



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[Docket No. FRA-2025-0077; Notice No. 2]

RIN 2130-AD11

Prosecutorial Discretion of Enforcement Attorneys

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule clarifies that FRA’s Office of the Chief Counsel has discretion to decline or dismiss a violation, such as a technical violation where challenged conduct does not raise a practical safety issue.

DATES: This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

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SUPPLEMENTARY INFORMATION:

I. Background

Consistent with Executive Order (E.O.) 14192, Unleashing Prosperity Through Deregulation (90 FR 9065, Feb. 6, 2025), and E.O. 14219, Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative (90 FR 10583, Feb. 25, 2025), FRA is reviewing its regulatory requirements in parts 200 through 299 of title 49, Code of Federal Regulations (CFR) and updating requirements to reduce unnecessary burdens without compromising transportation safety.

As part of this effort, on April 3, 2025, DOT issued a request for information in which it asked the public to assist in identifying existing regulations, guidance,

paperwork requirements, and other regulatory obligations that can be modified or repealed, consistent with law, to ensure that DOT administrative actions do not undermine the national interest and that DOT achieves meaningful burden reduction while continuing to meet statutory obligations and ensure the safety of the U.S. transportation system.¹ DOT received 955 comments, including some that were rail-related and specifically received a comment from the Association of American Railroads (AAR). In addition to other proposals, AAR requested that FRA clarify in 49 CFR part 209 that FRA's Office of the Chief Counsel has discretion to dismiss a technical violation where the challenged conduct does not raise a practical safety issue.

On July 1, 2025, FRA published a notice of proposed rulemaking (NPRM) that proposed to adopt this AAR comment and to clarify that attorneys in the Office of the Chief Counsel have enforcement discretion in all phases of a potential enforcement action.² FRA has broad discretion to enforce the Federal railroad safety laws and regulations, including determining the appropriate method of addressing any violation it finds.³ Accordingly, similar to the discretion that FRA has in determining whether to transmit or decline an enforcement action, FRA also has discretion to dismiss a violation, such as a technical violation, where the challenged conduct does not raise a practical safety issue. Even where FRA has transmitted a violation and decides not to dismiss it, FRA continues to have the discretion to reduce the civil penalty, but not below the respective statutory minimum amount, adjusted annually for inflation.⁴ In the NPRM,

¹ 90 FR 14593 (Apr. 3, 2025).

² 90 FR 28609 (July 1, 2025).

³ *Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1025 (9th Cir. 1985) (finding "nothing in the railroad safety legislation to indicate Congress intended to make prosecutorial discretion subject to judicial review," and upholding the dismissal of a challenge to the Secretary of Transportation's safety plan that stressed cooperation with railroads in finding and remedying safety problems).

⁴ See Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Pub. L. No. 114-74, 129 Stat. 599, codified at 28 U.S.C. 2461 note.

FRA noted that this clarification would streamline the enforcement process, relieve enforcement burdens on regulated entities, and promote due process and fairness. In addition, FRA noted the proposal was consistent with the Mar. 11, 2025 DOT Memorandum, *Procedural Requirements for Enforcement Actions*.⁵

FRA received three comments. The American Short Line and Regional Railroad Association (ASLRRRA) submitted a comment in support of this proposal⁶ but requests that FRA add a reference to its Small Entity Enforcement Policy, found in FRA’s Policy Statement Concerning Small Entities at 49 CFR part 209, appendix C. The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART-TD) and Brotherhood of Locomotive Engineers and Trainmen (BLET) submitted comments both in opposition to this proposal. Concerned that increased Office of the Chief Counsel discretion could diminish worker safety as Class I carriers could “argue away infractions as ‘not a practical safety issue,’” SMART-TD strongly recommended that FRA provide a clear, narrow definition of a technical violation and publicly report each dismissal, and that rail labor should be permitted to review violation categories considered for dismissal.⁷ Recognizing that FRA has discretion in determining and enforcing violations, BLET is concerned that using the term “practical safety issue” as a test of when expanded discretion may be utilized will create unnecessary confusion and uneven enforcement.⁸ If FRA chooses to move forward with this rule, BLET stated that the term “practical safety issue” must be defined for consistency.

⁵ See *Procedural Requirements for Enforcement Actions*, Mar. 11, 2025, available at <https://www.transportation.gov/sites/dot.gov/files/2025-03/Procedural%20Requirements%20for%20DOT%20Enforcement%20Actions.Cote%20Memo.Signed.03-11-2025.pdf>.

⁶ <https://www.regulations.gov/comment/FRA-2025-0077-0004>.

⁷ <https://www.regulations.gov/comment/FRA-2025-0077-0002>.

⁸ <https://www.regulations.gov/comment/FRA-2025-0077-0003>.

