THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

(110–84)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 25, 2007

Printed for the use of the
Committee on Transportation and Infrastructure

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October 22, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure, Oversight and Investigations Majority Staff

SUBJECT: Hearing on "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads."

PURPOSE OF THE HEARING

The Committee on Transportation and Infrastructure will meet on Thursday, October 25, 2007, at 10:00 a.m., in 2167 Rayburn House Office Building, to receive testimony regarding the impact of railroad injury, accident reporting, and discipline policies on rail safety. The Oversight and Investigations ("O&I") staff has conducted an in-depth review of railroad employee injury reporting practices. The purpose of this hearing is to examine allegations, included in hundreds of reports from rail employees that were collected and reviewed by O&I staff, suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job injuries.

BACKGROUND

The Federal Railroad Administration ("FRA") administers the rail safety program, and its primary responsibility is to promote and enforce rail safety regulations. The FRA has the authority to issue regulations and orders pertaining to rail safety and to issue civil and criminal penalties to enforce those regulations and orders.

The FRA relies on approximately 421 Federal safety inspectors and 160 State safety inspectors to monitor the railroads' compliance with federally-mandated standards. The key to any safety and regulatory program is the ability to collect and categorize all incident and accident data so that safety problem areas are fully understood, identified, and addressed.

The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years. The primary issue identified in many previous government investigations is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice.

In 1989, the General Accounting Office[1] ("GAO") issued a report of a comprehensive study of FRA's railroad injury and accident reporting data, which raised important questions about the quality of railroad compliance with FRA accident reporting regulations. GAO found systematic underreporting and inaccurate reporting of injury and accident data by the railroads it audited. The GAO recommended that railroads develop and comply with an Internal Control Plan ("ICP") that would clarify reporting requirements, and that FRA should use its authority to cite those railroads for inaccurate reporting arising from noncompliance with an ICP.[2] GAO also concluded, "It would be unlikely that all railroads, given the various pressures and structural changes in the industry, would adhere to their ICPs consistently, and over time, without steady pressure from the FRA."[3]

In 1996, the FRA, following GAO's above recommendations, issued a final rule – 49 CFR 225.33 – which mandated that each railroad adopt and comply with a written ICP approved by the FRA.[4] In particular, this ICP must contain provisions against the harassment of employees who report injuries occurring on the job.

The Department of Transportation Office of Inspector General ("OIG") concluded that, "FRA investigated <u>less than two-tenths of one percent</u> of all accidents and incidents involving railroads" [emphasis added].[5] From 2002 through 2004, FRA inspectors identified 7,490 critical safety defects out 69,405 total safety defects related to automated grade crossing warning signals. However, FRA recommended only 347 critical defects, or about five percent, for findings of violations that carry a fine. According to the OIG, the FRA's standard practice of allowing safety inspectors to use their discretion in deciding whether to recommend a violation has resulted in a small number of critical defects that were recommended for violations. Moreover, in those few instances where violations are found, Federal law allows the FRA to negotiate-down the amount of civil penalties proposed, and this is a common practice.

Since O&I staff began contacting various railroad labor groups on the injury accident reporting issue, staff has received several hundred e-mails and reports of alleged harassment of railroad employees who have reported injuries. Many other reports allege cases where employees were cautioned not to file an injury report, in order to avoid disciplinary action. More than 200 individual cases, with documentation, of alleged management harassment following injury reports have been provided to the Committee staff.

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[1] GAO renamed Government Accountability Office in 2004; (GAO/RCED-89-109)
[2] Internal Control Plans are now mandated by the FRA and define the procedures that each railroad uses to comply with Federal incident and accident reporting regulations.
[3] GAO/RCED-89-109.
[4] *Federal Register*, Vol. 61, No. 247, December 23, 1996.
[5] "Audit of Oversight of Highway-Railroad Grade Crossing Accident Reporting, Investigations, and Safety Regulations." DOT OIG Report Number: MH-2006-016, November 28, 2005.

FRA AUDITS OF RAILROAD INJURY REPORTS

According to FRA's "Comprehensive Accident/Incident Recording Keeping Audits" conducted under Part 225 of the FRA regulations for Class I railroads, FRA found 352 violations for underreporting, with the largest category representing failures to report employee injuries. It is important to recognize that this number of violations represents the number of underreported injury events that FRA was able to identify by auditing railroad records, but this number does not represent the number of injuries that may have never been reported by employees.[6]

In a discussion with O&I staff, the FRA Associate Administrator for Safety stated that she believed that supervisory pressure on employees to not report injuries is a significant issue. When the agency receives complaints on this subject, FRA does investigate these reports. However, she maintained that FRA simply does not have the resources to investigate the extent of the "harassment" issue.[7]

However, FRA recently conducted an extensive audit into allegations that CSX frequently harasses and intimidates employees and found numerous violations of Federal law. In the FRA's executive summary of its findings, it concluded:

> The consensus of the investigative team was that certain CSXT officers were creating an atmosphere or culture that tends to have a chilling effect on employee injury/illness reporting and which ultimately sends a message to employees that if they report an on-duty injury, they would be subject to adverse consequences.[8]

RAILROAD EMPLOYEE ALLEGATIONS OF INTIMIDATION

It is alleged that many Class I railroads have management programs and policies that inhibit or intimidate employees into not reporting on-the-job injuries. Thus, many injury accidents, that are required to be reported to the FRA, may never be reported as a result. It is alleged that railroad management personnel invoke pressure upon employees in three common ways: 1) by "counseling" them not to file an injury report in the first place, subtly suggesting that it might be in their "best interests" not to do so; 2) by finding employees exclusively at fault for their injuries and administering discipline; and 3) by subjecting employees who have reported injury accidents to increased performance monitoring, performance testing, and often followed by subsequent disciplinary action up to, and including, termination.

O&I staff examined many of the Class I railroads' safety management policies for dealing with employee injuries. All of these programs certainly appear intent on preventing injuries, but it is also clear that these programs may create "unintended consequences". A major unintended consequence is that employees generally perceive intimidation to the extent that those who are injured in rail incidents are often afraid to report their injuries or seek medical attention for fear of being terminated or severely disciplined. Many of the reports suggest that railroad employees often

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[6] United Transportation Union officials contended that up to fifty percent of on-the-job injuries by railroad workers may be unreported. (Meeting with O&I staff on October 4, 2007.)
[7] September 19, 2007 briefing by the FRA Associate Administrator for Safety to O&I staff.
[8] FRA Draft Report on CSX Transportation Harassment and Intimidation Investigation, p. 4, October 17, 2007.

find themselves the targets of a higher degree of management scrutiny immediately after filing an injury report. These practices are well-known among railroad employees and affect their willingness to report.

FRA injury reporting guidelines distinguish between "reportable" and "non-reportable" injury accidents. Typically, any injury occurring on the job that requires medical treatment and/or prescription medication is reportable and required by law to be submitted to the FRA by the company as dictated by procedures in their ICPs. These guidelines are clearly outlined in FRA regulations and official reporting guides.[9]

The following are common policies and practices that the O&I staff has identified as creating at least the potential for abuse and which are often perceived by employees as harassment and intimidation:

"Risky" Employee Assessments: Burlington Northern Santa Fe ("BNSF") uses a points system ("red/green program") where employees are assigned points for safety incidents, rule infractions, and injuries. The program assigns 40 points for a FRA-reportable injury and 5 points for a non-reportable injury. The points are apparently assigned whether the injury is the fault of the employee or not. When an employee receives 45 points (becomes a "red employee"), he or she is automatically targeted with additional inspections and performance checks. The net effect to the employee is that suffering an FRA-reportable injury often places an employee in disciplinary jeopardy, and reportedly inhibits employees from seeking medical treatment and filing FRA-required safety reports. BNSF reported to staff that they were re-evaluating their use of "red/green" employee points system.[10]

Union Pacific ("UP") also uses a similar policy called the Employee Quality Management System ("EQMS"), where each employee starts with 1,000 points and then receives debits and credits based on observed performance and structured testing. An EQMS score of 900 could subject the employee to Field Training Exercises, which allows management to test and monitor employees essentially at their discretion.[11] UP also has "Preferred Attention List" Employees or "PALs", which are employees identified by management based on: personal injury, absenteeism, human factor incidents, major rule violations, current discipline, EQMS score, and attitudinal behavior. A PAL employee is assigned a "manager mentor" to "coach" the employee over 90-day increments. UP recently reported that it is in the process of changing this aspect of its PAL program to ensure that every employee receives a similar mentoring program.[12]

Railroad management typically refers to these practices as necessary to identify employees, who are "at risk" and who may need coaching and counseling. They suggest that targeting risky employees is a more effective use of management and training resources, and that these programs are only to assist workers in being more careful. However, employees frequently perceive these interventions as harassment. The practical effect of these programs is that they appear to suppress

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[9] *FRA Guide for Preparing Accident/Incident Reports*, FRA Office of Safety, DOT/FRA/RRS-22, May, 2003.
[10] October 12, 2007 meeting between BNSF and O&I staff.
[11] 49 CFR 217.9 requires railroads to conduct operational tests and inspections, however each railroad can design and tailor their own policies as they deem appropriate to meet this requirement.
[12] October 12, 2007 meeting between UP and O&I staff.

injury reporting, and that they often subject employees to a higher probability of discipline in the future.

Targeting Employees for Increased Monitoring and Testing: Injured employees are sometimes "targeted" for close supervisor scrutiny, and staff reviewed numerous reports of minor rule infractions resulting in employee termination following injuries. O&I staff obtained a CSX presentation to managers, entitled "Safety Action Plan", that required supervisors to identify their five "most at risk employees". This new policy was to closely observe the targeted employees in each operating region over a period of time. Staff obtained several examples involving different railroads of minor rule infractions resulting in employees being fired for relatively minor incidents following injuries reported to FRA. In one case, an employee was fired for heating a can of soup in the locomotive (even though this is a common practice for which most are not disciplined); and in another case, an employee was fired because he failed to inform his supervisor that he had an appointment with his personal physician in connection with a previously reported injury, even though the appointment was during his off-duty time.

Supervisors Discouraging Employees From Filing Accident Reports: It is alleged that front-line supervisors often try to subtly prevent employees from filing injury reports and/or lost work day reports in an attempt to understate or minimize on-the-job injury statistics for FRA reporting purposes. If medical treatment or prescription medication is declined by an employee, then the injury accident becomes "non-reportable" for FRA purposes. O&I staff has a court-certified transcript of a tape recording where a railroad supervisor subtly cautions an employee not to file an accident report, because of the increased scrutiny it will bring to him. A senior supervisor at one major railroad was recently fired for attempting to cover up multiple FRA-reportable employee injuries.

Supervisors Attempting to Influence Employee Medical Care: Railroad supervisors are often accused of trying to accompany injured employees on their medical appointments to try to influence the type of treatment they receive, or try to send employees to company physicians instead of allowing a choice of their own treatment providers. There are reports of employees being instructed by supervisors after an accident that they cannot go to the hospital or seek medical attention until they sign certain forms, give statements, or attend accident reenactments. Railroad supervisors have insisted on accompanying injured employees into exam rooms and attempt to have private conversations with treating doctors. O&I staff reviewed cases where railroad supervisors have allegedly denied and/or interfered with initial medical treatment for injured employees. The type of treatment and medication the patient receives determines whether the injury becomes FRA reportable. Moreover, FRA-required ICPs and railroad policies specifically prohibit any interference with the medical treatment of injured employees.

Light Duty Work Programs v. Injury Leave: Some railroads are accused of using "light duty programs", where injured employees are told to come to work, often doing nothing but sitting in an empty room. The employees are paid for their time, but this policy could be viewed as another subtle form of intimidation. It also allows carriers to minimize the required reporting of lost work days to the FRA. Since the injured employee is unable to do his or her normal work duties, the railroads often claim that no lost work day occurs since employees are "at work". Thus, lost work day statistics are also likely underreported to the FRA.

Availability Policies: Another practice, allegedly used by railroads to prevent employees from missing work days is a company "availability policy". These are policies that require an employee to work a certain number of days per year. If the employee cannot work the required number of days, he or she is no longer a full-time employee. Injured employees trying to retain their jobs and full benefits are then faced with the dilemma of complying with the railroad's availability policy, and pressured into returning to work before full recovery from a previous injury.

Supervisor Compensation: One alleged cause of the pressure placed upon injured employees is the compensation system for rail supervisory personnel. A part of management compensation is often based upon performance bonuses, which can be, in part, based upon reportable injury statistics within their supervisory area. Thus, it is alleged that meeting bonus targets provides an incentive for some front-line supervisors to place direct and/or indirect pressure on employees to not report injuries.

RAILROAD SAFETY PROGRAMS AND INTERNAL CONTROL PROGRAMS

O&I staff requested the ICPs and safety programs from all the major railroads. These documents were received from six of the eight Class I railroads. All of the company plans reviewed appear to comply with FRA regulations on the required components of ICPs. All contain the required "anti-harassment provisions" for employees reporting injuries.

Meetings were held by O&I staff with senior executives of five railroads who supplied their safety programs and ICPs.[13] All of these officials stated that they maintained a "zero-tolerance" policy toward supervisors who intimidated employees or otherwise attempted to suppress injury reporting. They cited examples where supervisors were discharged for actions related to covering up injury reports. Most of the railroads contended that they audited their insurance claims against FRA injury reporting programs required under ICPs in an effort to ensure that all FRA reportable injuries were being captured and reported. However, as FRA audit records repeatedly demonstrate, this system still fails to capture numerous unreported incidents. Some railroads do a better job than others.

All of the railroads reported that they had established toll-free employee hotlines, some administered by a "neutral" third party, for the expressed purpose of providing employees with a safe and confidential mechanism for reporting cases of employee harassment, as well as other safety and ethics incidents. All reported that they carefully investigate every single report to the employee hotline – often having each report reviewed by the company's safety or operating officers. However, railroad employees frequently suggested that they did not trust these "hotlines", saying it was virtually impossible to keep complaints made against their supervisors anonymous, and they feared subsequent retribution by reporting to the ethics hotlines.

Railroad officials maintain that "at risk" employee tracking systems, or "points systems," where certain employees receive heightened management scrutiny, are useful tools to identify the employees who are most likely to be involved in an accident. They suggest that the intent of these management tools is to "counsel and assist" employees in avoiding hazardous behavior and subsequent injuries in the future. The railroads admit that sometimes severe discipline is applied in

[13] Burlington Northern Santa Fe, Canadian Pacific, CSX, Norfolk Southern, and Union Pacific. Kansas City Southern also submitted an ICP.

instances of "dangerous" behavior and violations of FRA regulations, and they argue that, under the law, they must comply with Federal regulations regarding rule infractions and discipline, up to and including termination in many cases.

It appears that at the senior executive level, at least, the major railroads are attempting to proactively manage safety and to comply with the FRA regulations as outlined in each railroad's approved ICP. It also appears that these systems routinely break down at the front-line, supervisory level. While front-line supervisors may not always set out to harass employees into not reporting injury accidents, the "unintended consequence" of many management safety programs appears to be that front-line supervisors often feel pressured to meet safety goals and sometimes subtly (or not so subtly) engage in behaviors that are perceived by employees to be "management harassment". A frequently-heard response during preparation for this hearing is that "railroad culture" is the primary culprit. Several rail executives referred to the fact that the industry was developed on an authoritarian-based "military model" more than a century ago, which remains embedded today.

All of the railroad executives interviewed in preparation for the hearing, as well as the American Association of Railroads, acknowledged that the "railroad culture" has traditionally been characterized by very adversarial labor-management relationships and remains so today. Virtually all the railroad executives interviewed in preparation for this hearing contend that the Federal Employers' Liability Act ("FELA") of 1908 is a causal factor in creating this adversarial environment.

FELA was enacted at a time when the railroads were the nation's largest employer and rail work was particularly hazardous. According to a 1996 GAO study, in the early 1900s, injured railroad workers had difficulty getting compensated under the common law that governed injury compensation.[14] Railroads often avoided paying compensation for on-the-job injuries by arguing, for example, that an injury was the result of co-worker negligence or that workers accepted the risk of injury at the time they accepted railroad employment. FELA provided rail workers with more protection against denied railroad liability, but workers are required to establish employer negligence to receive compensation.

