

Federal Railroad Administration



Track and Rail and Infrastructure Integrity Compliance Manual

Volume I General

Chapter 4 Exceptions to the Standards

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CHAPTER 4 Exceptions to the Standards

Introduction

Title 49 Code of Federal Regulations (CFR) Part 213 Track Safety Standards (TSS), contains the minimum requirements for safe track and roadbed. Railroads must comply with many separate requirements contained in the TSS. If a railroad deviates from these requirements and train operations continue without appropriate remedial action, consider enforcement action.

Each situation contains a multitude of factors. As such, each inspector must exercise professional judgment, guided by the enforcement discretion criteria set forth in 49 CFR Part 209, Appendix A (Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws), when deciding whether to recommend legal action for noncompliance with the TSS. Among those criteria are “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,” “the general level of current compliance,” and the “recent history of compliance.” This chapter will assist the inspector in making enforcement determinations by providing guidelines for assessing the seriousness of any defect in the specific context of the TSS and the conditions observed during a particular inspection. This promotes FRA’s policy of focused enforcement (i.e., the use of FRA’s limited enforcement resources to attack the most serious and persistent compliance problems).

FRA’s primary purpose is to carry out the intent of Congress as stated in the Federal Railroad Safety Act of 1970: “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” Improved safety performance, achieved by adherence to prescribed standards, accomplishes this objective. Therefore, obtaining compliance with the TSS satisfies the purpose of the act. It may be necessary to improve compliance to reduce the risk of accidents in a particular situation; this should be a primary factor in determining enforcement action, such as the imposition of civil penalties.

An inspector can initiate enforcement action of various types (used individually or in combination). The enforcement tools available (in order of increasing severity) are:

1. Defect report (F6180.96).
2. Violation report recommending a civil penalty (F6180.111).
3. Special Notice for Repairs (slow order).
4. Compliance order recommendation.
5. Notice of track conditions (emergency order).

Each inspector should remember that the purpose of the safety laws, the TSS, and enforcement activity is to reduce train accidents, casualties, and property damage resulting from defective conditions in tracks and roadbed. Whereas adherence to each requirement of the TSS will help lessen the risk of track-caused accidents, the inspector must be able to distinguish the varying levels of safety risk presented by violations of different standards. Each condition identified in the TSS has a different effect on the performance of the track structure and, accordingly, different conditions have widely varying effects on the immediate hazard to train operations. For example, in most cases, a broken rail presents a greater immediate hazard to trains than vegetation adjacent to the roadbed.

When determining which of the five enforcement actions to pursue, an inspector must consider the risk of an accident presented by the defect itself. In addition, the inspector must consider the possible consequences of an accident caused by the condition, if the railroad representative knew the defective condition existed, previous track-caused accident performance on the particular rail line, and the railroad's track standards compliance program. Train speed at the particular location, type of traffic handled on the line (hazardous materials, passengers), population proximity, and terrain all can influence the consequences of an accident.

Defect Reports

All enforcement activity begins with an inspection, during which the inspector will record all defects on an F6180.96. (See Volume I, Chapter 2 of this manual for instructions.) Defect reporting constitutes the most frequently used enforcement action and may lay the groundwork for more severe enforcement action, if necessary. Exercise care to conduct a thorough inspection, recording the location, type, and size of each defect discovered. Whereas defect reporting is usually sufficient to bring about compliance, the inspector must remember that every defect report may become part of a violation report if defects remain. It is imperative that these reports are legible, accurate, and complete. The description and location of each defect should be concise enough that persons not present during the inspection could locate the defects. Sound performance during inspections and reporting ensures sound legal action in the future, if needed.

Violation Reports

In recent years, the railroad industry has experienced a continued reduction in track-caused accidents. The number of rail and rail joint-related accidents is increasing. Therefore, it is important that inspectors use all the enforcement tools, including the track violation, to help ensure compliance. It is the responsibility of each Regional Supervisory Track Safety Specialist to ensure effective violation report usage.

A defect is a condition not in compliance with the TSS. Defects noted on inspection reports serve as notification to the railroad of FRA's awareness of the defect's existence. Defects may also serve as evidence of the railroad's knowledge of the defect (see the discussion below of the knowledge standard). An FRA inspector may choose to also recommend a civil penalty (violation) for a defect, and so note the decision on the inspection form. A violation serves two purposes: 1) It notifies the railroad that FRA has concluded that a condition does not comply with the TSS, and 2) it notifies the railroad that the inspector has reviewed the circumstances associated with the conditions of noncompliance and is recommending a civil penalty.

