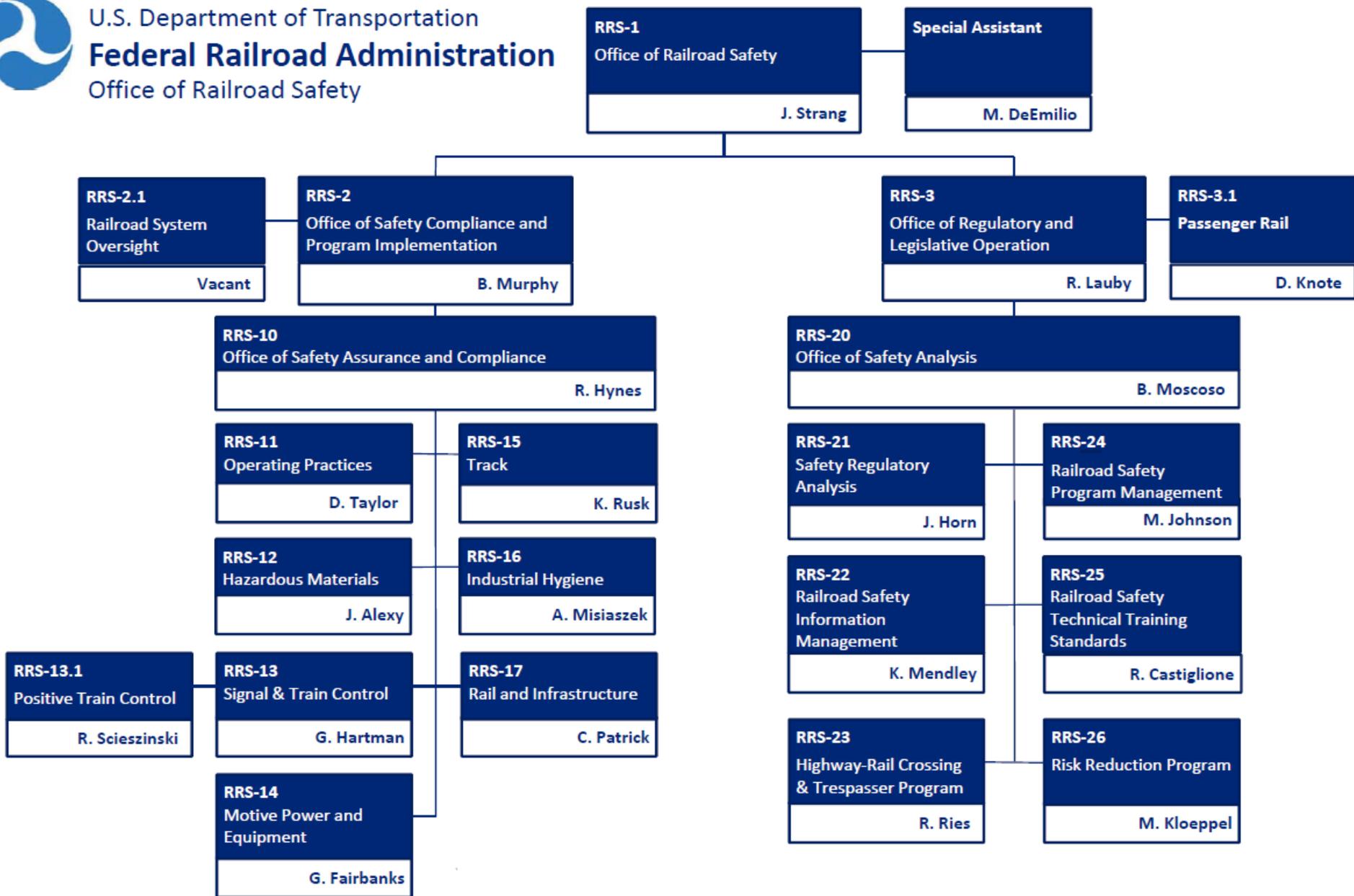
Associate Director of Congressional Affairs N. Robinson Program Analyst M. Patterson Administrative Specialist R. Macklin