FELA applies exclusively to the railroad industry and is a "fault-based" system, while most workers in other industries are covered by state government-administered, "no-fault" workers' compensation systems. The railroads argue that this "fault-based" system creates the adversarial labor-management relationship.

Railroad labor groups, on the other hand, believe that FELA is working well and should not be replaced or changed. In these organizations' view, FELA provides workers the opportunity to fully recover their losses from on-the-job injuries and provides railroads with an incentive to operate more safely.

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[14] GAO report to Subcommittee on Railroads, Committee on Transportation and Infrastructure, *Federal Employers Liability Act: Issues Associated with Changing how Railroad Work-Related Injuries are Compensated*, GAO/RCED-96-199, August 1996.

THE REGULATORY ENVIRONMENT: FRA VS. FAA REGULATORY APPROACHES AND "HUMAN FACTORS"

Another factor that was cited by many during preparation for the hearing is the "traditional" regulatory philosophy of FRA, which is similar to the traditional law enforcement model. FRA safety inspectors spot check for rule infractions, and are tasked with invoking a system of civil penalties and other enforcement actions to ensure compliance by the railroad industry. However, with a limited inspector force of approximately 420 inspectors, FRA cannot hope to oversee but a tiny fraction of railroad operating practices.

By contrast, the Federal Aviation Administration ("FAA"), while still employing traditional regulatory practices (albeit with a much larger inspector force of approximately 3,000 inspectors), has been very successful at augmenting its inspector force and conventional enforcement models with the implementation of "government/industry partnership" approaches to safety regulation.

In the 1980s, scientists at the National Aeronautics and Space Administration ("NASA") and leading universities demonstrated persuasively that more than 75 percent of all incidents and accidents in air transport have some sort of human-related causal factor.[15] More importantly, however, this seminal research demonstrated that accidents almost always involve multiple and interrelated causal factors. While the final "pilot error" may have been the most salient and obvious factor in an accident sequence, there are always many other factors that either caused the pilot to make the error, or allowed a simple error to progress to a catastrophic conclusion. In this philosophy of accident causation, it makes little sense to blame a complex accident sequence on a single human operator, when there were many other factors that led the operator down a path toward making the "final" error. Pronouncing an accident "human error" sheds very little useful light on <u>why</u> an accident occurred.

Recognizing these human factors and complex accident causation principles, the FAA began to promote and establish voluntary reporting programs such as NASA's Aviation Safety Reporting System ("ASRS"), where anyone in the aviation system could report a mistake or a violation and receive immunity from the finding of a civil penalty violation. In addition, the FAA has established a "Voluntary Self Disclosure" program where both organizations and individuals can disclose a violation, cease and desist from the unsafe practice, develop a corrective action plan, and be immune from civil penalty action. The dramatic improvement in U.S. airline safety over the last two or more decades has been directly linked to the implementation of these "non-punitive" principles in the regulatory environment.

It is clear that these programs have led to a more open and to a more complete and non-punitive, safety reporting culture in aviation, and that the FAA and air carriers have eliminated many of the factors inhibiting incident and accident reporting. The FRA is just beginning to experiment with similar techniques, and has begun a pilot program, the Confidential Close-Call Reporting System ("C3RS"), which has similar features to the FAA's voluntary self-disclosure programs. To their credit, some railroads have begun to institute C3RS in some areas.[16] These types of "non-punitive" regulatory programs continue to provide significant benefits, and it is difficult to argue with the dramatic improvements in air transportation safety.

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[15] *Human Factors in Aviation*, Wiener and Nagel (Eds.), Academic Press, 1986.

[16] Union Pacific is implementing a trial C3RS program as indicated to O&I staff.

Today's railroad regulatory environment is more oriented toward assigning blame to a single individual, without a thorough examination of the underlying causes that led that single individual to commit an error. This approach is apparent in both railroad internal investigations of injury accidents, as well as FRA regulatory reports.

LEGISLATIVE ISSUES

It has been suggested that the major railroads traditionally have had a financial incentive to underreport injury and accident statistics as a means of avoiding Congressional legislation or additional FRA regulations. On the surface, the available safety statistics seem to support railroad claims of decreasing injuries and improving statistics. However, for reasons discussed above, the validity of these statistics is subject to question.[17]

A related issue is reflected in the legislative history of statutes passed by the states of Minnesota and Illinois. Both states were concerned by the large number of reports of rail carriers denying medical treatment or interfering with medical treatment of injured employees, and state statutes were passed prohibiting such conduct by rail carriers. In each case, rail carriers joined together and challenged these statutes in Federal District Court. The Illinois Federal District Court struck down its statute on the basis of Federal preemption; the Minnesota Federal District Court struck down the Minnesota statute in part for the same reason. Both cases are now on appeal.

Section 1521 of Public Law 110-53, the "Implementing Recommendations of the 9/11 Commission Act of 2007", and section 606 of H.R. 2095, as passed by the House on October 17, 2007, are intended to address the above problems. Section 1521 strengthens whistleblower protections for rail workers and could prevent harassment. Section 606 is similar to state laws in Minnesota and Illinois that were struck by federal courts as preempted. By enacting both of these provisions, a uniform national standard will be created for the protection of injured workers and allow them access to immediate medical attention free from railroad interference.

[17] In addition, it is important to recognize when looking at injury reporting data over the years, that due to industry consolidation, there are far fewer railroad employees than there were 10 years ago, thus fewer injury reports.

WITNESSES

PANEL I

The Honorable Joseph H. Boardman
Administrator
Federal Railroad Administration
Washington, DC

PANEL II

Mr. William G. Jungbauer
President
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Mr. James M. Brunkenhoefer
National Legislative Director
United Transportation Union
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Mr. John Tolman
Vice President & National Legislative Representative
Brotherhood of Locomotive Engineers and Trainmen
International Brotherhood of Teamsters
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Mr. David Cook
Former CSX Locomotive Engineer
Sumter County, FL

Mr. Gregory Haskin
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Norfolk Southern Corporation
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Canadian Pacific Railway
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Mr. Ed Hamberger
President
American Association of Railroads
Washington, DC

Mr. Sherman Joyce
President
American Tort Reform Association
Washington, DC

TOTAL ACCIDENTS AT A GLANCE

(Breakdown: train accidents + grade crossing accidents + other incidents)

	1996	1997	1998	1999	2000	2001	2002
Total Accidents/Incidents	17,690	16,698	16,501	16,776	16,919	16,086	14,403
Frequency Rate	26.37	24.68	24.16	23.55	23.41	22.61	19.77
Total Fatalities	1,039	1,063	1,008	932	937	971	951
Total Injuries	12,558	11,767	11,459	11,700	11,643	10,985	11,103
Total Train Miles	670,923,960	676,716,407	682,894,841	712,452,725	722,876,632	711,549,906	728,674,146
Total Employee Hours	504,598,777	503,917,598	514,869,550	509,997,442	490,926,324	475,119,692	454,102,243

	2003	2004	2005	2006
Total Accidents/Incidents	15,350	14,514	14,192	13,237
Frequency Rate	19.30	18.84	17.95	16.33
Total Fatalities	868	895	886	909
Total Injuries	9,247	9,166	9,421	8,224
Total Train Miles	743,525,419	770,260,190	790,496,579	810,770,693
Total Employee Hours	451,139364	458,382159	478,440080	485,617,018

Note: Total accidents/incidents is the sum of train accidents, highway-rail incidents, and other incidents. Total accident/incident rate is the number of events times 1,000,000 divided by total train miles.

Train Accidents

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Total Train Accidents	2443	2397	2575	2768	2983	3023	2738	3013	3378	3250	2925
Number per million train miles	3.64	3.54	3.77	3.89	4.13	4.25	3.76	4.05	4.39	4.11	3.61
Train Accident Fatalities	25	17	4	9	10	6	15	4	13	33	6
Train Accident Injuries	281	183	129	130	275	310	1884	232	317	776	199
Collisions	205	202	168	205	238	220	192	198	238	270	195
Derailments	1816	1741	1757	1961	2112	2234	1989	2129	2430	2299	2157
Other accidents	422	454	650	602	633	569	557	686	710	681	573
Number of accidents on Yard Track	1299	1223	1306	1531	1619	1569	1478	1671	1930	1806	1535

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Human Factors	783	855	971	1031	1147	1035	1050	1229	1352	1259	1039
Equipment Defects	318	271	307	321	372	427	367	361	428	369	342
Track Defects	905	879	900	995	1035	1121	941	972	1051	1080	1052
Signal Defects	49	39	38	49	70	42	50	58	70	63	46
Other causes	388	353	359	372	359	398	330	393	477	479	446

Note: A train accident is an event involving ontrack rail equipment that results in monetary damage to the equipment and track above $6,600. Lading, clearing costs, and environmental damage are not included.

Grade Crossing Accidents

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Number per million train miles	6.34	5.71	5.14	4.90	4.84	4.55	4.22	4.00	3.99	3.86	3.61
Total Highway-Rail Incidents	4257	3865	3508	3489	3502	3237	3077	2977	3077	3053	2924
Total Fatalities	488	461	431	402	425	421	357	334	372	358	369
Total Injuries	1610	1540	1303	1396	1219	1157	999	1035	1092	1023	1029

Trespassing Incidents

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Frequency per million train miles	1.41	1.55	1.54	1.30	1.21	1.29	1.28	1.21	1.14	1.10	1.22
Trespassing Fatalities (not at crossings)	471	533	536	479	463	511	540	501	483	476	530
Trespassing Injuries	474	516	513	445	414	404	395	396	396	395	466

NOTE: A highway-rail incident is any impact between a rail and a highway user at a crossing site, regardless of severity.

Other Incidents

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Other Incidents	10,990	10,437	10,420	10,519	10,433	9,827	8,589	8,360	8,059	7,889	7,388
Other Incident Fatalities	526	585	573	521	502	544	579	530	510	495	534
Other Incident Injuries	10,557	10,044	10,027	10,174	10,149	9,518	8,220	7,980	7,757	7,622	7,016

NOTE: Other incidents include any event that caused a death or an injury to a person, or an occupational illness to a railroad employee. Most fatalities in this category are trespassers.

EMPLOYEE ON DUTY CASES

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Employees on duty cases	9232	8332	8425	8653	8447	7837	6664	6267	6040	5827	5193
Total employee fatalities	33	37	27	31	24	22	20	19	25	25	16
Total employee injuries	9199	8295	8398	8622	8423	7815	6644	6248	6015	5802	5177

INSPECTION RECORDS

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
BNSF	5,981	5,508	6,361	6,242	6,959	7,727	8,245	8,736	8,071	7,416
Canadian National	1,950	2,065	1,351	1,593	1,539	1,746	1,803	1,927	2,127	1,809
Canadian Pacific	753	599	529	473	533	465	673	648	632	667
CSX	7,130	7,604	6,838	8,158	9,678	10,124	10,411	11,473	11,614	11,113
KCS	741	575	739	963	833	979	1,177	1,262	1,011	1,177
Norfolk Southern	4,350	3,818	4,106	5,394	6,782	7,569	7,736	8,033	7,776	7,593
Union Pacific	9,349	9,621	11,019	11,158	11,483	12,686	14,844	14,615	13,767	12,348

DEFECTS FOUND

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
BNSF	24,104	27,499	28,468	23,781	26,649	36,099	31,753	32,613	33,035	31,229
Canadian National	89,47	10,631	5,808	9,191	8,950	12,366	11,589	11,370	12,797	8,917
Canadian Pacific	4,640	4,615	3,505	3,421	3,567	3,585	5,701	4,326	3,417	3,856
CSX	29,894	38,893	35,885	47,069	59,228	57,461	54,301	62,115	62,093	57,217
KCS	3,922	2,797	4,175	9,423	3,184	6,973	7,583	8,138	8,107	9,036
Norfolk Southern	2,2247	17,493	24,436	34,702	49,883	55,676	45,436	45,760	45,279	38,189
Union Pacific	45,281	50,472	48,888	51,966	57,838	70,843	76,152	75,162	68,739	63,281

TOTAL ACCIDENTS BY THE FOUR MAJOR CLASS I RAILROADS

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF	2108	2064	2253	2303	2409	2407	2088	1952	2049	2006	1924
CSX	1318	1432	1580	1835	2115	1853	1657	1912	1841	1641	1456
Norfolk Southern	1224	1069	1117	1407	1546	1308	1328	1390	1424	1380	1224
Union Pacific	3611	3218	3389	3632	3218	3210	2778	2556	2694	2681	2626

TOTAL FATALIES BY THE FOUR MAJOR CLASS I RAILROADS

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF	174	180	209	130	151	126	149	136	143	152	147
CSX	101	112	125	120	124	143	120	134	137	112	135
Norfolk Southern	108	108	112	104	118	126	126	108	127	139	118
Union Pacific	294	258	240	278	204	211	221	207	203	173	226

TOTAL INJURIES BY THE FOUR MAJOR CLASS I RAILROADS

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF	1208	1174	1412	1495	1493	1485	1242	1115	1105	1139	1108
CSX	847	894	953	1150	1324	1119	859	980	980	753	692
Norfolk Southern	657	534	563	756	778	653	614	662	618	922	572
Union Pacific	2207	2101	2192	2356	1994	1877	1566	1374	1376	1408	1353

PRIMARY CAUSES OF ACCIDENTS BY THE FOUR MAJOR CLASS I RAILROADS

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF	TRACK	TRACK	HUMAN	TRACK	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN
CSX	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN
Norfolk Southern	HUMAN	HUMAN	HUMAN	HUMAN	HUMAN	TRACK	TRACK	HUMAN	TRACK	HUMAN	HUMAN
Union Pacific	TRACK	HUMAN	HUMAN	TRACK	TRACK	TRACK	TRACK	HUMAN	HUMAN	HUMAN	TRACK

OVERSIGHT AND INVESTIGATIONS HEARING ON THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

Thursday, October 25, 2007

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Committee met, pursuant to call, at 10:05 a.m., in Room 2167, Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Full Committee] presiding.

Mr. OBERSTAR. Good morning. The Committee on Transportation and Infrastructure will come to order. Apologies from the Chair for being delayed. Unfortunately, people just stop in to a Member's office, and you can't turn them away.

This morning, we gather for a very important hearing, a very critical examination of rail safety, and we do so a week after the House passed, by a vote of 377 to 38, the Federal Rail Safety Improvement Act, another historic act from this Committee with enormous, as the vote shows, bipartisan support to enhance safety in the rail sector, increase the number of rail safety inspectors and enforcement personnel.

It has been a long time in coming. Only once in the last 100 years has there been a significant amendment to and update of the Rail Safety Act of 1907.

Well, the issue we consider today is that of railroad injury, accident, and discipline policies. The accuracy of the databases for rail safety has been criticized by a number of government reports over the years. Reports have documented a long history of under-reporting of accidents, under-reporting incidents, of noncompliance with Federal regulations; and under-reporting of rail injuries is significant because employees frequently report that harassment of those who do report incidents, being hurt on the job, is a common practice in the rail sector.

One of the reasons for this pressure is the 1908 law itself, the Federal Employers Liability Act, and under-reporting or withholding of reporting makes accident statistics look better than they really are, but it denies the public, it denies regulators, and it denies the Congress a full understanding of the nature and extent of safety problems in the rail industry, and that is vital to improving safety. And it is not right for people on the job to be told you shouldn't report this injury; maybe you can just sit here in the health room, maybe you just need an aspirin or maybe you just

need a little time, and don't put this on the report because then it becomes an accident, and then that looks bad for the railroad. Most often, these incidents happen at inconvenient times: late hours, during bad weather.

I recall my own experience working in the mine, sampling ore in the night shift on top of a rail car. We had to crisscross the car, take little samples in an X, put them in a canvass bag, throw the bag over, and then jump to the next rail car and go on and sample ore on it, and then send that ore sample to the lab so it could be analyzed before the train was dispatched to Lake Superior for shipping.

And it happened one of those nights, night shift, about 1 a.m., 2 a.m. It was raining, and as I was making the move from one car to the next, the ore slipped out from under me and I fell 15 feet and landed right between two ties; smacked my head. Fortunately, I missed a rock that was right nearby that would have gone into my temple. Some of my political opponents of the years thought that probably would have been a good idea.

But I sat there in the dry, as we call it, for quite some time. There wasn't a car to take anybody injured to treatment, to the hospital, to go to town. Eventually, a first aid person came and looked me over and said, well, tomorrow morning you go check in at the hospital. It was reported under the mining laws as an on the job injury.