In many cases, documenting conditions of noncompliance is sufficient to achieve compliance with the TSS. However, there are many instances in which a condition warrants a violation. When recommending a violation, the inspector must prepare a well-documented narrative report describing the seriousness of the condition.

Once the inspector has determined that a civil penalty should be recommended, all facets of the conditions and circumstances must be carefully considered to make a judgment as to the degree of the violation. Any person (see 49 CFR § 213.15(a) for definition of a person) who violates, or causes the violation of, any requirement of Part 213 is subject to a civil penalty of at least \$650, and up to \$25,000-ordinary maximum (maximum penalty for any ordinary violation under federal railroad safety laws), per violation. A penalty, not to exceed the amount specified in 49 CFR 209 Appendix A (\$105,000 as of December 2016) - aggravated maximum (for

violations of railroad safety laws “when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals or has caused death or injury) may be assessed under conditions described in § 213.15(a). Therefore, the inspector must present the facts of the situation in the narrative report and a recommendation for prosecution should leave no doubt as to the degree of seriousness of the violation.

The inspector should be familiar with the penalty amount normally assessed for a particular violation under the penalty schedule for Part 213 (see Volume II, Chapter 2, Appendix B – Defect Codes). If the circumstances seem to warrant a higher penalty and/or the assessment of penalties for multiple days that a violation continued, the inspector should discuss these factors with the Regional Specialist. If both agree that the extraordinary penalties are appropriate, they should prepare a cover memorandum for a Regional Manager to send to FRA’s Office of Chief Counsel. The memorandum should explain the factors that warrant higher-than-normal penalties and/or an assessment for multiple days, note what the amount of the recommended assessment would be, and explain why such an extraordinary assessment is needed in this situation.

Knowledge Standard

Section 213.5 requires that any track owner who “knows or has notice that the track does not comply” with the TSS must bring the track into compliance or halt operations over that track. This knowledge standard has been in the TSS since its creation, and FRA decided to retain the standard when revising the TSS in 1998. The standard holds a track owner liable for violations of which it has actual knowledge or of which it would have known if the owner had exercised reasonable care (e.g., violations of which it has constructive knowledge). The standard is thoroughly discussed in the preamble to the 1998 final rule, found at 63 Federal Register 33992, 33995–33996 (1998).

In submitting a violation report recommending the issuance of a civil penalty, the inspector must fully support the conclusion that the track owner had actual or constructive knowledge of the defect at a time when operations occurred over the track. One way to establish actual knowledge is for the inspector to record and notify the track owner when the defect is found, then reinspect later to see if the track owner has taken appropriate remedial action. If the track owner has not taken appropriate action, the inspector should cite the track owner for a violation of the TSS. Another method to demonstrate actual knowledge is to show that the defect has been noted in the track owner’s inspection records, including records of automated inspections. In demonstrating actual knowledge, the violation report should clearly trace each defect to a specific item in an FRA inspection report and/or railroad inspection records. Additionally, a citizen complaint or concern directed to a railroad would fulfill the knowledge standard.

In some situations, the defect has not been noted on a previous FRA inspection report or the railroad’s own inspection records. Citing such a defect as a violation requires that the inspector demonstrate the track owner’s constructive knowledge. Establishing constructive knowledge of a defect requires proof that the track owner would have known of the defect if the owner had conducted its previous inspection with reasonable care. A track owner cannot simply wait for FRA to provide notice of defects that the track owner should find. The track owner’s duty to inspect its track gives it notice of any defect that such a required inspection would reveal, whether or not the railroad detected it. With demonstrated constructive knowledge and a civil penalty recommended, the inspector should attach a copy of the railroad’s last required report of inspection. The inspector should explain why the defect is of such a nature that it would have

had to exist at the time of the last inspection. For example, crossties generally deteriorate slowly over time, so a crosstie condition found by an FRA or State inspector probably was defective when the track owner last inspected the track. Similarly, rust on the surface of a component that would be exposed to moisture only when it is in noncomplying condition (e.g., on the broken surface of a joint bar) may demonstrate that the defect must have existed at the time of the last inspection.