Administrative Specialist E. Wall

Program Analysis Officer R. Millman
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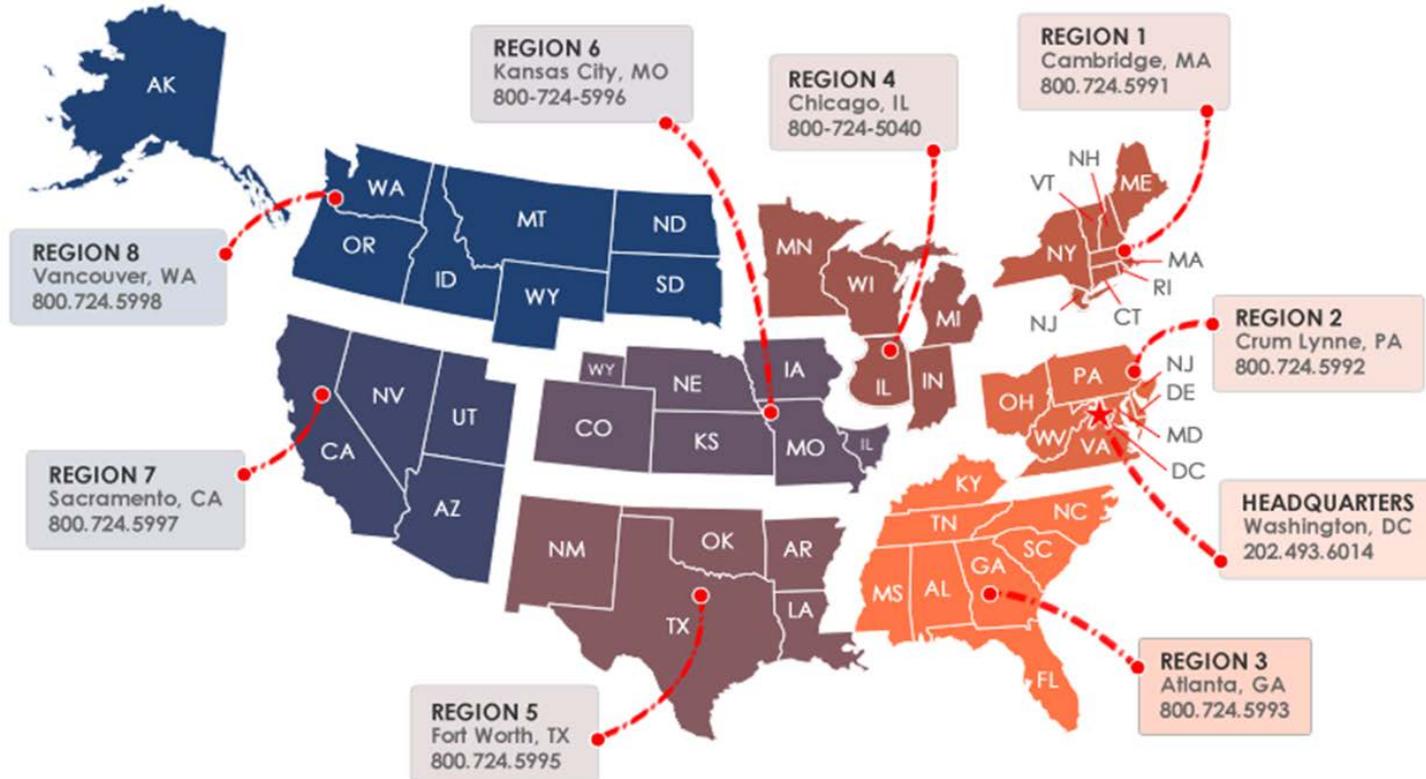