I grew up in a mining family. My father was chairman of the safety committee in the underground mine. Safety, to me, was something that was an everyday matter; required everyday vigilance. I never forget my father coming home midday, white as a sheet. The mine collapsed; the drift that he was working in collapsed. He had thrown his two coworkers out the mouth of the drift when he heard the timbers cracking, and the ore stopped just at his shoulders. It took four hours to dig him out. But for weeks, as chair of the safety committee of the underground mine, he had complained to the company that they were using green wood timbers, they weren't putting seasoned wood in the drifts to hold up the ceiling of the drift.

That was just one incident, but when you are the victim or when you see the victims, it has a different effect, a lasting effect.

So when I began hearing reports, which was a few years ago, about these matters, I said this is serious stuff: intimidation, threats on the job; some not so subtle, some perhaps subtle. So I directed the Oversight and Investigation Staff to get out in the field and go out and talk about injury accident reporting. Since then, we have had a floodgate of e-mails of alleged harassment of railroad employees. Some are cases where employees were cautioned by managers not to file an injury report in order to avoid future problems or disciplinary action. We have 200 individual cases with documentation of alleged management intimidation following injury reports, and they have been provided to the Committee.

We have reviewed the most recent FRA comprehensive accident incident reporting and recording audits. Those audits, conducted at major railroads. FRA found 352 violations of Federal law for underreporting in the largest category: failure to report employee inju-

ries. That is only the number of under-reported injury events that FRA was able to identify. Maybe just the tip of the iceberg.

The associate administrator of FRA for safety said she believed that supervisory pressure on employees to not report injuries is a significant issue. When the agency receives complaints, FRA does investigate reports. But the associate administrator maintained that FRA simply does not have the resources, meaning people, to investigate the extent of the harassment issue. If our legislation, H.R. 2095, is enacted, we will see an increase in personnel; FRA will have the staffing they need to follow up.

Many railroads have management programs and policies that may give the benefit of the doubt and unintentionally inhibit or intimidate employees into not reporting injuries on the job. The result is many injury accidents may never be reported. We have seen a number of cases—I have looked at the docket myself—where railroad managers sometimes bring pressure on employees, one, counseling don't file that injury report, it is in your best interest not to do this; finding, secondly, employees exclusively at fault for their injuries: you are the cause, you are the fault of your own problem; and, third, subjecting employees who report an injury accident to increased monitoring and performance testing on the job. I know how intimidating that can be in the mines, in the shops. I have seen it. And we can't allow this to continue to happen.

We have to find a way to have a more open, non-punitive environment for reporting of rail incidents and accidents, and an environment where railroad workers feel free to come forward and report. That will be a subject of inquiry in the course of this hearing today. We are going to hear some very startling and dismaying testimony, but it has to be laid out in the public, and then we have to move ahead to address it in a constructive manner.

With that, I withhold further comment and yield to the distinguished gentleman from Pennsylvania, Mr. Shuster, our Ranking Member.

Mr. SHUSTER. Thank you, Mr. Chairman. I first want to start off by congratulating you and Chairwoman Brown for the passage of the Rail Safety Act, and thank you for working with us. We didn't get everything we wanted in there, but we certainly know we have another opportunity. I understand that the Senate is trying to work through a rail safety bill, and hopefully we will take a conference——

Mr. OBERSTAR. If the gentleman would yield.

Mr. SHUSTER. Certainly.

Mr. OBERSTAR. I want to express my appreciation to the gentleman for his thoughtful manner in approaching this issue. We had many, many hours of discussion, and constructive discussion, and the gentleman came forward with thoughtful recommendations for changes in the legislation, and the end result was, I think, a very good bipartisan product.

Mr. SHUSTER. Thank you very much. And, again, congratulations, we look forward to seeing that Senate bill come forward and moving through the process.

Today's oversight hearing on rail safety is a subject that has been examined many times in the past couple of years by this Congress and the last Congress, and each time we found that our rail

safety programs have made significant positive impact and progress. The railroads have a large presence in my home State of Pennsylvania and safety is a top priority for me. We are coming off a record year for safety in the rail industry, and I certainly, every chance I get, like to point out, especially in a public forum, some of those statistics.

In 1996 there were 33 railroad employees killed. In 2006, that is down to 16; 16 too many, but still is an improvement, significant improvement. In 1996, 25 employee deaths were involved in train accidents; in 2006 there were only 6. Passenger trains carried 397 million people in 1996 and 12 passengers were killed, and in 2006 almost 550 million passengers and only 2 fatalities.

I cannot say enough. In 2006, it was the best year yet, but there is always room for improvement and, of course, that is what we want to focus on today and as we move forward.

Today's hearing will focus on allegations that railroad safety policies may have unintended consequences, such as harassment and intimidation of employees who report injuries on the job. Working through these issues, coming to better understand FELA, which, as the Chairman pointed out, was passed in 1908, 100 years ago, it appears to me that the FELA, Federal Employees Liability Act, doesn't encourage disputes being settled in a positive way, but, from what I can tell, it encourages litigation. It encourages, when there is a problem, both sides get attorneys and we go to war.

And I think we need, as the Chairman pointed out, a more open and non-punitive process that will encourage cooperation. All types of businesses across this Country and across the world, when we are cooperating, finding problems, finding solutions, not sitting in a courtroom, enriching attorneys, but enriching the business by making it safer for employees, by improving the quality of the product or the quality of the service that we provide, I think that is what we need to focus on and, again, stay away from the courtroom and stay away from hiring attorneys that are just going to go out there and battle one another, instead of, as I said, sitting down the table, figuring out a positive solution.

In 1997, the FRA implemented a new regulation which required each railroad to adopt and comply with a written internal control plan. This plan bans the practice of intimidating or harassing employees who wish to file an injury claim or seek medical treatment. My understanding is that the railroads have disciplined or even fired managers for violating this policy. When you have hundreds of thousands of people involved on both sides, I am certain situations like these occur, but I don't believe, from what I can see, that it is widespread on either side. I think people with good intentions are out there trying to make sure that, whether they are labor, whether they are management, trying to improve the safety in the rail system.

Additionally, hefty fines and civil penalties are placed to discourage such harassment. In fact, the recently enacted 9/11 bill imposes $250,000 in punitive damages on railroads who intimidate or harass injured workers. As a matter of full disclosure, it is important for me to point out that the majority staff will likely reference an FRA report today that is still in draft form, and it should be treated as such during questioning.

Finally, I want to point out, in full disclosure, I am not an attorney, thank goodness. My brother is an attorney, so I take full liberty to bash attorneys whenever I get the opportunity. I feel that gives me the right, if I have a family member that is an attorney, which I am sure turnabout is fair play; I am the politician, so he can bash me from time to time.

But I am troubled by the Committee's decision to call certain witnesses who have litigation pending in the courts. This Committee has always avoided taking an action which might appear to prejudice litigation, and that is exactly where we are heading today, I am afraid. We have two witnesses who are parties to pending litigation against the railroads, and another of our witnesses is a lawyer who is suing the railroads. So I would ask our Members to please keep this in mind when they are questioning these witnesses today.

With that, I look forward to the testimony today and I thank you, Mr. Chairman, for holding this hearing.

Mr. OBERSTAR. Thank you, Mr. Shuster. Your last point about whether it is appropriate or just raising the question about witnesses who are involved in litigation, it is not at all a common fact, regular practice of the Committee over the many years that we have conducted investigations and oversight. One of my very first hearings as Chair of the Investigations and Oversight Subcommittee was on Galaxy Airlines crash, a fatal crash in Reno, Nevada, in which 93 people from the State of Minnesota were killed; one survivor. The matter was under investigation, there were lawsuits pending. We held a hearing on the safety issues, the safety implications of that crash. We held hearings on TWA 800 while lawsuits were pending and while the NTSB investigation was underway. Careful to separate those matters that were under litigation and investigation, and make sure that witnesses were not pressed to answer questions that were the subject of litigation. We held hearings on the Value Jet accident. In fact, that was a Full Committee hearing in which we had witnesses shielded from public view.

So, we are being very careful on the line dividing courtroom testimony from a matter that is appropriately the subject of safety inquiry.

We do have a vote in progress. We have probably 5 minutes left.

Ms. Brown, the Chair of our Rail Subcommittee and a vigorous advocate for rail safety and for railroads in general and rail workers.

Ms. BROWN. Thank you, Mr. Oberstar, for your leadership on this Committee and also on improving safety in all transportation sectors.

I want to thank you, Mr. Shuster, for your leadership, along with Mr. Mica, in passing the railroad safety bill.

The Railroad Subcommittee has concentrated on safety in the rail industry, and that includes the safety and well being of railroad employees. The railroad safety bill will address many of the issues that we are going to discuss today. The bill that passed overwhelming the House last week had seven provisions that would improve the reporting of railroad accidents: it would require the Federal Railroad Safety Administration to conduct audits of railroads

to ensure that they are fully reporting all accidents and incidents to the national accident database; it increased the maximum penalty for failing to report an accident; it makes it unlawful for anyone to knowingly interfere with or obstruct an investigation by the Secretary of Transportation or the National Transportation Safety Board; it also doubles the number of Federal safety inspectors who monitor the railroad compliance with Federal standards.

I have talked to CEOs and senior management of all of the major railroads, and I know that they do not support or condone employee intimidation in any form, but that message needs to be made clear to every employee in the company, including those in the field. There may also be a need to reconsider some of the company's programs that encourage under-reporting of accidents, while still ensuring that employees have the right to make sure that workers are following the rules and doing their job properly.

We also need to consider the inherent problem that is caused by a faulty base compensation system and need to look at improving a system that now seems to pit management against employees. Nobody wants to see people get hurt on the job, and an injury should not be compounded by a hostile work environment.

I look forward to hearing from today's panelists on ways that we can create a culture of safety in the railroad industry so that both the management and workers can safely handle the significant increased workload that is predicted for America's railroads.

I yield back the balance of my time.

Mr. OBERSTAR. I thank the gentlewoman for her statement.

We have just two minutes remaining on this vote. The Committee will recess and reconvene as quickly as possible after this vote.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting. When we recessed for the vote, Ms. Brown was concluding her statement, and the Chair recognizes the Chair of the Rail Subcommittee, Ms. Brown.

Ms. BROWN. Thank you, Mr. Chairman. I think I need to just repeat some of the things that I said to reiterate. First of all, I think I said that since we passed the railroad safety bill and it passed by a large measure and the Senate is beginning to work on their bill, many other problems that are inherent with railroad reporting and safety I think have been addressed in the railroad safety bill. But I think there are a couple of aspects of this program that I want to repeat what I said earlier.

One, I talked to all of the CEOs and senior management of all of the major railroads, and I know that they don't support or condone employee intimidation in any form. But that message needs to be made clear to every employee in the company, and, in particular, including those that work in the field.

We also need to consider some companies' programs that encourage under-reporting of accidents, while still ensuring that employees have the right to make sure that workers are following the rules and doing their jobs properly.

We also need to consider the inherent problem that is caused by a faulty base compensation system and need to look at improving

a system that now seems to pit management against employees, and I say may need to look at.

No one wants to see people get hurt on the job, and injuries shouldn't be compounded by a hostile work environment. I look forward to the hearing today and the panelists, and I have questions for all of them, that we can create a culture of safety in the railroad industry so that both the management and workers can safely handle the significant increased workload that is predicted for American railroads.

And I yield back the balance of my time.

Mr. OBERSTAR. Mr. McNerney?

Mr. MCNERNEY. Thank you, Mr. Chairman. First of all, I would like to say that the railroad business is in my family; my grandfather was a railroad engineer, I have cousins that work in the industry. So I am keenly interested in the outcome of this hearing and seeing that railroad employees have a culture of safety. It is true that every side should be aligned on the safety issue. It is in everyone's interest that safety be maintained and that injuries be minimized. So we can look at this objectively and find a way forward.

I look forward to the testimony and thank the Chairman for his leadership on this issue.

Mr. OBERSTAR. I thank the gentleman and appreciate his personal connection to the subject matter; it always adds a dimension of significance and heavy weight. Thank you.

Does the gentleman from Wisconsin have a comment to make?

I would ask unanimous consent to include in the record, at the conclusion of my opening statement, the letter from the Attorney General of the State of Minnesota, Lori Swanson. Without objection, so ordered.

She concludes: "All can agree that railroads should not deny prompt medical attention to injured rail workers and should not discipline or otherwise harass and intimidate them. While it is my strong belief that our state law is not preempted, I nevertheless urge the Congress to act to ensure that rail workers throughout the nation, not just in Minnesota, are provided prompt medical care and not subjected to harassment and intimidation." And this follows several paragraphs describing the State's action in the legislature enacting protective legislation and pursuing the matter in lawsuits in Federal District and Circuit Court.

Now we will begin, as we will do with all witnesses, Mr. Boardman, if you would rise and raise your right hand. Do you solemnly swear the testimony you will give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

[Witness answers in the affirmative.]

Mr. OBERSTAR. Thank you. Please begin.

TESTIMONY OF THE HONORABLE JOSEPH H. BOARDMAN, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, WASHINGTON, D.C.

Mr. BOARDMAN. Thank you, Mr. Chairman. Mr. Petri, Mr. McNerney, thank you, all the Members today. The FRA appreciates the efforts of the Committee in addressing this issue and in devel-

oping rail safety reauthorization proposals in H.R. 2095, the Federal Railroad Safety Improvement Act of 2007. I look forward to working with you on these proposals as the legislative process moves forward.

Currently, each railroad carrier is required to file a monthly report with the Secretary of Transportation, under oath, listing all accidents and incidents resulting in injury or death to an individual or damage to equipment or roadbed arising from the carrier's operation during the month. The carrier is required to describe the nature, cause, and circumstance of each accident or incident included in the report.

The Secretary's enforcement authority under the Act includes the power to impose civil and criminal penalties. The penalty for a violation ranges from $550 to $27,000. The Act does not address harassment or intimidation of railroad employees.

Both the Accident Reports Act and the Federal Railroad Safety Act of 1970 confer broad powers on the Secretary of Transportation to implement the provisions of the Accident Reports Act, including the authority to issue regulations and investigate accidents or incidents resulting in serious injury to an individual or to railroad property.

The reporting requirements of Part 225 concerning an employee injury are triggered generally when an event involving the operation of a railroad results in an employee dying, requiring medical treatment beyond first aid, missing at least one day of work, being placed on restricted work activity, receiving a job transfer, or losing consciousness due to the injury.

The regulations also require that railroads keep records of so-called "accountable injuries." These injuries are defined as any condition not otherwise reportable of a railroad worker which condition causes or requires a worker to be examined or treated by a qualified health care professional.

FRA's current accident reporting regulations prohibit railroad actions calculated to discourage or prevent proper medical treatment or reporting of an accident/incident to FRA. While other actions of a railroad or railroad official may constitute harassment or intimidation, it is important to note that only actions calculated to prevent proper medical attention or accident reporting are violations of FRA regulations.

But there are other provisions, and some of them were identified this morning, other legal protections. Department of Labor is the 900-pound gorilla on this issue, really, not the FRA. Discriminating against an employee for, among other things, notifying or attempting to notify the railroad carrier or FRA of a work-related personal injury or work-related illness of an employee is prohibited under 49 U.S.C. 20109, as amended, by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007. The employee whistleblower rights are enforced under the procedures set forth by the Department of Labor, and the FRA and the Department of Labor have already begun the process of coordination with respect to the administration of this newly amended Executive Branch function.

As I said earlier, the issue of harassment and intimidation occurs against a much broader background than the narrow scope within

which FRA works to promote reporting of accidents and incidents. The DOL, and before it the Railway Labor Act Boards of Adjustment, works on those complex issues. Rail labor relationships are complex and often involve conflicts, and the conflicts are, for the most part, subject to the jurisdiction of those courts and the Labor Board Adjustment.

In order to create a culture of risk reduction, FRA is working to establish programs that will encourage employees to fully disclose information regarding precursors to accidents or near accidents without fear of blame. Such programs will allow FRA to gain a more complete picture of how and why accidents occur and, thus, identify and reduce risks before accidents occur.