Criteria Affecting the Seriousness of a Noncomplying Condition

A noncomplying condition under one set of circumstances may warrant a defect, while the same condition under a different set of circumstances may warrant a violation. The enforcement discretion considerations in Part 209, Appendix A, require the inspector to consider the inherent seriousness of the condition. For example, in the TSS context, is the defect among the leading causes of track-caused accidents nationwide? Does the nature of this particular defect (e.g., wide gage of a particular dimension) substantially increase the risk of an accident? Application of these criteria requires that the inspector be generally familiar with the leading causes of accidents in his or her discipline. Consult the FRA Office of Railroad Safety's accident/incident database for more detailed information about accidents on a particular railroad.

In addition to the inherent hazard posed by the defect, the enforcement discretion considerations also require the inspector to consider factors present in the immediate factual situation that may exacerbate or lessen the risk of serious consequences should an accident occur due to the inherent hazard posed by the defect. The inspector must also consider the track owner's compliance history at this location; repeated noncompliance is generally more deserving of enforcement action than is a rare noncomplying condition. Some examples of criteria for consideration when making a decision whether or not to recommend civil penalty include:

- Passenger trains.
- Hazardous materials.
- Population density (urban or residential areas).
- Speed.
- Tonnage.
- Involvement of a bridge or bridge approach.
- Proximity to schools and highway-rail grade crossings.
- Compliance history.
- Accident history.
- Potential for negative environmental impact.
- Strategic Rail Corridor Network (STRACNET) Route.

A violation report should stress the importance of the violation in light of the immediate circumstances, as well as the inherent hazard posed by the condition.

As discussed above, each inspector must exercise good professional judgment and weigh the enforcement discretion criteria when deciding whether to recommend a violation. However, the inspector must exercise discretion on behalf of the Agency, not his or her personal discretion. Accordingly, the inspector's exercising of discretion is subject to supervisory review. Moreover, as an Agency, FRA has the duty to guide the exercising of that discretion and, when necessary, the authority to exercise that discretion above the level of the individual inspector to ensure properly focused enforcement on important compliance problems.

In determining which instances of noncompliance merit penalty recommendations, the inspector considers (49 CFR Part 209, Appendix A):

1. The inherent seriousness of the condition or action.
2. The kind and degree of potential safety hazard the condition or action poses in light of the immediate factual situation.
3. Any actual harm to persons or property already caused by the condition or action.
4. The offending person's (i.e., a railroad or an individual) general level of current compliance as revealed by the inspection as a whole.
5. The person's recent history of compliance with the relevant set of regulations, especially at the specific location or division of the railroad involved.
6. 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.
7. Other factors that the immediate circumstances make relevant.

Certain circumstances concerning the TSS most likely warrant recommendation for civil penalty. These criteria (listed below) are a general application of the enforcement discretion applied to common factual patterns involving defects known to be leading causes of track-caused accidents, extremely persistent noncompliance, and/or willful noncompliance. Although it is not possible to list all circumstances that most likely warrant a civil penalty, these conditions should result in a violation unless the Track inspector determines that special circumstances are present that indicate otherwise. Such special circumstances may include immediate and comprehensive remedial action or factors that lessen the severity of the defects (e.g., dramatic reductions in traffic volume or changes in the railroad's management). Unless the inspector and Regional Specialist agree that circumstances dictate otherwise, civil penalty is recommended for the following situations:

- When followup inspections disclose that unsatisfactory remedial action (or no action) was taken for conditions of noncompliance previously noted by Track inspectors for FRA or the track owner. This includes ATIP reinspections.
- Systemic defects (should have been known to the track owner) are part of a pattern of repeated, similar substandard conditions on the same line, same subdivision, same yard, or within the same supervisor's territory. For example, a center-cracked or broken joint bar that the railroad knew, or should have known, existed (as shown by specific evidence) and is part of a track segment that has an excessive number of center-cracked or broken joint bars. For such situations, it may be appropriate to use a Special Notice for Repairs Report (SNFR).

- Multiple defective conditions occurring at the same location (e.g., joint tie defect with a center-cracked bar, a geometry defect with defective ties, etc.). In such cases, inspectors shall confer with their Specialist to determine the civil penalty or penalties to be cited.
- A rail documented as defective by the railroad's continuous rail flaw inspection with the absence of required remedial action.
- A "breakout in rail head" (§ 213.113) that has obviously existed since the last required railroad inspection.
- A track defect caused by improper repairs (deliberate installation of a joint bar that is not of a structurally sound design and dimension for the rail on which it is applied, or failure to drill holes in rail ends not complying with TSS).
- Defective turnout ties or poor support causing a spring rail frog to have excessive clearance between the hold-down housing and the horn(s). (Note: include a description of gouging or contact by the outside of the wheels against the gage side of the wing rail).
- Excessively chipped or worn switch points that are so chipped or worn as to present a significant derailment hazard.
- Any track geometry defect that clearly existed since at least the last required railroad inspection. Therefore, when these types of defects do not comply with the designated class of track and are found by an inspector, it is obvious the railroad was not following due diligence in inspecting the track (i.e., constructive knowledge).
- A switch stand or derail that can be thrown with the lock or hasp in place.
- The noncompliance of requirements under excepted track. For example, the track at a highway-rail grade crossing does not meet Class 1 requirements when the railroad is moving hazardous material placarded cars in trains over the track.