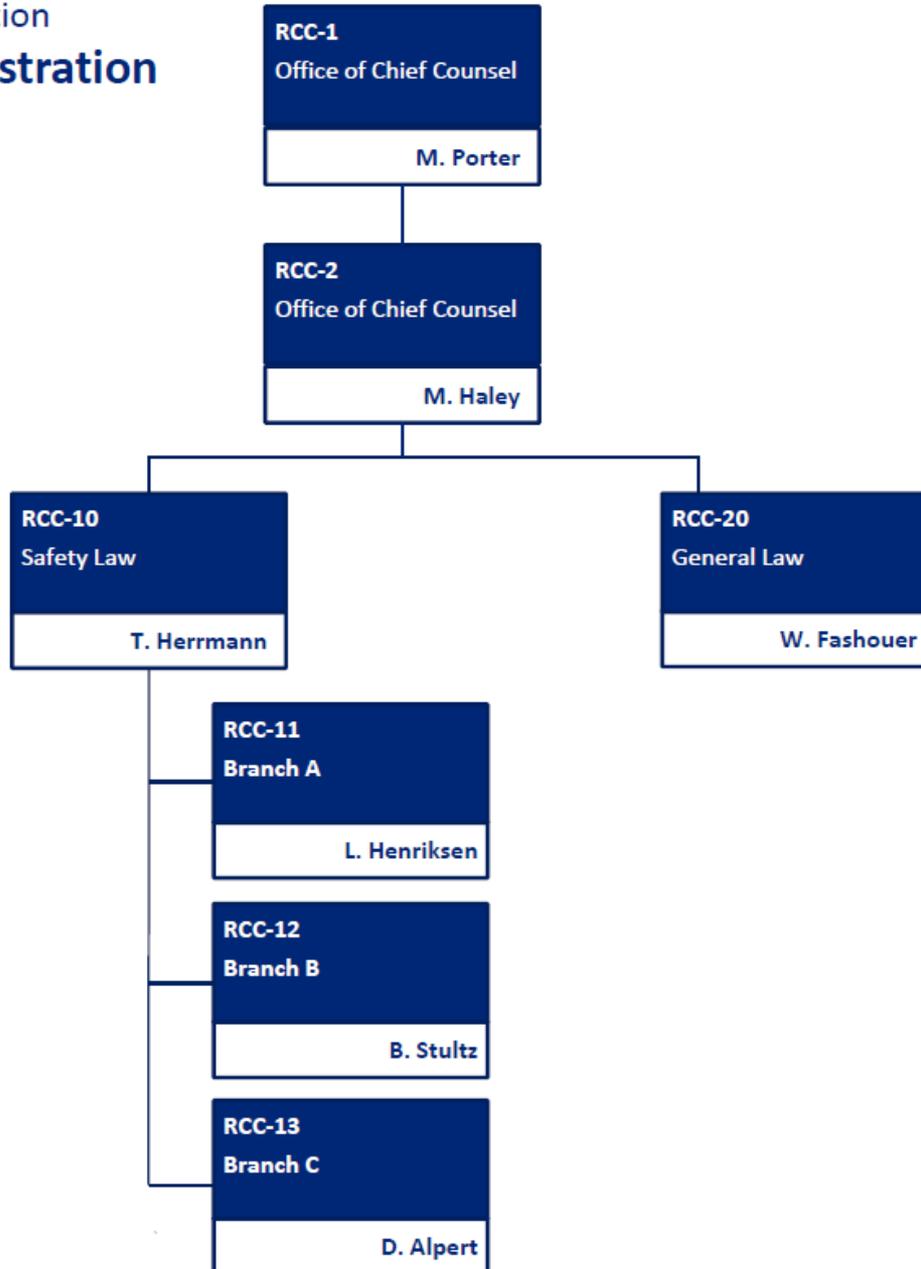
U.S. Department of Transportation
Federal Railroad Administration
 Office of Railroad Safety