To date, two FRA-led demonstration projects, in cooperation with the Union Pacific Railroad Company, have been launched in an effort to support a positive change in a safety culture of the railroad industry: the Close Call Confidential Reporting System (C3RS) and the Clear Signal for Action reporting system. The FRA will remain aggressive in its efforts to promote accountability and will seek to plant the seeds of cooperative programs that may help reduce risk, while engendering greater trust in the railroad industry.

Thank you very much.

Mr. OBERSTAR. Thank you very much, Mr. Boardman, and my appreciation to you for those initiatives that the FRA is undertaking. They seem to be moving in the right direction.

You are familiar with the points system. What are your thoughts about the point system and risk ranking indices?

Mr. BOARDMAN. There are different systems among the railroads. I think that is what you are referring to. Or is it more about the——

Mr. OBERSTAR. No, that is exactly right.

Mr. BOARDMAN. Okay. I think each railroad has the intent to try to figure out a way that it can provide the incentives that would provide a better record of safety and reward employees. Some of those kinds of systems that railroads put together—and I think they will freely admit—have unintended consequences of difficulty for those employees in terms of how they interpret and what happens to those employees as peer pressures and other kinds of concerns raise their head.

Mr. OBERSTAR. Well, if a railroad has a ranking system and the employee builds up points over a period of time, eventually he becomes a problem employee in the mind of the railroad, and the point system, from what we have seen, from the documents—and by no means are every incident reported, but a very good sampling of incidents—do not take into account contributing factors. It is a fault system. You had an accident? It is your fault. Now you have a choice: report it or not report it. If you don't report it, then you don't get points against you. Have you looked at this?

Mr. BOARDMAN. I don't understand the intricacies of what you are asking. I mean, I would have to look at the specifics of the point system that we might really be talking about here. I know that when you determine whether there is a fault of an employee or whether an accident occurred, there is no question that an accident occurs. Is it a fault of an employee or is it a system that

doesn't have a fault attached to it I think is a common question that all operators look at.

In other words, in my own background, not rail, as a bus operator and oftentimes you would have bus operations where you would line all the buses up at one time, and when those buses began to leave that location so that everybody could transfer at the same time, one of the most serious accidents that could occur is a rear bus running into a front bus, because what it told you immediately was the driver of the rear bus really wasn't cleared to go forward; no different than somebody trying to merge onto an expressway.

So there was always a debate, and I think one of the difficulties here that we need to think about is as the railroads themselves try to reduce risk in their operations—and we think that they really ought to try to reduce that risk, one of the severest judges that I had when I had a safety committee were the employees themselves, and I think that is a critical element of any risk program, any points program, any of the things that the railroads do. There has to be a structure to how they analyze those accidents; there have to be regular data reviews themselves; and there has to be that critical part, which is the employee input.

Mr. OBERSTAR. Well, you are getting on to another issue that I think we need to explore in this inquiry in the course of this hearing, and that is individuals, individual incidents, and systems. Do you think there is, in the rail sector, a culture preoccupied with blame, with fault, and with individuals, rather than one that reviews the system within which safety should be addressed?

Mr. BOARDMAN. I think, today, my observation is that two or more conditions exist in the railroad industry: the one you describe, but, paradoxically, the railroads that are becoming more progressive and understand the need for this employee input are also understanding that there needs to be, first and foremost, a focus on the individuals, the employees, the people that are impacted in the accident itself, and the third parties that pay the price of being either evacuated from a particular accident location or that are impacted at a grade crossing.

And there needs to be an unequivocal understanding in that company that that comes first, and then the occurrence of an investigation to find out what really occurred; and I think that does not exist in the entire railroad industry. You have differences among railroads, differences among managers, but, today, I think there are real indications—and I won't single any one in particular out, but one of the women you will have up here later I was particularly impressed with in the most recent review of their railroad and how they are really rethinking this culture of safety.

Mr. OBERSTAR. You are quite right on that and I have been impressed with that particular railroad and their approach to the subject, and you touch on something that is important: the culture of safety. With every mode of transportation, safety begins in the boardroom, in the corporate boardroom. Safety is not the primary responsibility of the Federal Railroad Administration or of the FAA or the Federal Motor Carrier Safety Administration. Safety is the primary responsibility of the company itself. And the reason we

have government oversight agencies is to keep them honest and to help employees train and develop their own culture of safety.

When the Steelworkers Union was formed in 1937, one of their ten points was safety on the job. The conditions in the steel mills weren't safe.

I see the bells have rung. We are going to have this action throughout the day, until final consideration of the pending legislation, so I will withhold further questions at this point and yield to Mr. Petri.

Mr. PETRI. Thank you very much, Mr. Chairman.

Thank you for your testimony, Mr. Boardman. I wonder, based on your experience not only in your current job but in the transportation industry and in other positions, if you have any basis to indicate how the railroad industry stacks up with other modes of transportation so far as concern about safety or actual safety records are concerned. Obviously, they are not completely comparable because I guess the operating conditions are different between a truck or a railroad or an airplane and so on, but could you comment on how it stacks up with other transportation sectors?

Mr. BOARDMAN. Certainly. I think, I guess, the best way to say this is one of the things I get surprised about—and while I think this is extremely serious business that we are dealing with with railroads, what I find surprising sometimes is that there have been tremendous improvements made in rail safety, and the focus—we have difficulty, as an industry, getting, for example, the highway side of the House to pay attention to our grade crossing accidents, which result in 600 [subsequently corrected to 400] or so deaths a year.

[Information follows:]

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October 25, 2007

1. Insert on page 28 at line 618:

Mr. BOARDMAN: To be exact, FRA's accident/incident database shows that grade crossing accidents caused an average of 358 deaths per year during last five calendar years. The current number for 2006 is 369 fatalities.

Mr. BOARDMAN. And part of the reason we have such difficulty—and, yet, that is one of our key elements of reducing the number of injuries—one of the difficulties we have is that there are over 40,000 highway deaths a year.

So for the highway side that we work with, that particular mode, we are a very low ranking priority in terms of what they feel they need to do. And, yet, in my arguments with them to try to say, listen, if you took some of the resources you had and worked with us and this industry, what we could do and what would be a tremendous impact on reducing the number of these grade crossing accidents. It is particularly frustrating because of those differences in modes.

So I am not sure I get at your question absolutely directly, but what I see is an industry that is willing, that wants to improve safety, that has demonstrated that improvement in safety, but that we can always do better.

Mr. PETRI. Just a second question. I know we have to go and vote. I guess the statistics indicate that there has been a reduction in accidents over the last few years in the railroad industry. Is that because of underreporting or is it because of better safety? What would be the reasons for that? What can we learn from that?

Mr. BOARDMAN. We absolutely believe it is because there is less accidents. We do not believe it is because of—I mean, what we are talking about today is employee injuries, and there may be some difficulties, and we have investigated and looked to see what the difficulties were on this underreporting, but when you look at the absolute number of accidents that are out there, they are down dramatically, and we appreciate that.

What we are not content with is that here, a couple of years ago, we began to flatten out in terms of the rate of reduction; and the rate of accidents continues to bother us. So we are specifically looking at the rate of accidents at this point in time. It is something we really need to approach, and we are looking at that with a Risk Reduction Program to really get at that problem.

Mr. PETRI. Thank you.

Mr. OBERSTAR. Mr. McNerney?

Mr. MCNERNEY. Thank you, Mr. Chairman.

I was wondering about the difference in the sort of culture between the railroad industry and the airline industry. There seems to be a fairly good culture of reporting and encouraging people to report accidents in the airline industry, or incidents. Could you address that, what you think the cause of that difference and how we might expand that sort of culture to the railroad industry?

Mr. BOARDMAN. Congressman, I think you have hit on a key point, and that is we decided to do that, exactly that, with the Close Call Reporting mechanism we now have in place, and we are beginning to expand. We modeled it very similarly to what occurred in the aviation industry under FAA. We think the critical element of that is that there be a reporting system that allows the employee to be anonymous; that we really find what could have happened here when there was a close call of an accident. We think the FAA did the absolute right thing when they looked at that in their particular culture. We, right now, are looking at and modeling that, and have begun to do so.

Mr. MCNERNEY. Thank you. Do you think the difference of the sort of criteria between reportable and non-reportable incidents is any way impacting this culture or this dynamic?

Mr. BOARDMAN. Yes. I think there is a complexity here that is very difficult, and that our particular area is a very narrow one on harassment and intimidation, it is only: was there an effort to prevent the employee from making the report or was there a manipulation or a prevention of seeking proper medical care? The rest of it, that because human nature becomes complicated in the relationship between the employee, the supervisor, the people involved, and the witnesses, are other cases or occurrences that maybe you or I would judge as harassment and intimidation, but do not fall under the authority of the FRA. They may fall under the authority of the Department of Labor. So that makes it much more complex.

Mr. OBERSTAR. Mr. McNerney and Ms. Richardson, we have five minutes to go on this vote. The majority leader has announced that voting will be closed at 17 minutes, so we had better recess now, Mr. Petri, and we will resume as soon as possible after conclusion of this vote.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting.

Mr. Boardman, do the Federal Railroad Administration criteria for reportable and non-reportable injuries play a role in the problems that we are discussing here? The definition of reportable and non-reportable injuries, does that play a role?

Mr. BOARDMAN. Well, I think, yes, it does, because I think our regulatory requirements are very narrow in regard to what harassment and intimidation would be. And just to reiterate for a second, it is really about preventing any report at all, which would be harassment and intimidation, or discouraging or preventing the proper treatment or a treatment at a level that would kick in the requirement to report. If it is a minor treatment, it does not require reporting, and if it is prescription drugs or a more serious treatment, then it does require reporting. So there is an element of that, yes.

Mr. OBERSTAR. What should be changed?

Mr. BOARDMAN. Well, I think, obviously, the broad concept of what you talked about in terms of the culture itself certainly needs to be changed. We think that you have stepped in the right directions with adding DOL now to actually going in and providing some of their resources to look at this issue in the most recently passed bill that came from the 9/11 Commission.

Mr. OBERSTAR. Thank you.

Mr. BOARDMAN. We think that the paradox that I talked about earlier, that there is the old and there are the newer things or structures within the railroad themselves, and what you talked about earlier. You used a corporate language, I think, as the language, and I think I would just say to you I agree with that; it is the leadership first, it is the leadership from the top and it is all the way down.

What we found, as our investigators get into this, is that when you do get up to a leadership level, there is an immediate fixing of the problems. Whether there is a continuation and a hanging in there to keep them fixed is another question. But we do see and are encouraged, once it gets to the right level, that they fix it.

Mr. OBERSTAR. Thank you.

Can you describe in layman's language the distinctions between FELA and worker's comp?

Mr. BOARDMAN. I guess, in layman's language, I was trying to understand it for myself in regard to that, and one of the things that hit me here in my whole career was that there was always an immediate reporting of an injury under Worker's Compensation; there was not any delay. And I don't remember—I mean, there were times when employees themselves didn't want to report it, didn't want to go through the paperwork, didn't want to do those kinds of things. I said to somebody during prep for this that there are injuries that—I was on a dairy farm, I wasn't from a mine. But I remember basically going home every day with something cut, bleeding, or something wrong, and it wasn't a reportable accident or injury on my own regard. And I do think you see a lot of that among employees themselves, that they aren't going to normally go forward with that.

I think where it begins to get difficult is that, with FELA, there is a necessity on the part of the employees to go forward and represent themselves to get a solution to something that is not minor, that is not something that they wouldn't bother reporting. So I think the differences, at least in my mind, are those.

Mr. OBERSTAR. More simply, could you describe FELA as fault-based, a fault-based system and worker's comp as essentially a no fault system?

Mr. BOARDMAN. Yes, I think that is fair.

Mr. OBERSTAR. And in a fault-based structure, then, every injury becomes reportable.

Mr. BOARDMAN. Has to be proved, yes, and reportable.

Mr. OBERSTAR. Can FRA make changes in that structure without the need of legislation?

Mr. BOARDMAN. I don't know the answer to that, sir, but I will get an answer for you.

[Information follows:]

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October 25, 2007

2. Insert on page 35 at line 773:

Mr. BOARDMAN: Congressman Oberstar, I've consulted FRA counsel and been informed that there is no way that FRA can make changes to the Federal Employers' Liability Act (FELA). It is necessary for Congress to make the changes by enacting legislation to amend or repeal FELA.

Mr. OBERSTAR. And, by that, then my next question would be are you considering any such changes, and your answer would be, well, no, because we haven't fully considered——

Mr. BOARDMAN. Not that have made their way to me.

Mr. OBERSTAR. Okay.

Mrs. Capito?

Mrs. CAPITO. Thank you, Mr. Chairman, I have no questions at this time.

Mr. OBERSTAR. Thank you.

I have other questions which I think we will submit to you in writing, Mr. Boardman.

Mr. BOARDMAN. Yes, sir.

Mr. OBERSTAR. Because we are likely to have another vote in a few minutes, so I will hold you excused and call our next panel.

Mr. BOARDMAN. Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you.

Ms. BROWN. Mr. Chairman, I do have a question for Mr. Boardman.

Mr. OBERSTAR. Oh, certainly. Of course.

Ms. BROWN. In your opinion, is there a significant under-reporting of rail accidents?

Mr. BOARDMAN. No, there isn't. We do not believe that they are significantly under-reporting. We believe there are occurrences, but with the modifier "significant," no.

Ms. BROWN. What would the FRA need to more thoroughly investigate railroad accidents, what tools would you need?

Mr. BOARDMAN. We have begun to change our concept of how we would use tools, and we are using much more today a Risk Reduction Program that we would really be looking at. So what we really would want to see, for example, in human factor accidents—and I have got a rule of eight requirements, and I would be happy to give those to you or I can go through them right now. But what we are really looking at today is to try to find a way to reduce risk to have railroads themselves look at their hazards and then make decisions on mitigating those kinds of things.

Ms. BROWN. You indicated that a lot of the intimidation kind of, and I guess civil rights kind of violations, came under the Department of Labor, and it seems to me, under this particular Administration, Department of Labor is kind of weakening. And I know you can't respond to that——

Mr. BOARDMAN. Thank you.

Ms. BROWN.—but how can we improve the system, then?

Mr. BOARDMAN. I think what we are doing, Congresswoman,—and I think that you have worked with us very well on this with your Committee and your leadership and your ranking in the past—is that these kinds of things that we are looking at today to reduce risk, to have our railroads more involved in the RSAC process, for example, and the labor unions, we are finding real success in those areas. This is not an area that we have particularly put into that process, and I am not even really considering that at this point in time, but we are making the kinds of improvements I think that are driving down the number of accidents and trying to get out and make sure we investigate the ones that are under our

national inspection program, that we begin to look at where we would use or get the most bang for our buck in the process.

Ms. BROWN. My last question. I guess you have taken a look at the safety bill. Do you see provisions in there that would strengthen how we investigate accidents?

Mr. BOARDMAN. Well, in this particular area I see, in particular, Section 506, which is one that addresses this very directly, and, yes, that would help.

[Information follows:]

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October 25, 2007

3. Insert on page 37 at line 838:

Mr. BOARDMAN: I should add, also, that although Section 506 of H.R. 2095 would help in some ways, we do have suggestions on how it could be improved. On page 10 of the enclosure to the Department's May 21, 2007 views letter on that bill as introduced, we summarize the section and comment on it, as follows:

"Section 506 makes it unlawful to knowingly interfere, obstruct, or hamper an investigation by the Secretary or the NTSB. This also includes attempts to harass, intimidate, mislead, or coerce another person with the intent to hinder, mislead, or prevent that person from cooperating with any investigation by the Secretary or the NTSB. Any person found violating this section may be fined or imprisoned for up to one year[,] or both.

"The penalty assigned to this offense seems inconsistent with the felony penalties assessed under 18 U.S.C. 1510 for obstruction of a criminal investigation or section 1512 (witness tampering) or the felony penalties for obstructing proceedings before an agency of the United States set forth in 18 U.S.C. 1515; and the penalties for destruction and alteration of records in Federal investigations, 18 U.S.C. 1519. DOT suggests that the penalties for the offense prohibited by Section 506 of H.R. 2095 be substantially increased to reflect the critical importance of deterring this offense, by making it a felony, consistent with the cited provisions from title 18 of the U.S. Code."

The penalty provision of Section 506 in the version of the bill as passed by the House remains the same and so merits the same recommended change, which we hope might be accomplished during the conference process.

