

FRA's traditional practice has been to issue penalty schedules assigning to each particular regulation specific dollar amounts for initial penalty assessments. For each regulation, the schedule typically shows two amounts within the \$500 to \$11,000 range in separate columns, the first for ordinary violations, the second for willful violations (whether committed by railroads or individuals).

The penalty schedule constitutes a statement of agency policy, and 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. Accordingly, under this revised schedule, and regardless of the fact that a lesser amount may be shown in both columns of the schedule, FRA reserves the right to assess the statutory maximum penalty of up to \$22,000 per violation where a grossly negligent violation has created an imminent hazard of death or injury. (See Footnote 1 in appendix A to part 214.) This authority to assess a penalty for a single violation above \$11,000 and up to \$22,000 is used only in very exceptional cases to penalize egregious behavior. Where FRA avails itself of this right to use the higher penalties in place of the schedule amount, it will so indicate in a penalty demand letter.

Regulatory Impact/Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures. It is considered to be non-significant under both Executive Order 12866 and DOT policies and procedures (see 44 FR 11034, February, 26, 1979). FRA has prepared and placed in the docket a regulatory analysis addressing the economic impact of the rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., Seventh Floor, Washington, DC. Photocopies also may be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590.

This rule will cost about \$1,500,000 per year. About 45 percent of that or \$675,000 per year will go into safety enhancements which serve to prevent accidents and acute injuries of the type usually reported to FRA. That portion will generate benefits of about \$1,900,000 per year. The remainder of the rule will address long-term risks like

skin cancer and chronic diseases related to silica exposure, or address event mitigation, through requiring first-aid kits and fire extinguishers. FRA does not have a good way to quantify that portion of the benefit, although existing industry practices, and the willing participation of the representatives of the railroads are substantial evidence that the burden is likely not to be very great. The almost infinite variety of equipment involved, combined with limited information collection resources and reporting detail, make it impossible to measure more accurately the problem without a substantial expenditure of resources. But in consultation with our industry partners, we have agreed that there is a risk reduction opportunity. We have, together, come up with a reasonable minimum set of precautions and measures, at a reasonable level of costs, that we believe will achieve the desired reduction in risk. Our industry partners will willingly absorb these new costs because they believe it is justified to do so.

A significant portion of the costs of environmental controls will be offset by productivity enhancements. The vast majority of new roadway maintenance machines are ordered with air conditioning because it enhances productivity. There may be some cases in which the additional productivity does not offset the cost of the environmental controls, but there will be a safety benefit in terms of reduced long term exposure to silica dust.

FRA found one fatal accident in the years 1996–2000 which would have been prevented by the rule. In that case a contract employee fell off a crane, which then rolled over him. The rule would have required a safe place to ride on the crane and likely would have prevented the fatality. See FRA accident file CFE-4–97, June, 23, 1997, Fort Worth, Texas.

Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket a Regulatory Flexibility Assessment (RFA) which assesses the small entity impact by this rule. Document inspection and copying facilities are available at the Department of Transportation Central Docket Management Facility located in Room PL-401 at the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Docket material is also available for inspection

on the Internet at <http://dms.dot.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Ave., NW., Washington, DC 20590.

“Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a railroad business “line-haul operation” that has fewer than 1,500 employees and a “switching and terminal” establishment with fewer than 500 employees. SBA’s “size standards” may be altered by Federal agencies, in consultation with SBA and in conjunction with public comment.

Pursuant to that authority, FRA has published a policy which formally establishes “small entities” as being railroads which meet the line haulage revenue requirements of a Class III railroad. Currently, the revenue requirements are \$20 million or less in annual operating revenue. The \$20 million limit is based on the Surface Transportation Board’s threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment (49 CFR part 1201). The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA uses this alternative definition of “small entity” for this rulemaking.

FRA took steps during the proceedings for this rulemaking to minimize the adverse effects of the rule on small entities. FRA invited the American Short Line and Regional Railroad Association (ASLRRA) to be a member of the Task Group. ASLRRA declined, securing representation by the individual also representing the AAR. It appears the rule will have a minimal effect on small entities as the overwhelming majority of roadway maintenance machines owned by small entities were manufactured before 1991, and would be exempt from most of the rule’s requirements. FRA was careful to limit retrofit requirements, which might have imposed an undue burden on small entities. There appears to be no substantial impact on a significant number of small entities.

FRA sought comments on the effect of the proposed rule on small entities, but received only one comment relative to small businesses. Transtar noted that small railroads would bear an onerous