

§ 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 culpability;
- (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.

The Federal hazardous materials transportation safety laws (49 U.S.C. 5124) provide a criminal penalty of a fine under title 18, United States Code, and imprisonment for not more than 5 years, or both, for any person who knowingly violates 49 U.S.C. 5104(b) or who willfully violates chapter 51 of title 49, United States Code, or a regulation prescribed or order issued under that chapter.

[61 FR 38647, July 25, 1996]

§ 209.133 Referral for prosecution.

If an inspector, including a certified state inspector under Part 212 of this chapter, or other employee of FRA becomes aware of a possible willful violation of the Federal hazardous materials transportation safety laws (49 U.S.C. Chapter 51) or a regulation issued under those laws for which FRA exercises enforcement responsibility, he or she reports 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]

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

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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.

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(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;