Ms. BROWN. Thank you, Mr. Chairman.

Mr. OBERSTAR. I apologize to the gentlewoman. I lost track of who was where with all these votes.

Ms. BROWN. I know. Thank you.

Mr. OBERSTAR. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman. I am sorry I kind of missed a little bit of the ongoing statements, but I have a question in regard to what role the inspectors play in assisting the FRA in collecting and categorizing the incident and accident data. And then do the States all receive all of the same incident reports as reported to the FRA?

Mr. BOARDMAN. In the State that the accident occurs in, Congresswoman?

Mrs. NAPOLITANO. In any State.

Mr. BOARDMAN. Yes. As far as I know, we do. Am I right on that? Yes, they do. And we have our operating practices inspectors, for example, in this particular subject area, both in FRA and the States. I think there are about 90 plus or minus. I think there are 88, actually, for FRA and in the States there are another 30 folks that investigate these particular incidents, so they provide that data.

Mrs. NAPOLITANO. You are talking about incidents that happen outside on public-private property. What about on rail property?

Mr. BOARDMAN. Oh, I was really specifically talking about the harassment and intimidation subject of the hearing. In terms of the rail property and all of the inspectors we have out there, we have a little over 400 of them.

Mrs. NAPOLITANO. I am not asking you about the number, I am asking do they report to FRA——

Mr. BOARDMAN. Yes.

Mrs. NAPOLITANO.—as they report to the States. Because, in my State, I know the CPUC specifically told me that they were not getting the reports of incidents on rail property.

Mr. BOARDMAN. Oh. We will check that for you, Congresswoman.

Mrs. NAPOLITANO. I think they are now, after I brought it up on one of the Committee hearings.

Mr. BOARDMAN. Okay.

[Information follows:]

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October 25, 2007

4. Insert on page 39 at line 877:

Mr. BOARDMAN: I should add, also, that while FRA does not require railroads to report their accidents/incidents directly to the States, as the railroads are required to report them to FRA under 49 C.F.R. part 225, FRA works cooperatively with the States to share information on railroad accidents/incidents. For instance, FRA's policy is to share with the CPUC the information we have on railroad accidents/incidents occurring in the State of California, including providing notice to the CPUC of their occurrence. I understand that the CPUC is likewise committed to share the same information with FRA, so that both of our agencies work together to identify and address the causes of railroad accidents/incidents occurring in the State.

Mrs. NAPOLITANO. But that is why I am asking are they required to report all incidents, whether on their own property, outside of their property.

Mr. BOARDMAN. Yes. If it meets the criteria for reporting, which is either generally monetary-or injury-based, they are required to report.

Mrs. NAPOLITANO. Is there a difference between an accident that the railroad companies are required to report and one that is not required to be reported? What is the criteria specifically that differentiates?

Mr. BOARDMAN. I will respond to you in writing and give you a general answer and then give you——

[Information follows:]

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5. Insert on page 39 at line 889:

Mr. BOARDMAN: The criteria establishing what must be reported to FRA as an accident/incident under FRA's accident reporting regulations at 49 C.F.R. part 225 are set out in detail in those regulations. The criteria are sometimes complex and are further explained in the FRA Guide for Preparing Accident/Incident Reports. The Guide is posted on FRA's Web site at --http://safetydata.fra.dot.gov and can be obtained through the "search" function on that site.

Part 225 requires railroads to submit various types of reports and to keep various types of records for specified types of events. For example, Part 225 mandates the following: telephonic reports to the National Response Center of certain accidents/incidents as well as other events (under section 225.9); monthly reports to FRA of certain accidents/incidents (under section 225.11); and various records, which must be made available for FRA inspection, concerning reportable accidents/incidents, accountable injuries or illnesses, and accountable rail equipment accidents/incidents (under section 225.25).

With respect to these monthly reports in particular, section 225.11 of FRA's regulations requires railroads to provide a monthly report to FRA of all accidents/incidents described in section 225.19. In turn, section 225.19 divides reportable railroad accidents/incidents into three groups: (1) highway-rail grade crossing; (2) rail equipment; and (3) death, injury, and occupational illness. An event that falls into any of these categories must be reported with the specific details of information referenced in that section. Some events fall into more than one category and must be reported using the forms or alternative forms specified in section 225.19.

The most basic term in this discussion, "accident/incident," is defined in section 225.5 as follows:

> (1) Any impact between railroad on-track equipment and an automobile, bus, truck, motorcycle, bicycle, farm vehicle or pedestrian at a highway-rail grade crossing;

(2) Any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad on-track equipment (standing or moving) that results in reportable damages greater than the current reporting threshold to railroad on-track equipment, signals, track, track structures, and roadbed;

(3) Any event or exposure arising from the operation of a railroad, if the event or exposure is a discernable cause of one or more of the following outcomes, and this outcome is a new case or a significant aggravation of a pre-existing injury or illness:

(i) Death to any person;

(ii) Injury to any person *[including a railroad employee]* that results in medical treatment;

(iii) Injury to a railroad employee that results in:

(A) A day away from work;

(B) Restricted work activity or job transfer; or

(C) Loss of consciousness;

(iv) Occupational illness of a railroad employee that results in any of the following:

(A) A day away from work;

(B) Restricted work activity or job transfer;

(C) Loss of consciousness; or

(D) Medical treatment;

(v) Significant injury to or significant illness of a railroad employee diagnosed by a physician or other licensed health care professional even if it does not result in death, a day away from work, restricted work activity or job transfer, medical treatment, or loss of consciousness;

(vi) Illness or injury that meets the application of any of the following specific case criteria:

(A) Needlestick or sharps injury to a railroad employee;

(B) Medical removal of a railroad employee:

(C) Occupational hearing loss of a railroad employee:

(D) Occupational tuberculosis of a railroad employee; or

(E) Musculoskeletal disorder of a railroad employee if this disorder is independently reportable under one or more of the general reporting criteria.

(4) Occupational illness.

Many of the key terms in the definition of "accident/incident" are also defined in section 225.5, and the applicable reporting threshold for rail equipment accidents/incidents is set forth in section 225.19 or in appendix B to part 225. For rail equipment accidents/incidents in calendar year 2007, the threshold is $8,200.

Mrs. NAPOLITANO. Okay. I would really appreciate it. One of the other questions I would have, and one of those that is very near and dear to my heart because of what I have been through in my area. The appellate courts have found that the local safety hazards do not exist in any State because local safety hazards can be encompassed within Federal regulations, even if the Federal Government has not acted.

Should the States be allowed to regulate the railroad industry when the Federal Government has not acted in order to protect against local safety hazards? And I find that quite often is the case with the cities that I represent, and I keep getting information that not once has any State been successful in getting some alleviation to the issues.

Mr. BOARDMAN. I think, Congresswoman, we know that this is a particular interest area of yours and that we are working with the California PUC right now to try to resolve any of their issues that they have.

[Information follows:]

INSERTS TO THE TRANSCRIPT OF THE TESTIMONY OF JOSEPH H. BOARDMAN, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, U.S. HOUSE OF REPRESENTATIVES

October 25, 2007

6. Insert on page 40 at line 904:

Mr. BOARDMAN: Congresswoman, you have identified two important, but separate, areas of State authority to regulate railroad safety. The first is the authority to regulate where there is no Federal requirement covering a particular subject matter, and the second is the authority to have an additional or more stringent requirement, which is necessary to eliminate or reduce an essentially local safety or security hazard.

Pursuant to 49 U.S.C. § 20106 (section 20106), if there is no Federal regulation or order covering the particular subject matter, then a State is free to address that subject in any way it chooses. However, if there is a Federal regulation or order covering the particular subject matter, this does not allow a State to substitute its own judgment if it would have addressed a subject matter in a different way than FRA has chosen and the State does not like the regulation with which FRA has covered the subject matter. If a State has thoughts as to how to make existing Federal regulations better, FRA is glad to consider them. Two ways States can advance their ideas are filing petitions for rulemaking with FRA and participating in the Railroad Safety Advisory Committee. Absent the existence of an essentially local safety or security hazard, if one State has a better idea for improving railroad safety, it is a better idea for *all* States and should be embodied in uniform, National regulations.

With regard to essentially local safety or security hazards, while it is true that in most cases courts have found that no essentially local safety hazard was present in the specific situations before them, I am not aware of any court that has said that local safety hazards do not exist in any State. However, a fairly narrow interpretation of this provision is consistent with both the stated purpose and legislative history of section 20106. For example, the legislative history of section 20106 makes clear that this savings clause was never intended to allow State-wide regulation. Every condition that exists is "local" in the sense that it occurs somewhere. However, most hazards are not "essentially local," as there is nothing about the nature of the hazard itself that is particular to that location. Section 20106(1) is intended to allow regulation specifically addressed to a particular location at which hazardous conditions exist that are related to that location and not common throughout the State or elsewhere in the Nation.

If a State were allowed to regulate as a local safety hazard any condition that it believed would be better served by a different regulation than the existing Federal requirement, the national uniformity of regulation, which Congress so carefully crafted, would be destroyed, and railroad safety would be substantially compromised. Nevertheless, States retain the authority to address essentially local safety hazards where they truly exist, as well as to address those subjects not covered by Federal regulations.

Mr. BOARDMAN. But there is certainly a right, and I think your point is that even though there is a right for the locals if the feds have not ruled to make a rule, that in fact that hasn't happened. There are cases where that has happened, and this is a very difficult area right now, and we understand it, certainly the Chairman as well has brought it up with Minnesota in regard to the particular subject area that we are dealing with.

We will continue to work with California or any other State, but we think it would create more difficulties by having 50 different regulations to cover a particular area than it would to continue to work——

Mrs. NAPOLITANO. That is the argument that I heard, and I understand that. However, if we are still continuing to have States in some and those national regulators say we need some assistance, isn't it proper for you to be able to begin to work on having some relief for them?

Mr. BOARDMAN. I think that it is proper for us to work with them continually, and I think, for the most part, we resolved their issues, and there are some that seem to be intractable and that we really can't get resolved. All of us, as humans, don't like to be told "no," in the end, that we are not going to do this particular part of it, but we will continue to work with them, ma'am.

Mrs. NAPOLITANO. I would appreciate it. And if you could send some of that information as to what you are doing, what outreach or what is it specifically that we may be able to share with some of our individuals that we work with, that would be very helpful, especially at the local level.

Mr. BOARDMAN. Yes, ma'am.

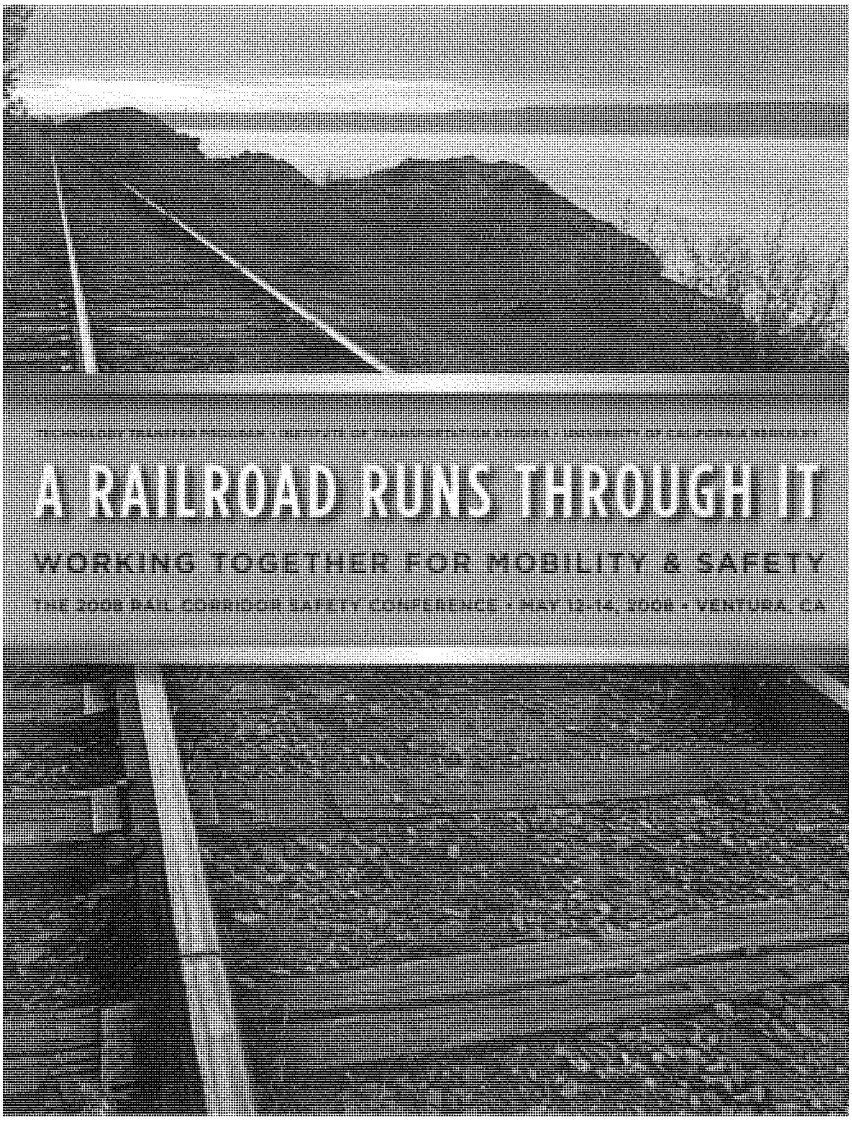
[Information follows:]

INSERTS TO THE TRANSCRIPT OF THE TESTIMONY OF
JOSEPH H. BOARDMAN,
ADMINISTRATOR,
FEDERAL RAILROAD ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION,
BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
U.S. HOUSE OF REPRESENTATIVES

October 25, 2007

7. Insert on page 41 at line 936:

Mr. BOARDMAN: One event that we are particularly excited about is an upcoming Rail Corridor Safety Conference, scheduled for May 12-14, 2008, in Ventura, California. The conference will bring together Federal, State, and local transportation agencies and officials to discuss a variety of railroad safety and security issues. This is just one example. We are committed to working both formally and informally to address the issues that are important to States and local communities, and these efforts are ongoing on a daily basis.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ABOUT THIS CONFERENCE

This conference will bring you up to speed on current developments in rail corridor safety priorities:

- the latest position on regulations, legal precedents, technology, and jurisdiction
- insights about best practices and case studies showing what works, what doesn't, and what's on the horizon
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- workshops that will address questions about participation, mediation, and work zones near and with from a public agency's perspective
- a forum to network and build relationships with colleagues, meet the experts, and debate the issues important to resources that can help you do your job more efficiently

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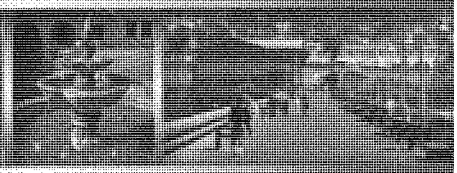
- Heavy and light rail operators, including freight, commuter, and passenger lines
- Local elected officials concerned about rail crossing safety
- Rail, highway and traffic engineering consultants
- Academics and researchers
- Suppliers of crossing equipment

CONFERENCE CO-ORGANIZERS:
Federal Railroad Administration and the University of California Berkeley's Institute of Transportation Studies

VENTURA



A beach town north of Santa Barbara, Ventura is a charming destination with a historic downtown, a vibrant arts community, and a wide variety of outdoor activities. Ventura's Mediterranean climate is ideal for year-round outdoor activities, including hiking, biking, and water sports. Ventura's downtown is a lively hub with boutiques, restaurants, and cultural venues. Visitors can explore the Ventura Pier, a popular spot for fishing and strolling, or visit the Ventura County Museum of History and Art to learn about the region's rich heritage.

Ventura's commitment to a thriving downtown has helped preserve its charm and attract a diverse array of businesses, from local shops to national chains. Downtown features a mix of boutiques, restaurants, art galleries, and vibrant night life. Downtown Ventura is also the site of one of the most successful and vibrant farmers markets in the region, held on Saturdays and which is open to conference guests.

The conference will take place in the Ventura Beach Marriott, which offers a variety of amenities including meeting rooms, ample parking, and easy access to the ocean. Guests can enjoy stunning ocean views, a heated pool and jacuzzi, a fitness center, and a dining venue.