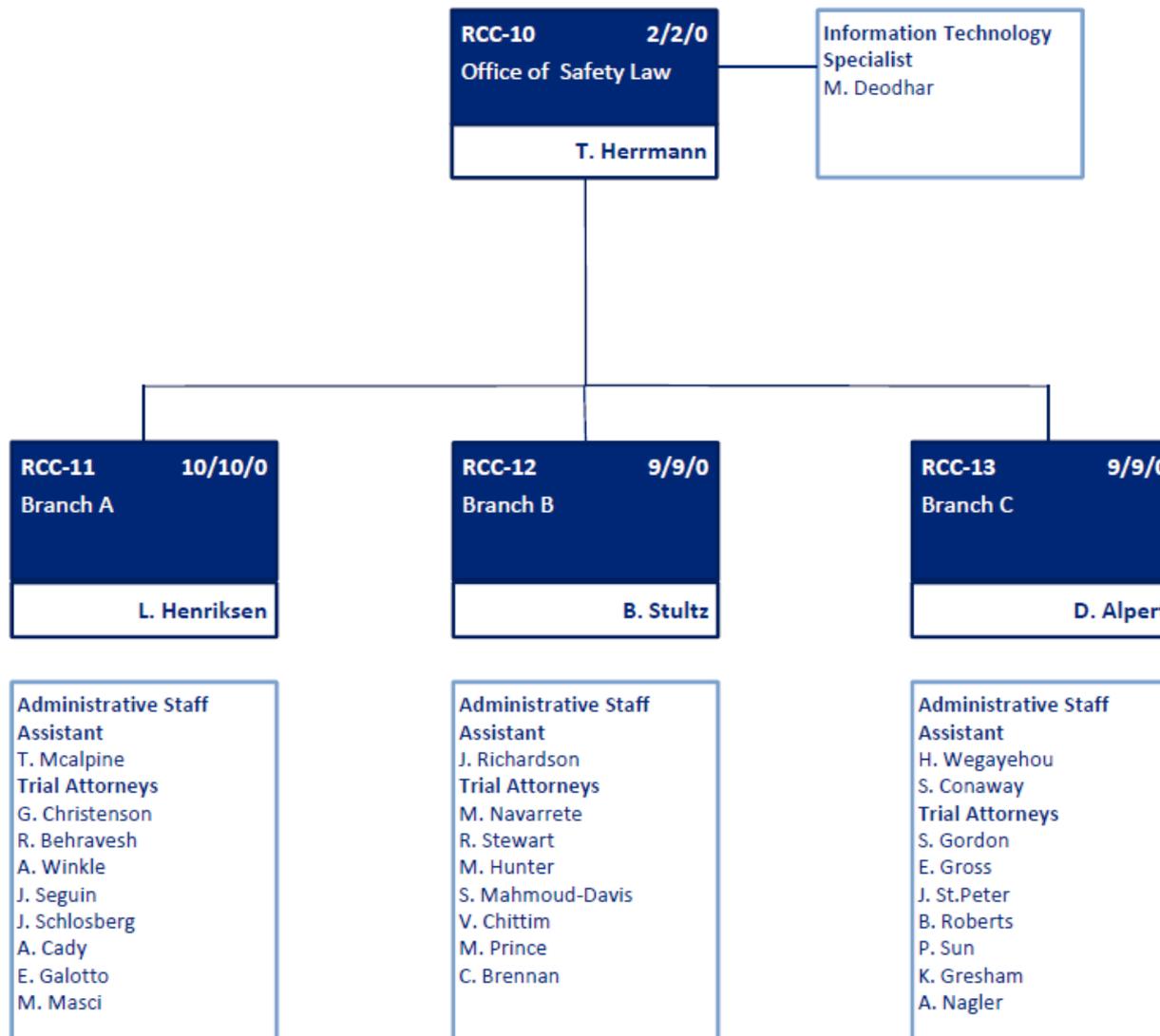


FRA's Office of Railroad Safety also includes 8 Regional Offices:

Regional Offices







FTP Summary
 Total: 30
 On-board: 30
 Vacancies: 0

Responsibilities of the Safety Law Division

1. Assess civil penalties for violations of the rail safety statutes and FRA safety regulations.
2. Develop and draft the agency's safety regulations.
3. Provide other legal support for FRA's safety program.