The list above does not in any manner constitute an all-inclusive list of items that should result in a violation. However, if inspectors consistently address these situations through enforcement action, we will effectively focus enforcement where it counts the most. This will be an important catalyst in helping the industry make significant reductions in track-caused accidents. If no civil penalty recommendation occurs for any situation described above, discuss the special circumstances with the Track Specialist. This review is necessary to achieve a reasonably uniform and consistent enforcement policy. Refer to Chapter 2 of this manual for instructions on preparing a violation report (F6180.111).

A regular cycle of inspection, notification by Form F6180.96, and reinspection is the best and most desirable means of promoting compliance and acquiring evidence of deliberate noncompliance. Make sure to cite the same defects in the original report and the report recommending a civil penalty. The original report should be included as background information supporting the material forwarded for legal action. In addition, individually reference each item number in the original report.

Complaint and Accident Investigations

If allegations of noncompliance with FRA's TSS are substantiated during a complaint investigation, and if consideration of the criteria discussed above indicates that it is the appropriate course, a violation report should be submitted.

During an accident investigation in which a track condition not in compliance with FRA's TSS is determined to be a causal factor and the knowledge standard can be satisfied, a violation report must be submitted. In such a situation, explain the causal relationship in detail, and a cover memorandum noting the causal relationship and recommended aggravated penalties should be submitted to the Office of Chief Counsel with the violation report.

Special Notice for Repairs–Track Class

Section 216.15 of 49 CFR deals with written notification issued to the railroad when track does not comply with the requirements for the class at which the track is being operated as defined in the TSS. The notice will describe the conditions requiring the track to be lowered in class, specify the exact location of the affected track segment and state the highest class and corresponding maximum speeds at which trains may operate over that track. This slow order will remain in effect until repairs are completed. Consider an SNFR, Form F6180.8, for a lack of voluntary compliance by the railroad.

Section 213.5 holds a track owner liable for violations of which it has actual knowledge or of would have known had it exercised reasonable care (e.g., violations of where it had constructive knowledge.) When other circumstances warranting issuance of a SNFR may exist, Track inspectors are advised to be judicious in their decisionmaking and to seek counsel with their respective Regional Specialist prior to or immediately after issuing a SNFR, when practicable.

If, during an inspection, a Track inspector determines that the track does not comply with the requirements of the TSS, make every attempt to encourage the carrier to take the proper remedial action to correct the existing defects. A Track inspector should consider issuing an SNFR when:

- The carrier refuses to take appropriate remedial action for the defective conditions found by the Track inspector.
- Finding defective conditions and determining that a pattern of noncompliance exists over an extended period of time.
- Observing evidence of repeated violations, which demonstrates a disregard of comprehensive inspections and taking appropriate remedial action.

The inspector should evaluate the seriousness of the defects. If it is determined that the existing defects presents a threat to safety, the inspector may issue an SNFR, requiring the carrier to reduce the maximum authorized operating speed over the affected track.

If issuing an SNFR to the carrier, compile complete documentation. This will include field measurements, photographs, location of defects in relation to known fixed points, and a written narrative. The narrative will give details concerning the track structure, the amount and type of rail traffic, and what type of condition is found. In addition, note conditions or defects throughout

the inspection area. Furthermore, note the reaction and response of the railroad and any other information that may affect the SNFR.

Complete the SNFR in the field. The track description must indicate track number or another designation that will specify the track to which the order applies. The location of the defects must be indicated and referenced to a known, fixed point (e.g., a milepost, road crossing, switch, etc.).

The SNFR must be in writing and personally presented to the appropriate carrier official. This will eliminate the possibility of a misinterpretation of the information being received by someone who does not have the authority or ability to carry out the provisions of the notice.

If encountering a delay in this action, a telephone warning can be used to advise the railroad that an SNFR is to be issued. The Track Specialist and/or the Regional Administrator will be notified by phone as soon as possible. Less serious conditions that do not meet the requirements of the TSS may not warrant issuing an SNFR. Consider this when determining the seriousness of the condition.