Ventura abounds with recreational activities, from cultural attractions and outdoor adventures to golf courses and beaches. For more information about local attractions, we suggest the website:

www.visitventuracoast.com

GETTING THERE

Ventura is easily accessible by air, road, and rail. The nearest airport is Oxnard Airport (OXR), which is just a few miles from the city center. Alternatively, travelers can also consider flying into Los Angeles International Airport (LAX) or Santa Barbara Airport (SBA), which are approximately an hour's drive away.

By Air: Oxnard Airport (OXR) is the closest airport to Ventura and is a convenient option for those traveling by private jet or small aircraft. Commercial airlines fly into OXR from various destinations, including major hubs like Los Angeles and San Francisco. Rental cars and shuttles are available at the airport.

By Road: Ventura is easily accessible by car from Los Angeles and Santa Barbara. The drive from Los Angeles takes about two hours, and from Santa Barbara it takes about an hour. The scenic route along the Pacific Coast Highway offers stunning views of the ocean and coastline.

By Rail: Amtrak's Pacific Surfliner route connects Ventura with major cities in California, including Los Angeles and San Diego. The train station is located in the heart of Ventura, making it convenient for visitors to explore the city on foot or by bicycle.

By Car: Ventura is easily accessible from Los Angeles by car via the 101 or 126, and from Santa Barbara via the 101. For directions, visit **www.marriott.com/sbpvb/dirbc.mi** or **www.google.com/maps**

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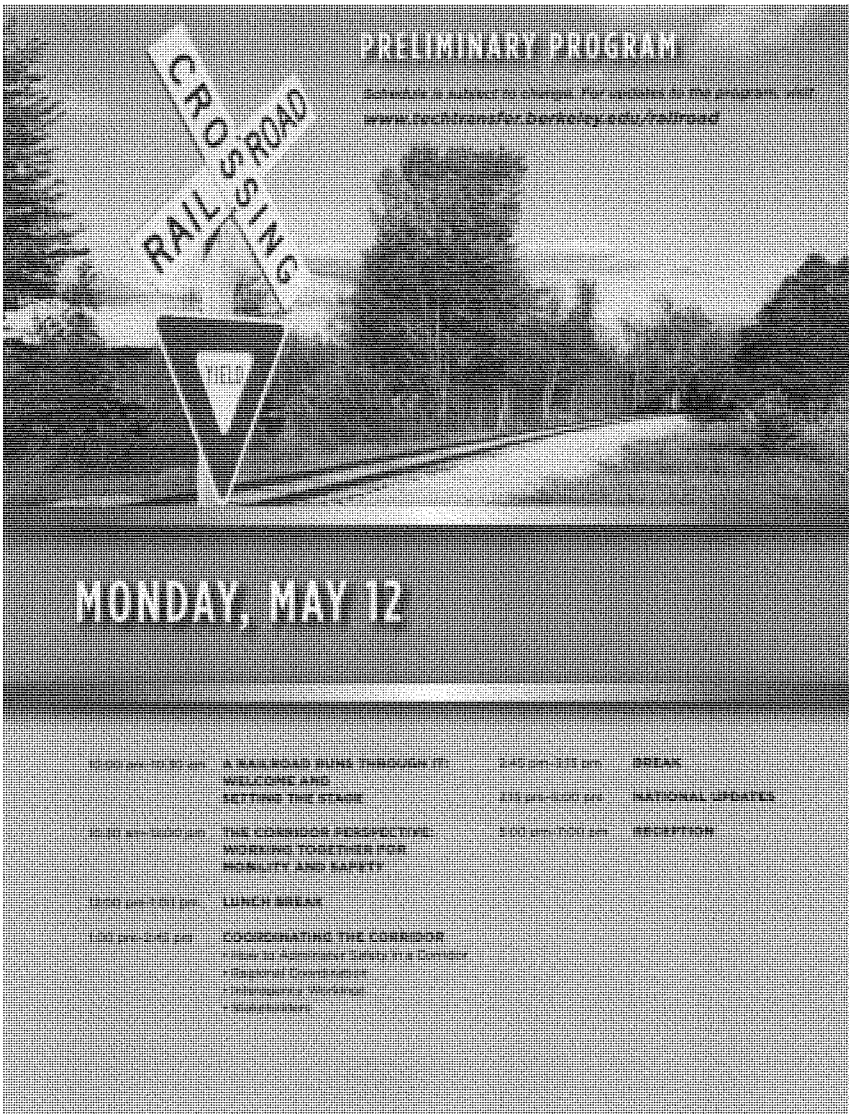
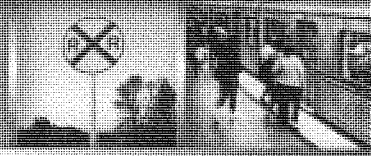

PRELIMINARY PROGRAM
RAIL ROAD CROSSING
YIELD
MONDAY, MAY 12
A RAILROAD RUNS THROUGH IT:
WELCOME AND
SETTING THE STAGE
THE CORRIDOR PERSPECTIVE:
WORKING TOGETHER FOR
MOBILITY AND SAFETY
LUNCH BREAK
COORDINATING THE CORRIDOR
BREAK
NATIONAL UPDATES
RECEPTION

TUESDAY, MAY 13



8:00 am–9:45 am **LAND USE, PLANNING AND DEVELOPMENT AROUND THE RAILS**
- Commercial Centers
- New or Infill Development
- Case Studies
- Urban Revitalization

9:45 am–10:15 am **BREAK**

10:15 am–12:00 pm **PARALLEL SESSIONS**

A **GRADE CROSSING DESIGN IN PRACTICE**
- Case Studies
- Implementing and Managing the Guidelines
- Pedestrian Issues
- Shared Corridors
- Presentation

B **QUIET ZONES – SUCCESS STORIES**
- The Train Horn Rule
- Developing Quiet Zones
- Case Studies

C **COMMUNITY OUTREACH: A PRIMER FOR AGENCIES**
- How to Assess Federal Agencies, State Agencies, and Railroads
- How to Respond to Community Issues
- How to Conduct Effective Outreach

12:00 pm–1:15 pm **LUNCH**

1:15 pm–3:00 pm **CONTINUING IMPACTS FROM CROSSING ENGINEERING**
- Quiet Zone Implementation and Objections
- Pedestrians
- Shared Corridors
- Grade Crossing Alternatives

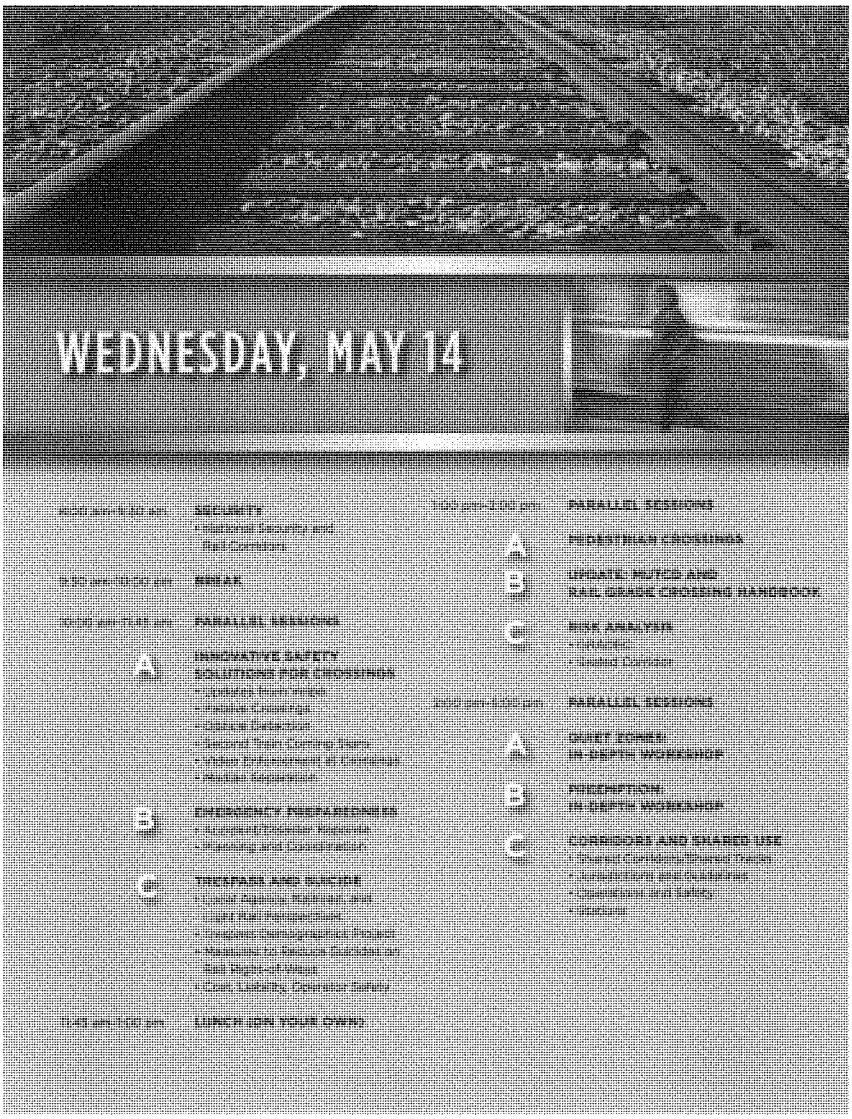
3:00 pm–3:30 pm **BREAK**

3:30 pm–5:00 pm **PARALLEL SESSIONS**

A **TRAFFIC SEPARATIONS**
- Underpass Design Concepts
- Grade Separations Pitfalls and Options
- Implementation, Overcoming Barriers

B **ROADWAY MAINTENANCE AND WORK ZONES**
- Overlapping Jurisdictions and Maintenance Responsibility
- Maintenance and Construction Issues
- Work Zones, Temporary Traffic Controls, and Flagging Advanced Warning

C **PRIVATE CROSSINGS**
- Briefing on FRA Community Meeting
- Licensing Concerns
- Health Concerns Private Crossing Safety Initiative


WEDNESDAY, MAY 14
8:00 am-9:30 am
SECURITY
• National Security and
Rail Corridors
9:30 am-10:00 am
BREAK
10:00 am-11:45 am
PARALLEL SESSIONS
A
INNOVATIVE SAFETY
SOLUTIONS FOR CROSSINGS
• Vehicle Trap Video
• Vehicle Crashes
• Vehicle Detection
• Second Train Coming Signs
• Urban Enhancement at Crossings
• Median Separation
B
EMERGENCY PREPAREDNESS
• Hazmat Chlorine Response
• Planning and Coordination
C
TRESPASS AND SUICIDE
• Video Deterrent Software and
Other Risk Management
• Trespasser Intervention Programs
• Trespasser Prevention Outreach on
Rail Right-of-Ways
• Cost, Liability, Operator Safety
11:45 am-1:00 pm
LUNCH (ON YOUR OWN)
1:00 pm-2:00 pm
PARALLEL SESSIONS
A
PEDESTRIAN CROSSINGS
B
UPDATE: MUTCD AND
RAIL GRADE CROSSING HANDBOOK
C
RISK ANALYSIS
• Urban
• Shared Corridor
2:00 pm-4:00 pm
PARALLEL SESSIONS
A
QUIET ZONES
IN-DEPTH WORKSHOP
B
PREEMPTION
IN-DEPTH WORKSHOP
C
CORRIDORS AND SHARED USE
• Shared Corridors/Shared Tracks
• Technologies and Challenges
• Operations and Safety
• Highways

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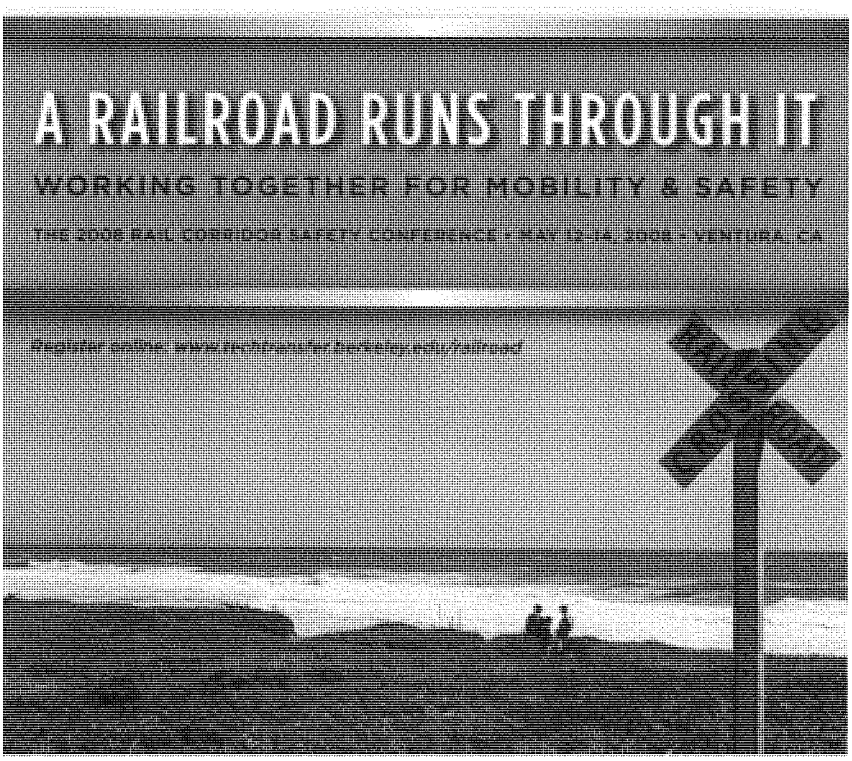

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Boardman, we hold you excused.

Mr. BOARDMAN. Thank you, sir.

Mr. OBERSTAR. Thank you very much for your testimony.

Our vote is now in progress, but I will call the next panel. Mr. William Jungbauer, Mr. James Brunkenhoefer, Mr. John Tolman, Mr. David Cook, Mr. Gregory Haskin, Mr. Timothy Knisely, Mr. Charles Ehlenfeldt.

Gentlemen, please rise. Raise your right hand. Do you solemnly swear that the testimony you will give before this Committee in the matters now under consideration will be the truth, the whole truth, and nothing but the truth, so help you God?

[Witnesses answer in the affirmative.]

Mr. OBERSTAR. You are now sworn in and we will—I hate to do this, but I will ask Mr. Jungbauer to begin, and I will interrupt you at about three minutes into your testimony.

TESTIMONY OF WILLIAM G. JUNGBAUER, PRESIDENT, YAEGER JUNGBAUER AND BARCZAK, PLC, MINNEAPOLIS, MINNESOTA; JAMES M. BRUNKENHOEFER, NATIONAL LEGISLATIVE DIRECTOR, UNITED TRANSPORTATION UNION; JOHN TOLMAN, VICE PRESIDENT & NATIONAL LEGISLATIVE REPRESENTATIVE, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; DAVID COOK, FORMER CSX LOCOMOTIVE ENGINEER; GREGORY HASKIN, FORMER UNION PACIFIC CONDUCTOR; TIMOTHY KNISELY, FORMER NORFOLK SOUTHERN CONDUCTOR; AND CHARLES R. EHLENFELDT, FORMER BNSF CONDUCTOR

Mr. JUNGBAUER. Thank you, Mr. Chairman. My name is Bill Jungbauer. I am an attorney; I am proud of it. The reason I am here is I want to tell this Committee and the Country about all of the abuses that are going on of rail carriers harassing and intimidating injured employees.

The Congresswoman had asked a question a little while ago and, Mr. Chairman, you mentioned the Minnesota statute. The State of Minnesota, the State of Illinois have found, they had legislation passed because there was so much harassment of injured employees going on that they passed criminal statutes, criminal statutes to stop these railroads from denying injured people medical care.

You know what these railroads did? They went to Federal court and they sued to stop the States from trying to protect their injured citizens. What these railroads are saying is, States, don't go out there, don't do anything to protect your citizens. And now they are coming to Congress and saying, Congress, don't you do anything either.

I am here to tell you that, based on my experience in this Country, that railroad workers, if you go home in your districts, they will tell you, every one of them, that this is a huge problem.