Responsibilities of the General Law Division

1. Provides legal services to FRA's various offices on all legal issues other than safety law.
2. Freedom of Information Act.
3. Federal Tort Claims Act.
4. Surface Transportation Board matters.

Federal Safety Statutes Enforced by FRA

- The Federal government began taking an active interest in railroad safety during the late 1800's.
- Congress passed a number of railroad safety laws through the first part of the 1900's, including:
 1. Safety Appliance Acts
 2. Locomotive-Boiler Inspection Act
 3. Hours of Service Act
 4. Signal Inspection Act
- These Acts regulated discrete areas of railroad safety.

- In 1970, Congress passed the Federal Railroad Safety Act, which gives the Secretary of Transportation the authority to regulate in all areas of railroad safety.
- All of these laws were subsequently recodified together in 1994 and can be found primarily in 49 U.S.C. chapters 201-213.
- Together they are commonly referred to as the “Railroad Safety Laws”.
- The Secretary of Transportation has delegated authority for regulating railroad safety to FRA.

Additional statutes that FRA is responsible for enforcing include:

- The hazardous materials transportation laws (“hazmat laws”) (primarily 49 U.S.C. chapter 51). FRA enforces these laws and their implementing regulations primarily in the rail mode of transportation.
- FRA also enforces a large body of regulations and orders implementing the Federal railroad safety laws and aspects of the Noise Control Act.

Enforcement Process

State Involvement in Rail Safety Enforcement

- State inspectors participating in FRA's State Participation Program have similar authority to enforce the Railroad Safety Laws as FRA inspectors.
- However, the scope of each state inspectors' access is determined by state law. (For instance, some state statutes do not authorize inspections of shippers).
- There are about 30 states that participate in FRA's program.
- Approximately 170 state inspectors have been qualified by FRA.
- States may act directly to collect civil monetary penalties or seek injunctions only if FRA fails to act within specified time limits.

Tools for Enforcing the Railroad Safety Laws

- Civil monetary penalties (civil penalties)
- Individual Liability Actions
- Criminal Penalties
- Compliance Orders and Agreements
- Emergency Orders
- Special Notices for Repairs
- Injunctions

Tools for Enforcing the Railroad Safety Laws (cont.)

Civil monetary penalties (civil penalties)—rail safety violations

- This is, by far, the most common enforcement tool.
- The civil penalty per rail safety violation ranges from the minimum of \$650, through the ordinary maximum of \$25,000; to the aggravated maximum of \$105,000. Each day that a violation continues is a separate offense.
- Most civil penalties are assessed in the range of \$2500-\$5000.
- Congress has set criteria that FRA must consider in compromising rail safety penalty assessments.
- Where compromise is not achieved, FRA asks the Attorney General to bring suit in U.S. District Court to collect penalties.

Tools for Enforcing the Railroad Safety Laws (cont.)

Individual Liability Actions

- Civil penalties against individuals for “willful” rail safety violations (intentional, voluntary acts with either knowledge of the law or reckless disregard for whether the conduct violates the law).
- Disqualification from safety-sensitive service for rail safety violations, whether willful or not, that demonstrate “unfitness for safety-sensitive service.”
- Warning letters to individuals from Office of Chief Counsel or Office of Railroad Safety.

Tools for Enforcing the Railroad Safety Laws (cont.)

Criminal Penalties

- Falsifying a record that FRA requires to be kept can result in imprisonment of up to 2 years and criminal fines under 18 U.S.C. § 3571, or both. See 49 U.S.C. § 21311.
- Train wrecking statute punishes wrecking or attempting to wreck a train. 18 U.S.C. § 1992.
- False statements in an investigation. 18 U.S.C. § 1001.
- Each of these statutes contain a “knowing and/or willful” requirement.