In response to ASLRRRA's feedback, FRA notes that it recently addressed the civil penalty concerns ASLRRRA raised through another mechanism. Specifically, on FRA's website, FRA describes its Small Entity Consideration,⁹ as follows:

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 to ensure that small entities receive appropriate treatment on compliance and enforcement matters, and such treatment enhances the safety of railroad operations. FRA has discretion in determining which instances of noncompliance by small entities merit penalty recommendations and the amounts for recommended civil monetary penalties. See 49 CFR part 209, appendix C. Consistent with this policy, FRA will typically reduce an initial assessed guideline penalty by 50% for small entities.

FRA declines to adopt SMART-TD's recommendation to include a public report of each dismissal, due to resource constraints. However, any dismissal will be reported in FRA's Annual Enforcement Report (issued on its website for each fiscal year).

FRA also declines to adopt the recommendations of both SMART-TD and BLET to define a "technical violation" or "practical safety issue," as what may be considered "technical" is a matter within FRA's discretion and FRA has determined that this flexibility is desirable to maintain, and FRA makes this determination on a case-by-case basis. For example, FRA could cite a railroad with an alleged violation of a railroad safety regulation, but during settlement discussions, the railroad may contend that while a violation occurred in a technical sense, the violation cited did not raise a practical safety issue based on the facts presented in the case, and if FRA agrees, FRA could dismiss the violation as a matter of the Office of the Chief Counsel's prosecutorial discretion.¹⁰

⁹ <https://railroads.dot.gov/legislation-regulations/civil-penalties-schedules-guidelines>.

¹⁰ Similarly, FRA's Office of Railroad Safety could observe and recommend a violation of an FRA regulation, and FRA's Office of the Chief Counsel could decline to prosecute the violation, in its discretion. As discussed in a report on FRA's use of civil penalties, the operative principle inherent in the administration of FRA's safety regulatory program is discretion, discretion by which FRA's response to deviations from Federal safety standards, whether major or minor, can be calibrated to achieve a proportionality that both serves the agency's purpose and inspires the respect of the regulated community. *See The Federal Railroad Administration's Use of Civil Penalties in the Federal Railroad Safety Program*, The Ventura Group (2009), p.6, available as appendix B to FRA's Fiscal Year 2009 Enforcement Report, at https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/282/Annual_Enforcement_Report_2009.pdf. This informed discretion, exercised at each level of FRA's safety structure permits small or large steps up or down the ladder of enforcement tools, as well as calibration within the application of each tool, depending on the particular rule and particular facts at issue in a given case. *Id.*

FRA proposed adding language that simply memorializes existing practice in FRA’s Statement of Agency Policy Concerning Enforcement of Federal Railroad Safety Laws. However, in an effort to provide guidance and clarity, FRA notes the following example of what it may find to be a “technical violation.” Specifically, FRA may cite a railroad for an alleged violation of 49 CFR 218.101 for an unattended car left fouling an adjacent track. Though a fouling violation often presents a critical safety issue, during settlement discussions, a railroad could argue that the adjacent track being fouled had been out of service for years, with the switch accessing the track lined, locked, and spiked, suggesting that there was little practical safety impact from the observed fouling equipment in this situation. As such, in this example, the Office of the Chief Counsel could determine that this alleged violation, given these particular facts, is “technical” in nature and may not merit further prosecution.

This final rule is also consistent with a DOT NPRM published May 16, 2025, titled Administrative Rulemaking, Guidance, and Enforcement Procedures. In this NPRM, DOT proposes to affirm that attorneys and policy makers have broad discretion in deciding whether to initiate an enforcement action as long as the decision is based upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness, the facts and evidence adduced through an appropriate investigation or compliance review, the availability of scarce resources, the administrative needs of the responsible DOT agency or DOT component, Administration policy, and the importance of the issues involved to the fulfillment of the DOT’s statutory responsibilities.¹¹

For these reasons, FRA is finalizing the revision to appendix A to part 209 as proposed.

¹¹ See 90 FR 20956 (May 16, 2025).

II. Section-by-Section Analysis

Appendix A to Part 209— Statement of Agency Policy Concerning Enforcement of Federal Railroad Safety Laws

As discussed above, this final rule clarifies that FRA’s Office of the Chief Counsel has discretion to decline to enforce a violation, such as a technical violation where the challenged conduct does not raise a practical safety issue. FRA adds this statement to the discussion of FRA’s Civil Penalty Process in appendix A to part 209. FRA also makes minor revisions, as proposed, to the Civil Penalty Process discussion, including removing a description of where settlement conferences are held and updating the discussion of how smaller railroads usually prefer to handle negotiations to reference “e-mail” rather than “mail.”

III. Regulatory Impact and Notices

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FRA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, and DOT Regulatory Policies and Procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866.