If I can get the Elmo up, please. This document I want to show you is an exhibit from Burlington Northern Santa Fe. I had to subpoena it. I had to fight for it. This is their red-green program. If you look at the things in the yellow, you will notice that for an employee they get 40 points if they have a reportable incident; 5

points if it is non-reportable. This is it in a nutshell. This is the type of programs that cause harassment and intimidation, because if you are a trained yard and engine employee, TYE employee, 47 points makes you a red employee.

I have personal examples—and you are going to hear from one of them today—of individuals who have been fired because they have an accident, they get 40 points, and then a minor little thing comes along again, or another accident, even though it is not their fault. And that is the most disturbing thing of all. Congressman, you brought this up before, yourself, Mr. Chairman, that people are being punished for getting hurt even when it is not their fault.

I also have for the Committee a transcript that is attached, it is Mr. Cloud's transcript. This is a CSX employee. We have tape recording, court reporter transcript of a CSX official saying don't file that accident report, and then saying we are going to go make up an accident; we are going to say that somebody threw a rock and hit you in the head and escaped. It is all in my—I have submitted it to the Committee. Nothing has been done.

What makes an individual cheat like that? And what the Congresswoman was asking before, what is the culture? And I have studied this for a long time, and I believe that it is the management programs at these railroads that cause middle and lower management people to harass their employees, and that, I believe, is the compensation system.

I also have attached as exhibits the fact that, in most of these railroads, the compensation, in part, for first-line supervisors and middle management is based on whether statistics go down or not. It doesn't matter if they try hard. If a defective rail car comes in from somewhere else and an accident happens in their territory, their family doesn't eat as well. That causes good people to become bad. And if you want to change the culture, change those programs that cause good people in these railroads to become bad and harass employees. That is what I am trying to argue for.

Again, the Minnesota——

Mr. OBERSTAR. I am going to interrupt you at this point because we have seven minutes remaining on this vote, and we will reconvene as soon as possible after the vote.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting.

Mr. Jungbauer, you were, I think, nearing completion of your statement when I interrupted you for the vote.

Mr. JUNGBAUER. Okay. Shall I start again?

Mr. OBERSTAR. No, you may continue at that point and conclude.

Mr. JUNGBAUER. Thank you.

There are three quick points I want to make. I take strong issue with FRA statements that this is not a problem. Statistics in our own office: 38 of the last 108 cases we have had in our office have either been not correctly filed with FRA or misfiled.

Secondly, FRA fines do not work. If anyone goes—and I have done a Freedom of Information Act request. Fines that are assessed against these corporations are reduced and paid in pennies. Billion dollar corporations don't worry much about thousand dollar fines that end up being negotiated down to hundred dollar ultimate payments.

And, finally, on Worker's Compensation, the problem with worker's compensation is it doesn't pay the injured person enough. A perfect example I can give you is the State of Arizona. I have a client who lost a foot in a switching accident. Under worker's comp, he would get $75,000. A foot is worth a lot more than that to my client.

Thank you very much.

Mr. OBERSTAR. Thank you, Mr. Jungbauer.

Mr. Brunkenhoefer.

Mr. BRUNKENHOEFER. Yes, sir. First, I want to give you a hypothetical story.

Mr. OBERSTAR. Pull the microphone around in front of you. There you are. Thank you.

Mr. BRUNKENHOEFER. I want to give you a hypothetical story. There is a couple named Jean and Jim, and they are out on their bicycles between a place called Beulah and Chisholm, and someone bumps the nice lady with a car, and Jim gets very concerned about her health, and the person gets out of the car and says before I can render you aid, we have to contact my insurance company, we have to fill out these forms, we have to have a conversation about this not being reported to the insurance company because my insurance rates will go up and I will lose my bonus.

And before I take you for medical care, I need my supervisor to come over from Hibbing or Virginia, and when you are through being treated, we are going to require you to go to a specialist in Duluth or Superior during the week, and the lady says, well, I can't do that, I don't have anybody except my son, who works for a railroad or works for someone, and he will have to take off work or my husband will have to take off work to transport me back and forth. And they tell you that is your problem, that you are going to have to handle it yourself.

Now, I believe, in the State of Minnesota, when you do not render aid to someone who is injured, it is a felony. If you do it on the railroad, you get a bonus. That is the culture.

Why are we here today? Because of a culture that says because I don't like FELA, it is my right, because there is a law I don't like, I have a right to torment, torture, commit fraud, abuse, and the list goes on. So the way I am going to do this is I am going to keep seeing people suffering; I am going to keep insisting that they can't report an injury; I am going to keep insisting they can't take medication; I am going to keep insisting that I have this right, because this is my way of protesting a law.

Now, I have done some protesting in my life, but I have never made anybody physically suffer because I didn't like it. That is not the way we are in the United States. Everybody here that is going to testify later is going to talk about these beautiful numbers we have. Well, I think we have established that it is garbage in and garbage out; that the numbers they are basing their testimony on we have already shown that they are not reporting what is going on, so how can you put faith in numbers?

The front of this testimony here says that we are going to have a hearing about injuries, harassment, intimidation. I didn't know that you could just come up here and change the subject to whatever you wanted to. So they are going to talk about FELA. They

don't want to talk about their culture that says it is okay. And something is very wrong, and I have read the testimony, and all I see is they want to defend the system the way it is now.

We are all doing a wonderful job on the management side and we want to keep doing it just like it is doing, because it works so well. They want to talk about FELA. I think Mr. Jungbauer and I can come to agreement. We will talk about it as long as treble damages are on the table. I mean, this game about we are always going to talk about FELA, I don't think this Congress is going to repeal FELA, and I don't think, if I am reading the numbers right, the next Congress is going to be interested in talking about it. And they are liable to talk themselves into a bigger problem than what they have.

Let's talk about harassment and intimidation, and people not getting medical care. Let's talk about families. Let's talk about people that hide injuries, find out two weeks later they are hurt and then they suffer the rest of their lives, the rest of their lives with pain because some manager wants his damn bonus. And this stuff about transferring them or docking them on pay or firing them, it is not working.

This hearing is about what is not working. People are hurt, people are suffering, but, yet, I haven't seen anything that says here is how we solve this problem. So the only concept I have been able to come up with, Mr. Chairman, is that we make it more punitive, because I haven't heard anything that says that anything else works. It is like we have got a bad culture out there and we have got a renegade official, and that renegade official is not going to make his safety numbers, so we are going to out here and we are going to tell the injured worker.

Now, I will agree with the railroads, we are not having the people who lose their legs or dying; they are getting reported. But what we are not getting reported is the small injuries that we could all work on and come to a solution.

Now, we hear all about this terrible program that we can't talk about called FELA. Eighty percent of all the people who are injured on the railroads settle between the employee and the employer without the help of any lawyer. Eighty percent. They want to tell you that every injury has something to do with a lawyer. That is not true. That is not true. I believe that is GAO. Twenty percent hire lawyers. Of the 20 percent, 19 percent settle short of jury settlement. They have lawyers all the way through the process, from the time you hit the ground, they are on the phone telling their law department, but, boy, they get all stirred up if one of our guys goes to a lawyer. Boy, that is horrible.

Then that 1 percent that goes to trial, two thirds of that one percent end up getting an award; one third doesn't. So they are trying to contend that all of this that is going on, all these people suffering, all these families are suffering because one percent of the time they have to go to trial. One percent.

What system do we have that we have to come before here to sit down and say these people—nobody in America has the right to treat people that are injured and hurt and denying them medical care? No one has the right to try to use their own employees to essentially cause them additional pain. I call that torture. They

didn't twist the guy's arm, but the guy's arm was already broke. So he is being tortured, he is being denied medical care, or she is being denied medical care, and, gee, because I don't like a law, I am going to keep torturing my people until I can get that damn law repealed.

God, I am Jewish. The history of my religion is people being tortured because they wouldn't change their faith. Now we want to torture the railroad employees until they somehow come to you and say we have had enough, Jim, we have had enough, Mr. Chairman, we want you to change the law.

I will answer questions.

Mr. OBERSTAR. Thank you, Mr. Brunkenhoefer.

Mr. Tolman.

Mr. TOLMAN. Good afternoon, Chairman Oberstar, Ranking Member Shuster, Members of the Committee. I appreciate the opportunity to be here today.

The subject of today's hearing is something that has been a bone of contention for the Rail Conference members and all railroad workers for generations. We believe these policies originated because of ties between the industry and military that go back quite a way.

This history underlines why managerial culture in the railroad industry is known as command and control. It should come as no surprise that railroads react swiftly and harshly when something goes wrong. This is true across the board. Whether an incident produces an injury to a railroad worker results in an accident or merely involves an act or omission that causes nothing more than a rules violation.

It is vitally important for this Committee to understand the industry's culture, dating back for more than a century, and a half is the root of this problem. This culture manifests itself in aggressive, draconian tactics across the board.

The carriers are fond of blaming the Federal Employees Liability Act as the culprit and suggest that it is far more adversarial than other programs designed to address workplace injuries and occupational illnesses. However, the railroads are wrong for two reasons.

First, injured employees work to seek out the assistance of an attorney, as Jim just said, in only a minority of cases. In fact, a number of studies have been done dating back for years which show that a percentage of cases in which an attorney is involved in FELA matters is significantly smaller than the percentages of worker's comp cases in which an attorney is retained. Moreover, the GAO study said that an overwhelming majority of FELA claims are resolved in upwards of 90 percent and less than 1 percent end up in court.

Second, if the industry's argument is valid, then we would expect to see a noticeably more lenient response to railroads in cases of accidents where no personal injuries are sustained and in simply disciplinary matters. This is simply not the case.

For example, the FRA first published a final rule governing locomotive engineers in 1991. The industry command and control culture went into overdrive. Scores of locomotive engineers found that certification revoked for incidents that would not have triggered a disciplinary action whatsoever in the past. The level of aggressive-

ness on the part of the carriers forced the FRA to reopen the rule for major revisions barely a year and a half after it went into effect. On April 9th, 1993, the FRA published an interim final rule that significantly scaled back some of the revocational offenses and clarified others.

Although the industry has been hemmed in somewhat by the FRA in terms of locomotive engineer certification, command and control remains the philosophy when related to railroad worker's discipline. The June 27th Senate Appropriations Committee report on Senate Bill 1710 points out that the Railway Labor Act arbitration cases—many, if not most, involving discipline—take an average of 30 months to resolve and funding for such cases routinely runs out several months before the end of the fiscal year because of the caseload.

It doesn't matter whether an event involves an injury, an accident, or merely a disciplinary matter; the industry's response is swift and harsh, and that is what command and control is all about.

In conclusion, the 19th century ended over 107 years ago, and it is time to bring the treatment of railroad workers into the 21st century. The culture of the industry must change now, and together we must share ideas, cooperate to implement programs where labor is treated as an equal partner throughout the industry and workers are considered a valued resource and not a disposable commodity.

Thank you, Mr. Chairman and Members of the Committee.

Mr. OBERSTAR. Thank you, Mr. Tolman. Your complete testimony, of course, will be in the record.

Mr. Cook.

Mr. COOK. I would like to thank the Members for this opportunity to state all factors regarding my injury while at work on CSX Railroad in January 2006. I was employed at age 18 by the Seaboard Coastline Railroad in May 1970, as a locomotive fireman and promoted to engineer position in January 1972, working over 36 years and 12,000 days until September 2006. I held elected positions with the United Transportation Union through 1992 and joined the BLE in 1993.

In 2005, I helped handle complaints of CSX employee fatigue from extended overtime, positive job changes were made in November, and I, as the senior engineer in our Orlando, Florida terminal, did work one of the newly reduced hour jobs. In late December I was told by a young CSX manager that "if I couldn't work 12 hours every day, CSX could pull me out of service and send me to a doctor," which I considered as a threat.

On January 12, 2006, after working over 10 hours, I told the same officer I was tired and felt unsafe. The following morning I was informed that I had failed three operational rules tests the previous work day at the same time he ordered me to leave. I knew of no personal test failures since 1993, and I filed a CSX code of ethics complaint for falsifying my personal employment records.

On January 20, 2006, after working over 10 hours with a relief crew available and ready to take over, this same CSX officer deliberately held me on extended overtime and I sustained my only career injury. After a medical check of my condition, it showed a back injury which was reported to the FRA. My crew and I were sub-

jected to increased operational rules tests ordered by the same CSX officer who took me for a medical injury evaluation and CSX officer test teams held tests much over the average two to four per employee per month.

The FRA requires the railroad officers to perform normal tests for education, not discipline. From January 24 through 26 of 2006, I was administered 13 tests, but only 11 were noted, with 2 alleged failures for me only, and on January 31st I was charged with another test failure and two more compliances were not recorded again.

After five area incidents from 12/05 through my injury, CSX ordered tests for 56 days, with 457 total employee tests, 19 failures by 13 different employees. I had 7, and 12 others had singular failures. From January 12th through February 16th of 2006, 35 days, there were 334 total tests wherein I had all six failures. These test failures showed CSX was only interested in building up a quick record of rules failures on me as a senior engineer and very active union member who was injured to cover up their goal to terminate me, sending a clear message to other local employees not to report any injuries in the future.

As a result, I was ordered to four separate investigations and no other failed employees were charged, with CSX officers acting as the prosecutor, judge, and jury. In three investigations my fellow crew members were called as Carrier witnesses, even though they were guilty of rule violations at the same test times, and my witnesses requested were refused to be made available by CSX.

On January 18th, 2006, I sent CSX President Michael Ward an 18-page letter about this harassment, copying other CSX execs, the FRA union officer, six Federal agencies, and three U.S. Congresspersons. On March 1st, CSX administered me 85 days of unpaid suspension, which was more discipline than our entire 100-man terminal had in a year. My four discipline cases were appealed by the BLET, my regional officer and one Congressperson's staff advised me that these actions by CSX toward an injured employee were unethical, unlawful, and suggested I needed legal advice.

In July of 2006, I filed an extensive Federal Labor lawsuit against CSX based on discrimination, harassment, and intimidation of me because I was injured while working for them. In early August 2006, the UTU and BLET presidents wrote a joint letter to CSX President Ward about injured employee incidents where CSX used terms of the "CSX Action Plan." This plan directs CSX terminal officers to name five BAD ACTORS in each location and all are to be targeted, stalked, and followed to find ways to terminate such persons.

In early 2006, most employees were told, in face-to-face rule meetings required by CSX, that if you get hurt, we will fire you. I had been checked regularly by numerous doctors and it was discovered that I have four bulging upper back and neck discs, causing my constant pain. After September 7th, 2006, I could no longer work based on my lack of ability to climb, sit extended times, or stand the whole body vibrations present while performing my engineer duties. I consulted my doctors and found that they are not op-

timistic about my injury improvement, so I filed for full railroad retirement disability, which was granted March 1st, of 2007.

In December of 2006, I was ordered to a fifth investigation using my crew members again as witnesses, disregarding their guilt, which was a final step to terminate me only after I was injured, and it was postponed until I will ever be able to return to work. This treatment by CSX caused a mental strain based on my personal disability, pain, and my employer attempting to paint a picture of me to take me from excellent, long-term employee, who trained many new hires for CSX, to deserving termination only because of my injury.

Mrs. NAPOLITANO. [Presiding] Mr. Cook, I hate to ask, but could you wrap it up, sir?

Mr. COOK. Yes, I am.

I started in September of 2006 with psychiatric counseling and meds which continue to date to be able to cope with such treatment. The CSX Action Plan and their clear actions against me show that CSX intends to terminate any employee who reports an injury using manipulated, false test records, threats, harassment, and/or discrimination.

All railroad workers hope this hearing and future legislation based on clear facts you are presented show that we are bullied in our workplace by officers in a transparent effort to intimidate employees from reporting injuries or face termination. The U.S. workers deserve to be treated with dignity and respect in their workplace. This Nation's railroad companies should continue to educate employees to improve safety, but by intimidating employees through any means is unacceptable to create misleading and faulty safety records.

Thank you.

Mrs. NAPOLITANO. Thank you for your testimony, sir.

Mr. Gregory Haskin?

Mr. HASKIN. Good afternoon, Chairwoman Napolitano and Members of the Committee. My name is Greg Haskin and I would like to thank you for the opportunity to testify today at this important hearing. I felt immediate impact of the failed railroad industry injury policies and hope this hearing can bring to light the abuses perpetrated by the railroads.