Tools for Enforcing the Railroad Safety Laws (cont.)

Compliance Orders and Agreements

- FRA's Administrator may issue an order directing compliance after providing notice and opportunity for a hearing.
- FRA sometimes enters into compliance agreements with railroads in which the railroad promises specific remedial action and, should it fail to deliver on its promise, agrees to the imposition of a compliance order, an emergency order, or particular fines.

Tools for Enforcing the Railroad Safety Laws (cont.)

Emergency Orders

- If the Administrator determines that unsafe condition(s)/practice(s) cause an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Administrator may order restrictions or prohibitions that may be necessary to abate the situation, without prior notice and an opportunity for comment.
- These orders can be used to enforce existing regulations or, in effect, to create additional regulations.
- FRA has issued 28 such orders.

Tools for Enforcing the Railroad Safety Laws (cont.)

Special notice for repairs

- Related action to an emergency order.
- An inspector may, under certain defined circumstances, order a locomotive, freight car, or passenger car out of service, or lower the class of track.
- Requirements are addressed in 49 CFR part 216.

Injunctions

- FRA may request that the U.S. Attorney General seek a court order prohibiting violations.

Tools for Enforcing the Hazmat Laws

- FRA primarily enforces the Hazardous Materials Transportation Act (HMTA) and its implementing regulations with regard to shipments by rail.
- Most violations of hazmat regulations are assessed in a range from \$1000 to \$10,000.
- The ordinary maximum civil penalty is \$75,000; and the aggravated maximum civil penalty (in the case of a violation that results in death, serious illness, severe injury, or substantial property damage) is \$175,000.

Tools for Enforcing the Hazmat Laws (cont.)

- The minimum civil penalty per violation of a hazmat regulation related to training is \$450.
- There is no statutory minimum for hazmat violations (not involving training) that occurred on or after October 12, 2012.
- For the same type of non-training violations that occurred between August 10, 2005 and October 1, 2012, the statutory minimum is \$250.

Tools for Enforcing the Hazmat Laws (cont.)

- Violations are typically settled with an order assessing civil penalty against a respondent; however, FRA must provide the respondent an opportunity for an administrative hearing.
- A few respondents choose to litigate before an FRA hearing officer. A hearing officer's decision may be appealed to the Administrator, whose decision may be reviewed in the appropriate U.S. Court of Appeals.
- Other potential remedies include criminal penalties, disqualification, or seeking an injunction or other court action.

FRA Dollar Recovery Levels from Civil Penalty Claims

- In FY 2012, FRA collected \$16.6 million in civil penalty final assessments or settlements.
- Penalty collections have ranged from a low of \$1.3 million in FY 1981 to a high of \$16.7 million in FY 1992.
- The final penalty assessment or settlement amount for a given claim varies depending on the strength of the claim, as described in written basis-for-settlement or basis-for-final-assessment sheets.
- The average final penalty assessment percentage for a given fiscal year has consistently been above 66% of the provable collectible amount, as illustrated on the following slide.

Fiscal Year	Total of Initial Assessments (POCA)	Total of Provable Collectible Amounts (PRCA)	Total of Final Assessments and Settlements	Total of Final Assessments and Settlements as a Percent of POCA	Total of Final Assessments and Settlements as a Percent of PRCA
2003	\$17,052,750	\$16,146,684	\$10,983,544	64.38%	68.00%
2004	\$16,626,748	\$15,897,640	\$10,604,970	63.62%	66.55%
2005	\$13,132,000	\$12,392,100	\$8,566,860	65.24%	69.13%
2006	\$17,231,500	\$15,687,900	\$10,656,270	61.86%	67.93%
2007	\$20,655,250	\$19,762,600	\$13,276,978	64.27%	67.18%
2008	\$17,907,250	\$17,570,000	\$11,678,855	65.31%	66.49%
2009	\$24,387,700	\$22,200,699	\$15,727,035	64.50%	70.88%
2010	\$22,398,500	\$21,326,500	\$14,639,070	65.30%	68.31%
2011	\$22,745,500	\$21,851,000	\$14,996,103	65.93%	68.63%
2012	\$26,685,000	\$23,971,000	\$16,579,184	62.11%	69.26%