Make a thorough description of each defect on the SNFR form using the language of the TSS and measurements made in the field. It must be exact and contain sufficient detail to describe each defect. Make reference to the completed F6180.96 at the time of inspection. Section 213.5 holds a track owner liable for violations that it had actual knowledge of or would have known had it exercised reasonable care (e.g., violations that it had constructive knowledge.)

Compliance Orders and Compliance Agreements

General Instructions

Under 49 U.S.C. 20111, FRA has the authority to issue compliance orders when the agency has reason to believe that the respondent is engaging in a continuing pattern of conduct that involves violations of the TSS. Procedures for issuing a compliance order are found in 49 CFR Part 209, Subpart C.

A compliance order normally will require remedial actions necessary to assure compliance with the regulations, and may impose restrictions until compliance is achieved. A compliance order involving the TSS may include a requirement that the track owner make specified repairs by a specific deadline. The compliance order does not necessarily remove tracks from service. If the railroad does not comply with the terms of the order, FRA may seek penalties for violation of the order or seek enforcement of the order in Federal court.

Procedures

If, during an inspection, a Track inspector determines that a railroad is engaging in a continuing pattern of conduct that involves repeated violations of the TSS, the Regional Administrator, through the Track Specialist, should be notified. General guidelines for determining this continuing conduct or pattern are as follows:

- A number of inspections have been made.
- These inspections continue to reveal defects and repeated noncompliance.
- The carrier refuses to bring the track into compliance with the standards.

- The inspector has made every attempt to have the carrier take remedial action through actions such as:
 - Repeated inspections.
 - Submission of violation reports.
 - Meetings with carrier officials explaining the seriousness of the existing conditions.
 - Slow order through the use of an SNFR.

If it is determined by the Regional Administrator, with technical guidance from the Track Specialist, that there is a pattern of repeated noncompliance and conditions present a threat to safety, consideration should be given to recommending the issuance of a compliance order. The Track Division Chief (RRS-15) in the Office of Safety Assurance and Compliance and the Assistant Chief Counsel for Safety (RCC-10) should be notified and consulted at this time. The recommendation containing the information noted below under “documentation” must be forwarded to both of those offices.

Documentation

Complete documentation of the entire area must be developed and included with the Regional Administrator’s recommendation. This documentation will include the following:

- Location of all defects including measurements, where required. This is to be recorded on Track Inspection Report Form F6180.96.
- Copies of Track Inspection Report Form F6180.96 for relevant previous inspections at this location.
- Copies of all relevant violation reports concerning the area in question.
- List of all track-caused accidents, reportable and nonreportable, that occurred during the previous 12 months.
- Copies of carrier inspection reports for the previous 6 months.
- A written narrative should be prepared detailing, but not limited to, the following:
 - Amount and type of rail traffic.
 - Proximity of tracks to homes, schools, stores, etc.
 - The carrier’s inspection and maintenance programs and procedures.
 - The seriousness of the defects.
 - The basis for the determination that a pattern of noncompliance exists.
 - Details of each meeting held with carrier officials including dates, names and titles of those in attendance and items discussed.

Based on the information submitted, the Office of Railroad Safety and the Office of Chief Counsel will decide whether to recommend to the Administrator that a compliance order proceeding be initiated. With the Administrator’s approval, the Office of Chief Counsel would then issue a notice of investigation based on the documentation submitted. If the railroad requests a hearing, FRA’s hearing officer would preside over a trial-type hearing where FRA

would have the burden of proving its factual allegations and the reasonableness of the remedial action sought. The hearing officer's decision could be appealed to the Administrator, and the Administrator's decision could be challenged in court. At any time during this process, FRA and the railroad could agree to a consent order and present it to the Administrator for signature. A consent order would impose requirements on the railroad and preclude further litigation of the issues.

In recent years, FRA has developed a simpler way of using the compliance order authority. Under a compliance agreement, the railroad agrees to take certain remedial actions; should those actions not occur to FRA's satisfaction, the railroad agrees not to oppose issuance of a compliance order or an emergency order imposing those conditions. Whereas the preparatory work necessary for a compliance agreement is substantially the same as for a compliance order (outlined above), the agreement presents FRA and the railroad with certain advantages. FRA can obtain remedial action quickly and informally, and if the terms of the agreement are not met, FRA can issue a compliance order or an emergency order without the time, expense, and litigation risk of a formal proceeding. Therefore, the railroad achieves improved compliance without being subject to an actual order unless it fails to meet its obligations under the agreement. In some agreements, FRA waives its right to pursue civil penalties for specified violations if the railroad meets all conditions of the agreement. In other agreements, the railroad will pay civil penalties on certain extremely serious violations that FRA may find while the agreement is in effect. If a compliance problem appears to be an appropriate situation for such an agreement, Regional Managers should contact RRS-15 and RCC-10.