FRA analyzed the potential costs and benefits of this final rule. This rule clarifies that FRA’s Office of the Chief Counsel has discretion to decline or dismiss a violation, such as when the challenged conduct does not raise a practical safety issue. By providing this clarification, regulated entities will benefit from a streamlined enforcement process, relief from enforcement burdens, and the promotion of due process and fairness. This clarification will also help to eliminate any confusion on the Office of the Chief Counsel’s discretionary authority to decline to enforce or to dismiss a technical violation

where the challenged conduct does not raise a practical safety issue. FRA requested comments on any potential costs from this rule during the NPRM comment period and received none.

B. Executive Order 14192 (Unleashing Prosperity Through Deregulation)

E.O. 14192, Unleashing Prosperity Through Deregulation, requires that for “each new [E.O. 14192 regulatory action] issued, at least ten prior regulations be identified for elimination.”¹² Implementation guidance for E.O. 14192 issued by OMB (Memorandum M-25-20, Mar. 26, 2025) defines two different types of E.O. 14192 actions: an E.O. 14192 deregulatory action, and an E.O. 14192 regulatory action.¹³

An E.O. 14192 deregulatory action is defined as “an action that has been finalized and has total costs less than zero.” This final rule will have total costs less than zero, and therefore will be considered an E.O. 14192 deregulatory action upon issuance of this final rule.

C. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,¹⁴ requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. The term *small entities* comprises small businesses and not-for-profit organizations that are independently owned and

¹² Executive Office of the President, *Executive Order 14192 of January 31, 2025, Unleashing Prosperity Through Deregulation*, 90 FR 9065-9067 (Feb. 6, 2025).

¹³ Executive Office of the President, OMB. Guidance Implementing Section 3 of Executive Order 14192, Titled “Unleashing Prosperity Through Deregulation,” Memorandum M-25-20 (Mar. 26, 2025).

¹⁴ Pub. L. No. 104-121, 110 Stat. 857 (Mar. 29, 1996).

operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000 (5 U.S.C. 601(6)).

In the NPRM, FRA certified that this rule would not have a significant economic impact on a substantial number of small entities. No comments were received on this certification.

This final rule will not preclude small entities from continuing practices that comply with part 209. By extending this regulatory relief, many regulated entities, including small entities, will experience benefits. Consequently, FRA holds to its previous certification that the final rule will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

This final rule offers regulatory flexibilities, and it contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Environmental Assessment

FRA has analyzed this rule for the purposes of the National Environmental Policy Act of 1969 (NEPA). In accordance with 42 U.S.C. 4336 and DOT NEPA Order 5610.1D, FRA has determined that this rule is categorically excluded pursuant to 23 CFR 771.116(c)(15). This rulemaking is not anticipated to result in any environmental impacts, and there are no unusual or extraordinary circumstances present in connection with this rulemaking.

F. Federalism Implications

This final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with E.O.

13132, Federalism (64 FR 43255, Aug. 10, 1999), preparation of a Federalism Assessment is not warranted.

G. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure, in the aggregate, of \$100,000,000 or more, adjusted for inflation, in any one year by State, local, or Indian Tribal governments, or the private sector. Thus, consistent with section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4, 2 U.S.C. 1532), FRA is not required to prepare a written statement detailing the effect of such an expenditure.

H. Energy Impact

E.O. 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”¹⁵ FRA has evaluated this final rule in accordance with E.O. 13211 and determined that this final rule is not a “significant energy action” within the meaning of E.O. 13211.

I. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this final rule in accordance with the principles and criteria contained in E.O. 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249, Nov. 6, 2000). The final rule will not have a substantial direct effect on one or more Indian tribes, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal laws. Therefore, the funding and consultation requirements of E.O. 13175 do not apply, and a tribal summary impact statement is not required.

J. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign

¹⁵ 66 FR 28355 (May 22, 2001).

commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This final rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

List of Subjects in 49 CFR Part 209

Administrative practice and procedure, Hazardous materials transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends part 209 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 209—RAILROAD SAFETY ENFORCEMENT PROCEDURES

1. The authority citation for part 209 continues to read as follows:

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

2. In appendix A to part 209 in the section under the heading “THE CIVIL PENALTY PROCESS,” revise the second-to-last paragraph, to read as follows:

Appendix A to Part 209—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws

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THE CIVIL PENALTY PROCESS

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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 include technical experts from both FRA and the railroad as well as lawyers for both parties. Similar to the discretion that the Office of the Chief Counsel has in determining whether to transmit an enforcement action or to decline to prosecute a recommended violation, the Office also has discretion to dismiss a violation, such as a technical violation where the challenged conduct does not raise a practical safety issue. Even if FRA determines not to dismiss the violation, FRA continues to have the discretion to reduce the penalty, but not below the relevant statutory minimum amount. 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 e-mail or over the phone, 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 payment is submitted to FRA's accounting division covering the full amount agreed on.

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Issued in Washington, D.C., under authority delegated in 49 CFR 1.89.

David A. Fink,

Administrator.

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