Violations Submitted by State Inspectors since 1991

- State inspectors have submitted approximately 10,555 violation reports.
- FRA has transmitted approximately 10,000 of the violation reports that were submitted.
- FRA has not kept precise data for to civil penalty recoveries based on state inspector violation reports; however, it is estimated to be in the range of \$25 to \$35 million.

Tips for Writing Effective Violation Reports

What happens to violation reports once received by RCC?

- Regional offices submit violation reports to RCC.
- RCC reviews all violation reports for legal sufficiency (the report must prove each required element).
- The goal within RCC is to complete the review within 120 days.
- RCC has consistently been able to complete its reviews in 70-80 days on average.
- Once the review is complete, the violation report will be transmitted, declined, or denied.

What happens to violation reports once received by RCC? (cont.)

- The vast majority of violation reports are transmitted by RCC to the intended railroad or shipper.
- In FY 2012, RCC received 4553 violation reports and transmitted 4394.
- RCC will decline enforcement if a violation report does not provide a legally sufficient basis for transmitting.
- RCC may after consultation with appropriate FRA personnel deny prosecution of a violation report for policy reasons.
- Most transmitted violation reports are settled by RCC.
- In some instances, railroad or shipper will present evidence that warrants terminating a violation report.

Reasons for Declining or Terminating Violation Reports

- Errors in evidence.
- Insufficient evidence.
- Inconsistent measurements.
- Citing improper party.
 - Citing federal entity, e.g., Air Force, Steamtown.
 - Citing a railroad that no longer exists, e.g., no Norfolk & Western Railroad after 8/31/98.
 - Citing associated party, but not the actual violator.

Reasons for Declining or Terminating Violation Reports (cont).

- Citing an entity for separate counts for each problem in a record, instead of 1 count for improper record.
- Referring to a complaint or a complainant.
- Duplicate violation report number.
- No signature on violation report.
- Failure to fulfill a necessary requirement (some regulations contain a knowledge requirement while some others have an in-use requirement, which must be addressed).

What makes a good violation report?

- Exercising appropriate enforcement discretion.
- Submitting the violation report promptly.
- Determining the elements of the violation.
- Providing evidence to prove each element.
- Anticipating defenses and mitigating factors.
- Using Witness Statements when required.
- Providing sufficient evidence.
- Providing useful background information.

Exercising Appropriate Enforcement Discretion

An inspector should consider:

- Inherent seriousness of the condition or action.
- Type of potential safety hazard the situation poses.
- Actual harm already caused.
- Offender's general level of current compliance.
- Offender's history of compliance.
- Whether another remedy is more appropriate.
- Other factors (as the immediate circumstances make relevant).

Submitting Violation Reports Promptly

- FRA generally has 5 years from the occurrence of a violation to initiate a lawsuit on a civil penalty claim.
- However, the prompt submission of a report prevents evidence from becoming stale and helps to ensure appropriate remedial action is taken.
- As noted, RCC's goal is to transmit legally sufficient violation reports within 120 days of receipt.

Determining the Elements of the Violation

- The laws and regulations state exactly what FRA has to prove to sustain the claim; however, every element of the violation must be addressed.
- For example: a track violation requires that FRA prove that the track owner knew or had notice that the track did not comply with part 213. So the inspector must address the knowledge component as well as substantive requirement in the regulation.
- If alleging willfulness, the report needs to cite evidence indicating that the individual knew of the facts of the violation and that the action was wrong.