Emergency Orders

Under 49 U.S.C. 20104, FRA has authority to take special remedial action to handle emergency situations. If, through testing, inspection, investigation, or research, FRA decides that "an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death or personal injury," FRA may immediately issue an emergency order. The order may impose restrictions or prohibitions necessary to bring about the abatement of the emergency situation. The authority to issue such an order rests with the FRA Administrator.

Unlike a compliance order, FRA may issue an emergency order without first providing the opportunity for a hearing. Accordingly, FRA has used the authority sparingly, and issued only 22 orders from 1970 through 2000. Although the statute does not define the emergency situation that must be present for FRA to issue such an order, FRA believes it refers to conditions and/or practices that present an imminent hazard of death or injury. The authority can be used to address conditions that are not in compliance with FRA's rules and conditions that are not addressed by those rules.

General Procedures

FRA has issued procedures for issuance of track-related emergency orders (49 CFR Part 216, Subpart C). Those procedures require that an inspector who detects an apparent emergency situation begin by issuing a notice of track conditions. The Regional Administrator then decides, based on that notice, whether to recommend that the FRA Administrator issue an emergency order removing the track from service. Those procedures (§ 216.27) also note that the Administrator can issue an emergency order without following this process. Ordinarily, in a true emergency, a cumbersome process is unacceptable. Therefore, we leave it to the discretion of

the region to determine the degree of urgency, and for more urgent situations, dispense with the process set forth in Part 216.

An inspector who discovers or is informed of conditions that may constitute an emergency situation shall immediately contact the regional office. During an inspection, if an apparent emergency situation is brought to the inspector's attention, the inspector shall immediately inspect the alleged condition or practice to determine whether an emergency situation exists. If, during an inspection, the inspector discovers an emergency situation or determines after inspecting that an emergency does or may exist, the inspector must immediately follow the procedures outlined in this chapter. If the inspector has any doubt as to whether a condition or practice constitutes an emergency, the inspector must consult the Track Specialist.

- The Track Specialist shall immediately ascertain if there is a reasonable basis for the allegation and alert the Regional Administrator and FRA Headquarters (HQ) to the situation. The Regional Administrator will keep HQ advised.
- The Track Specialist shall make a preliminary determination as to whether further inspection is necessary.
- If the allegation of an emergency situation appears to have merit, the Track Specialist shall contact the track owner immediately, ascertain as many pertinent details as possible concerning the situation, and attempt to obtain immediate voluntary abatement prior to the inspection. The Track Specialist should ascertain and evaluate the steps, if any, that the track owner indicates should be used to abate the danger. An investigation shall then be conducted in accordance with the procedures outlined in this chapter.

Technical Considerations

After the determination to investigate has been made, the inspection should be thoroughly planned to the extent time permits. The Track Specialist and inspector should review the known facts and decide what technical equipment and personnel may be necessary to conduct the inspection.

Scheduling

Any allegation of an emergency situation received by a regional office, whether written or oral, must be handled as a high priority. Other commitments, weekends, holidays, leave, and other considerations must not interfere with the expeditious and thorough handling of these cases.

If it is determined that an inspection should be made, it will be scheduled and conducted at the earliest possible time. Except in extraordinary circumstances, the inspection should be conducted within 24 hours of the receipt and preliminary evaluation of the alleged emergency situation.

Inspection

In an inspection conducted because of an allegation of an emergency situation, the alleged situation shall be inspected first.

Any additional inspection activity should take place only after resolution of the emergency situation. After the emergency situation has been resolved, a complete inspection of the facility may be conducted.

Voluntary Corrective Action

As soon as it is concluded that conditions exist that constitute an emergency situation, the inspector shall attempt to have the situation immediately corrected through voluntary corrective action by the carrier. The track owner or a representative of the owner should be promptly advised that such a situation exists.

The track owner is ultimately responsible for determining the manner in which they will correct the dangerous condition. Before leaving the premises, FRA or State personnel must determine that the emergency situation has been resolved and will not recur.

The track owner shall be deemed to have resolved an emergency situation if they eliminate exposure to the situation, or eliminate the condition or practice that resulted in the situation.