Provide Evidence to Prove Each Element

- Often, direct observations by the inspector cover all elements of the violation.
- Supporting the inspector's observations with a photograph is very helpful.
- Documents prepared by the railroad are also helpful.
- The inspector should state in the narrative of the report the purpose of each document.
- Admissions against the interest of a railroad are also helpful.
- Violation reports should not contain irrelevant information.

Anticipating Defenses and Mitigating Factors

- Examples:
 - Railroad could submit its own repair records claiming that a defective condition was not present as alleged by FRA.
 - Railroad could claim the defect was caused by a rogue employee.
- Inspector needs to be certain to get both sides of the story for the violation report.

Using Witness Statements

- A violation must be supported by first-hand knowledge of the events that are the basis of the violation.
- Unless a violation is substantiated by an inspector's personal knowledge, the railroad's records, or admissions of railroad officials in reports of interview, the report should be accompanied by a witness statement.
- A witness statement must be used whenever an employee volunteers information about a safety law violation on his or her own initiative.

Providing Sufficient Evidence

- Reports of Interview
 - Inspectors must be mindful that it can result in unintentional noncompliance with the law that prohibits disclosure of railroad employees who report railroad safety violations without their written consent.
- Evidence on CDs
 - RCC will accept on a case-by-case basis (e.g. train dispatcher records).
- Aerial maps
- Third Party Photographs
 - The inspector must clearly note the source of the photograph on the exhibit.

Providing Useful Background Information

- Every violation report should contain useful background information, especially about the history of compliance and any factors that may have made the particular violation or group of violations hazardous.
- This type of information provides context.
- Inspectors should also point out mitigating factors that are not otherwise addressed in the violation report.

Procedures for Submitting a Request for Extraordinary Penalties

For any report or group of reports seeking a total fine that is in excess of \$100,000:

- Prior to submitting the violation report, the region must coordinate with the relevant RRS Staff Director of the discipline related to the subject matter of the violation.
- Must have the recommendation approved by the Director of the Office of Railroad Safety Assurance and Compliance before the report is submitted to the RCC.
- Must provide an RA memo with all elements addressed.
- RCC attorney will either follow the recommendation or consult with the regional manager who signed the memo and the appropriate headquarters Staff Director.

Common Problems Arising from Inspections and Investigations

Access to Records

- FRA is troubled by delays in the production of records and our Administrator has recently addressed this issue with the industry.
- Access to records is often essential to proving a violation.
- FRA has broad authority to request documents and records from the railroads. See 49 U.S.C. 20107 and 5121.
- Before requesting records, an inspector should enquire whether there is a designated point of contact.
- Record requests, to the extent possible, should be made in a comprehensive fashion.
- The inspector should allow the entity a reasonable time to provide requested records.

Access to Records (cont.)

- If a railroad refuses to provide requested records (or refuses to provide them within a reasonable time period), then the inspector should get the railroad's justification for the refusal.
- If the records are relevant to proving the inspector's violation, he or she should contact RCC through the appropriate regional personnel.
- FRA has authority to subpoena documents and records, and will use the subpoena power where necessary to further the agency's enforcement process.

Access to Property

- Inspectors are authorized to enter upon, examine, and inspect shippers and railroads at reasonable times and in reasonable ways. See 49 U.S.C. 20107 and 5121.
- This includes rail facilities, equipment, rolling stock, operations, and pertinent records.
- Reasonable time includes any time when trains are operating and any time where work connected to rail operations are being performed.
- A railroad or other entity cannot require inspectors to sign a release of liability, to wear identity tags, or to use protective gear.

Access to Property (cont.)

- Access to port facilities sometimes creates problems because the U.S. Coast Guard (USCG) regulates access to such facilities.
- Regulations require a Transportation Worker Identification Card (TWIC) to have unescorted access to a port facility.
- Properly credentialed inspectors retain unconditional access to conduct railroad and/or hazmat inspections.

Questions?

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