If corrective action is taken voluntarily, the inspector shall make the appropriate notation on the FRA Track Inspection Report.

Refusal to Correct

If conditions that are of a serious nature are not corrected, the inspector shall immediately notify the regional office. Depending on the degree of urgency, the Regional Administrator will decide whether to proceed directly to recommend to HQ that an emergency order be issued, or to have the inspector issue a notice of track conditions to the appropriate railroad official, thus informing the carrier that the track does not comply with the requirements of the TSS. Whichever route is chosen, the inspector will issue a Track Inspection Report.

The inspector has no authority to order the closing down of an operation or to direct employees to leave an area in the case of imminent danger. His or her only authority is to inform the Regional Administrator of the conditions observed and provide the basis on which the Regional Administrator can make a recommendation to the FRA Administrator through the Associate Administrator for Railroad Safety/Chief Safety Officer.

The Notice of Track Conditions

Where the region decides to use the notice of track conditions process set forth in Part 216, the following procedures must be followed:

- The notice shall set out and describe in detail the conditions found, and specify the location, track number, and any other information necessary to properly describe the defects and the track involved.
- A copy of the notice of track conditions given to the carrier, along with a written narrative, must be provided to the Regional Administrator within 3 calendar days of the issuance of the notice. A copy of this notice will also be sent to the Office of the Associate Administrator for Railroad Safety/Chief Safety Officer, attention RRS-15, as soon as possible.
- The written narrative with complete documentation will include:

- Field measurements.
- Photographs.
- Location of defects referenced to a known fixed point.
- Details concerning the track structure.
- The amount and type of rail traffic, not only at the location of the emergency order but also throughout the entire inspection area.
- The reaction and response of the railroad.
- Other information that may affect the order.
- Copies of Notice of Track Conditions shall be distributed as follows:
 - Original and first copy—mail promptly to the Track Specialist.
 - Second copy—retained by the inspector.
 - Last copy—issue to the carrier representative.

The Track Specialist will review the report, retain the first copy for regional records, and forward the original to the Office of Safety Assurance and Compliance, RRS-15.

Information Needed to Support Issuance of an Emergency Order

The Regional Administrator considers the inspector's report, input from the Track Specialist, and any material submitted by the railroad in developing a recommendation to the FRA Administrator. If the Regional Administrator decides that emergency action is necessary, the recommendation should be supported by ample documentation of the imminent safety hazard and previous attempts to address related safety issues on the particular railroad. Time permitting, the supporting documentation should include all of the following information.

General information required:

- Track Inspection Report Form F6180.96 for the entire segment recommended for the emergency order, showing each defect found during the inspection. (Repetitive entries may be summarized if a significant number of specific conditions are itemized and portray an accurate view of overall conditions.)
- Previous inspection reports served on the carrier for the particular line segment, including returned reports showing corrective action.
- Relevant violation reports filed with Chief Counsel (by report number and date of transmittal; FRA case number if known) and waiver investigation reports, if any.
- Description of method of operation.
- Operating speeds, temporary and permanent (copies of timetable, special instructions, and slow orders).

Facts demonstrating that the defect poses an imminent hazard of death or injury to persons:

- ATIP data (including summary) if available.

- Narrative report of discussions with carrier representatives in chronological sequence, providing dates, locations, names, and titles.
- Number of trains (passenger through freight, local, by category) and annual tonnage.
- Motive power employed on line, maximum train lengths, carrier-imposed limitations on axle loads or particular equipment.

Hazardous materials information:

- Volume of hazmat traffic over the line, based on review of waybills or consists for a period of 2 to 4 weeks prior to the date of the investigation.
- Type of hazmat traffic (illustrative listing of recent hazmat data identifying number of cars carrying explosives, poison gas, flammable gas, chlorine, anhydrous ammonia, etc.).
- Hazmat violation history on line as related to derailment risks (train placement, etc.).

Demographic information:

- Towns and cities along the line by name, referenced by railroad milepost and approximate population.
- Illustrative description of the area (including homes, schools, businesses, hospitals, etc.), indicating proximity to rights-of-way, railroad mileposts, and estimated number of persons affected. Include major highway-rail grade crossings and railroad bridges over public streets. Provide photographs showing track in foreground and areas potentially at risk in background and street maps, if readily available.

Topographic information:

- General description of curves and grades. (Provide track charts, if available).
- Railroad bridges and sharp dropoffs adjacent to rights-of-way. (Photographs, as appropriate).
- Clearances with reference to other active track and structures along rights-of-way. (Photographs, as appropriate).

Accident history:

- Rail equipment accident/incident reports for the past 6 months, regardless of carrier-identified cause (affected line only).
- FRA accident investigation reports, if any (affected line only).
- Carrier internal reports of accidents not reported to FRA.

Special factors:

- Abandonment plans and status, if applicable.
- State agency interest in rail service continuation, if applicable.
- Planned rehabilitation efforts, if any.
- Involvement of State in inspections and investigations, if any.

- Press reports, complaints from public officials and/or union officers, etc.
- Economic impact of proposed order (only readily available information).
- List of major industries on line (with indication of hazmat traffic, if known), obtained from the railroad, and the likely effect that order will have on their business.

Railroad response:

Current information on planned remedial action, adequacy of response, projected completion dates, resources actually committed, progress of work to date of recommendation.

FRA actions needed to support issuance of an emergency order:

- Inspector serves Notice of Track Conditions to railroad representative. (Note: the Regional Administrator can choose to bypass this step and instead simply inform the railroad that he or she intends to recommend issuance of an emergency order based on the inspection results).
- Regional Administrator makes assignments of responsibilities to complete field investigation.
- Track Specialist alerts Track Division (RRS-15) requesting assistance, as needed. Track Division alerts Assistant Chief Counsel for Safety.
- Track Division (RRS-15) assists in the development of accident history information.
- Office of Chief Counsel and Office of Safety Assurance and Compliance, Track Division, work together to draft emergency order.
- Administrator issues order.

Wherever an emergency order has been issued by FRA, the Track Specialist shall arrange to immediately make a followup investigation to determine if the track owner is complying with the terms of the order. The Regional Administrator arranges followup inspections, as requested by railroad, to determine whether conditions for lifting the order have been fully met on all, or a portion, of the line affected.

Where followup inspections indicate that relief from the order is fully or partially warranted, the Regional Administrator notifies RRS-15 and RCC-10. Those offices draft Federal Register notices necessary to grant relief from the order.

These procedures are intended to provide general guidance. Additional information may be required in some instances. If there is any delay in the development of any elements pertaining to an emergency order, such as typing field reports, the Office of Safety Assurance and Compliance, Track Division, RRS-15, should be consulted.

Violation of FRA Emergency Order or FRA SNFR

When an inspector's investigation, inspection, or surveillance activity discloses that a carrier has violated a provision of an FRA emergency order or SNFR, the inspector will immediately report the circumstances of the violation to the Regional Administrator. The Regional Administrator will promptly transmit this information to the Associate Administrator for Railroad Safety/Chief

Safety Officer and Office of Chief Counsel for advice as to what action should be taken and what information will be required to support that action.

An emergency order or SNFR violation report shall be made in memorandum form. The subject at the heading of the memorandum should read, “Violation Report Concerning Emergency Order No. (fill in number of order) Issued Against (fill in name of railroad)” or “Violation Report Concerning Special Notice for Repairs (fill in number of notice) Issued Against (fill in name of railroad or other track owner).” The first paragraph of the memorandum report should refer to the order or notice involved, and provide a brief summary relative to the circumstances and evidence to support the violation report in accordance with the advice and instructions provided by the Office of Chief Counsel.

Enforcement of the Safety Laws and Regulations Against Individuals

For further discussion of individual liability, in addition to this Chapter, inspectors should also reference the General Manual, Chapter 3, for guidance.

Under 49 U.S.C. 21311, substantial criminal penalties may apply to individuals or companies who “knowingly and willfully” falsify records or reports required to be kept or submitted under the railroad safety laws. The TSS contains specific recordkeeping requirements (e.g., § 213.241) and a specific reference to the criminal provision (§ 213.15(b)). The “knowingly and willfully” standard essentially requires that the Government be able to demonstrate that the person knew what they were doing was wrong and did it anyway with criminal intent. The Government would need to be able to prove all elements of its case beyond a reasonable doubt. Because of the high standard for knowledge and difficult burden of proof in such cases, these are not easy to prosecute. Moreover, failure to record track defects on a railroad’s inspection records is most often the result of incompetence, negligence, or haste, rather than willful conduct. Nevertheless, if an inspector has reason to believe that a railroad might purposely be falsifying its inspection records, the inspector should contact regional staff, who should notify the HQ Office of Railroad Safety and the Office of Chief Counsel. Where appropriate, those offices will make the necessary referrals to request a criminal investigation.