November 5th, 2001 started out as a normal workday for me. Less than two hours later, my life as I knew it would change forever. As a young boy, I was a typical kid, fascinated by trains. My grandfather worked for 27 years for the Union Pacific and my father 43 years. I couldn't wait for my chance to do what I was born to do. In 1997, I was finally hired into train service on the Union Pacific Railroad.

That dream was cut short at the age of 28 and became a nightmare that I may never awaken from. I was truck in the head by a piece of steel projecting from a rail car. I would later find out that this bar had been broken for more than three weeks prior to the accident, but the company needed the car to lay rail in the yard and couldn't afford to take it out of service.

When I came to, I was laying face down on the car in my own blood and wasn't sure what had happened. Minutes later, Union Pacific management was on scene and my lesson in harassment

and intimidation was just beginning. I was on scene for two hours while management decided what to do with me. No call to 911 was ever made. No one stepped up to take me to an emergency room. No one with medical knowledge was ever brought to the scene. They just sat back, hoping and waiting to see if my head would eventually quit bleeding.

Finally, after two hours, I was told that I would be taken for medical attention. Instead of taking me to the nearest emergency room, the director of operations drove me 30 minutes to a clinic located less than a quarter mile behind Union Pacific's Central Regional Headquarters. I was injured in Kansas, but this clinic was in Missouri.

On our way there, we passed four major hospitals. I entered the clinic soaked in blood with the manager by my side. A nurse behind the desk rushed to me with a towel to help control the bleeding. She informed the manager that the clinic didn't handle injuries this serious. He replied that a UP nurse had called ahead and was told the doctor on call would handle it.

A doctor entered the room within minutes only to be told by this same manager he was not the doctor we were here to see. The doctor, stunned and amazed, turned around and left the room.

About 15 minutes later, that doctor entered the room. After quick examination, he told me I would need staples to close the wound and to talk with the manager about what I wanted to do. The manager stated if I received staples, my injury would turn into an FRA reportable accident, which would follow me for the rest of my railroad career and that I would have no chance of promotion and it could ultimately cost me my job. I was scared to death. I was doing the job I was born to do and here I was about to lose it all.

I chose not to have the staples. The doctor told me he could prescribe something, but it would be the same as taking four 200 milligram Tylenol, that I probably had at home. The nurse then informed the doctor that I had not had a tetanus shot in over 10 years. The doctor informed the director and myself that they would love to give me a tetanus shot, but they were all out of it because of 9/11.

I didn't know it at the time, but if the doctor would have prescribed the 800 milligram Tylenol or given me a tetanus shot, my injury would have become reportable to the FRA. I now know why he was so reluctant to do either.

I left with a bandage on my head, resigned to live with the pain until I could get home and take some Tylenol. I was driven the 30 miles back to the yard in Kansas, to my vehicle, and I drove myself 30 minutes to my home, which I barely remember doing.

I got home at about 5 p.m., almost eight hours after the accident, and I took four 200 milligram Tylenol, as directed, and went and laid down. I woke up at 9 a.m. the next day., 17 hours later. My head was pounding, I was nauseous, and the sheets were a bloody mess. I took more Tylenol and vomited throughout the day. My mother became worried about me and called my sister, who is a neurological ICU nurse at St. Luke's in Kansas City. When she came to check on me and heard about my symptoms, she called a friend of hers who is a neurological surgeon at St. Luke's, and after hearing the symptoms, told her to get me there immediately. I was

diagnosed with post-concussive syndrome and referred to a neurologist. The emergency room doctor told me I was lucky to awaken after being asleep all that time.

When UP learned that I went to the emergency room, they changed my work status to OS, short for other service, saying I was in training. I spent the next month at home in bed on narcotic pain medications to try and control the headaches, and was shown as OS the entire time, meaning that the UP did not have to report my injury to the FRA because I had lost no time from work, according to UP's records.

I then returned to work, continued to work with the railroad's approval for over two years, while still undergoing treatment for the headaches. In December of 2003, UP told me I could no longer work while taking the narcotic pain medications unless one of my treating physicians would put it in writing I was safe to perform my duties. I was devastated, to say the least. I went to all my doctors, pleading for a written statement that I was safe to work, but all the begging in the world could not persuade them.

From my injury in 2001 until 2004, I underwent seven surgical procedures on my head and neck trying to alleviate the headaches so I could keep what I thought was the best job in the world. My last surgery was one last attempt to stop the pain. In this surgery, a probe was heated to 178 degrees and placed on three separate nerves in my neck. Each nerve was burned for 60 seconds. No anesthesia could be given, as the doctors needed to make sure they were not burning the wrong nerves. The only way to describe this pain is to place your hand on a stove top on high and leave it there until you can no longer feel your hand. I still battle headaches every day. I have lost every ounce of pride I once had and deal with impotency and depression that no 34 year old man should ever have to go through.

There will be more stories like mine as long as railroads are allowed to harass and intimidate employees, as is current practice. The current reporting procedures give incentive to the railroads to keep an accident from becoming FRA-reportable. I do not know if those first 48 hours prior to my laying in the emergency room would have made a difference in my health today, but I do know if every injury, no matter what type of medical treatments are involved, had to be reported to the FRA, workers like me would be treated by emergency room doctors that are trained to treat traumatic injuries like mine. In my case, the doctor that first treated me at the clinic behind UP Headquarter was a retired ophthalmologist. That is right, an eye doctor.

The UP records show my accident never became an FRA reportable. The director of operations that handled me that day has since been promoted twice since my injury and is currently a superintendent.

To finish up, I only wish that—I am sorry. Excuse me. I am almost done.

I have not worked for the Union Pacific since December 1st, 2003, but to this day the Union Pacific still shows I have never lost a day because of my injury. The most ironic thing about my accident is that, according to the Union Pacific records, I never even

worked on November 5th, 2001. That was the day that I was injured. If only it was that easy to erase my headaches.

Thank you for the opportunity to address you here today.

Mrs. NAPOLITANO. Thank you, Mr. Haskin.

Mr. Timothy Knisely.

Mr. KNISELY. Thank you, ma'am. Good afternoon, Chairman and Ranking Members of the Committee. My name is Timothy Knisely. I used to be a conductor for the Norfolk Southern Railroad. I hired out in October 1974, at the age of 20. In 2001, I was injured in the course of my duties.

On the evening of March 9th, 2001, I reported to work as usual. I was required by the Norfolk Southern to take a train from our Homestead Yard in Oregon, Ohio to CSX's Stanley Yard in Walbridge, Ohio to pick up a number of rail cars and bring them back to Homestead Yard. After arriving at the CSX Yard, I went to disconnect the air hose from the set of rail cars. The brass fitting on the air hose fractured because of metal fatigue and old age.

When this happened, the air hose, being under approximately 80 pounds of pressure, began to whip around in the air much like a fire hose, and with its brass fitting on its end. The hose struck me, knocking me all around. It repeatedly hit me in my legs, back, chest, and head. Each time I tried to get up off the ground, it would knock me back down. This lasted for about one minute. It finally stopped when the hose got caught underneath one of the cars and permitted me to get on my feet as best I could. I knew I was seriously injured and called for help.

The Norfolk Southern trainmaster came to the site to investigate the incident. He transported me to the local hospital that the railroad uses. The trainmaster attempted to persuade me not to report my injury. When I refused his coercion and reported the injury, the next day I was charged with making a false injury report. The trainmaster did acknowledge that I in fact was struck in my legs, back, and chest, but claimed, because he could not see any injury on my head, that, therefore, I must have lied about being struck in the head. After 27 years of dedicated and loyal service to the railroad, I was subsequently charged with lying about being struck in the head and eventually fired. This charge happened solely because I dared to report my injury.

The day after the incident, the trainmaster, with others, went back out to the CSX yard to videotape a re-enactment in order to prove at my hearing that I could not have been struck in the head by the hose, to show that it could not go that high so as to support my firing. Unbeknownst to me, the videotape was altered and those portions that showed that the hose would in fact go even higher than my head, were removed from the videotape. The railroad contended that the hose would only go five to ten inches off the ground. The railroad proceeded to have their hearing and fired me after 27 years of service, allegedly not because of the incident and not because I claimed to be hit on other places on my body, but simply because I claimed I was hit on the head.

The truth was that they fired me because I chose to report my injury and the claim that I was not struck in the head was simply the best they could come up with. The railroad fired me even after I submitted voluminous pages of medical documentation specific to

my head injury. The medical reports included the emergency room treatment of the day of the injury and the immediate months thereafter, not the least of which was extensive examination right here with doctors from George Washington University School of Medicine.

The railroad chose to ignore both my statement and the volumes of medical proof of severe head injury. Nevertheless, I remained permanently fired not because of my work that night, nor because of my injuries, but solely because I chose to report my injuries.

During the civil FELA litigation that followed, the railroad was required to produce that videotape. It was then that it was discovered that the videotape had been tampered with and a portion out of the middle of the tape, which proved that the hose under these circumstances would fly in the air up to 9 feet or more, was taken out. When this was brought to the attention of the court, the railroad acknowledge and admitted in court to the tampering of the videotape. The court made a finding that "a videotape recreating an equipment malfunction which was videotaped by Defendant Norfolk Southern and produced during the course of discovery in this case was deliberately and intentionally changed for the purpose of deception before it was provided to Plaintiff.

Of particular concern to the court was the fact that the Defendant Railroad edited a significant portion from the videotape which helped substantiate the type of injuries Plaintiff received on March 9th, 2001 by the malfunctioning and defective equipment, and which controverts the basis upon which Defendant Norfolk Southern terminated Plaintiff's employment."

It was my belief then, and it remains my belief today, that I was charged and fired for daring to make an injury report so as to be made an example of and so that others in the future would think twice before filing a Federal Railroad Administration required injury report.

I am aware of other colleagues of mine at the same yard—Arthur Richter, Michael Linkenbach, Susan Sheidler, and others—who have been similarly charged for allegedly filing false injury reports within days or hours of such reporting of their injuries. It is my belief, as well as the belief of others, that the purpose of such firings is to maintain a chilling effect throughout the Toledo area on the abilities and initiative of other injured people who might dare to report their injuries as required by the FRA.

Thank you all for taking the time to listen to me today.

Mrs. NAPOLITANO. Thank you for your testimony, sir.

Mr. Charles Ehlenfeldt?

Mr. EHLENFELDT. Yes, Ehlenfeldt. Good morning. I am a former employee of the Burlington Northern Santa Fe. On August 1st, 2002, while operating a poorly maintained switch, I was injured. Since the accident, I have had two major back fusion surgeries.

Despite this, the BNSF reported the cause of my injury to the FRA as a human factor. They blamed me for the injury. In my opinion, the BNSF did not accurately report my injury to the FRA. From the date of incident, I have been harassed, intimidated and treated unfairly by the railroad.

I was called into the supervisor's office almost immediately after the incident. Both the superintendent and train master were in the

office. I had no union representation or even a neutral person with me at that time. The two officials closed the door and drilled me with questions.

The BNSF used my injury to fire me. When I called BNSF and told them I could not work due to my back injury, the Burlington Northern Santa Fe would not allow that. I had to lay off sick rather than lay off due to my on the job injury.

This counted against me in BNSF's attendance policy. I was eventually to attend an investigation where they alleged I violated the policy. I had an on the job injury, and the BNSF was going to punish me for that. The worst form of harassment and intimidation came when the BNSF terminated me.

On January 6th, 2006, while working on a train, I heated a can of soup in a sidewall heater. Engineers and trainmen do this because BNSF does not provide any way to heat food on a train. We often work 12 hours a day and sometimes must remain on the train for up to several hours more without access to food. When I opened the can of soup, it splashed on my face and burned it.

I reported this incident to the BNSF as I was required to do. The BNSF then forced me to attend an investigation concerning this incident. Prior to the investigation, I gave the railroad a doctor's note that I was unable to work due to my back injury. I was permanently terminated after this investigation.

In the investigation, Randy Cartwright, Road Foreman, a Burlington Northern Santa Fe official admitted that it was common practice to heat food on locomotive equipment including sidewall heaters. Mr. Cartwright had been with the railroad since 1969, and he himself had used locomotive equipment to heat food. To my knowledge, he was never investigated by the railroad.

He also testified that he knew that other people had used the sidewall heater to heat food in the past. Despite the railroad's knowledge of this common practice, there was no rule against it. In his deposition, Mr. Cartwright was unable to explain, in his position as a railroad official, why I was fired and he was not when we both had engaged in the same common practice.

I believe the facts of my case show that the Burlington Northern Santa Fe harassed and intimidated me because I was involved in an FRA reportable injury.

In a time when I was physically hurting—I had two major back fusion surgeries and was in significant pain—the Burlington Northern Santa Fe made the conscious decision to kick me while I was down. They cut my healthcare insurance during the time I was scheduled to have my second major back surgery and, while in the hospital, they had my car towed.

They brought trumped-up charges against me on two occasions and assessed discipline both times. The second trumped-up charge resulted in permanent dismissal. The only difference between my case and the numerous other employees that have done the same thing, including company officials, is that I had an FRA reportable injury.

The pain I have endured through 13 hours of surgery and the long months of recovery pales in comparison to the emotional pain and financial stress that Burlington Northern Santa Fe has put on me and my family.

Members of this Committee, thank you for listening to my story and taking on the issue of railroad harassment and intimidation. Individual employees, such as all of us here and many who are too scared to say, are not any match for the large railroad corporations, such as the BNSF. I believe we need Congressional action to solve this serious injustice.

Thank you.

Mrs. NAPOLITANO. Thank you, sir, for your testimony, and thanks to all of you for being here.

Unfortunately, we are going to be recessing for about an hour until after the vote. We are currently just about ready to go for another vote, and I have been instructed to please ask for the recess for one hour.

So, again, thank you so very much and please stand by.

[Recess.]

Mr. OBERSTAR. [Presiding.] The Committee will resume its sitting with, again, apologies to all, especially witnesses who have traveled a long distance to be here for this hearing and expected to be heard and to be heard in their entirety.

None of us could anticipate all the procedural motions that were offered on the House floor throughout the morning and into the early afternoon and the consequential votes that occurred because of those procedural motions. But I think my message from the floor from both sides of the aisle—I think Mr. Buchanan can confirm—is that we are safe for at least the next hour and a half.

Mr. Jungbauer, Mr. Brunkenhoefer, very powerful, compelling testimony, Mr. Tolman, Mr. Cook, each of our individual accident victims who told their stories in very compelling ways, I thank you for your testimony. Thank you for having the honesty, integrity and courage to come forward and express your particular case.

The purpose of this hearing is to give voice to those who have not been heard to an issue that has not be aired publicly in the hearing process and to seek redress.

Mr. Jungbauer, you have had a lot of experience in the courtroom, experience intimately engaged with the experiences of individual railroad workers. Why do you believe railroads systematically underreport accident and injury?

Mr. JUNGBAUER. Mr. Chairman, I believe, after studying this for quite a number of years, that there are programs that most carriers have that provide a financial incentive to middle managers and first line supervisors which, as I tried to say earlier, can cause even good people to turn bad. If it is a matter of whether or not they get a bonus or part of a bonus or promotion, people will start to put pressure on the injured people.

I think that is what has gone wrong because I have done this long enough that at the beginning of my career I didn't see this type of harassment. This is a much more recent thing that has gotten worse. Since about 1992 is about the best I can put a timetable on it, that it has really gotten worse since about then, major changes.

Some of the other witnesses had said that the FELA is combative. I have had wonderful relationships with some major rail carriers where we did everything on a handshake, but things have

changed. It is not just because of the FELA. It is because of other things that I can't fully put a finger on.

But in trying to think, to give advice to this panel, to this group, I think if we could convince railroads to get rid of the financial incentives to middle management and first line supervisors, that would go a long way to being able to protect our workers with the new legislation that has come forward and the legislation recently passed by the House.

Mr. OBERSTAR. I am a little reluctant to raise it, but that is the Harriman Award because it was started for a laudable purpose to reward and recognize railroads that have excellent operating practices and injury-free and accident-free practices. It has been alleged that in the rush and the pressure to win the Harriman Award that railroads are repressing adverse information.

Mr. JUNGBAUER. I believe that to be the case.

Mr. OBERSTAR. Mr. Brunkenhoefer, you said that 80 percent of injuries are settled within the company or railroad.

Mr. BRUNKENHOEFER. Yes, and Mr. Jungbauer corrected me. He says it is 90 percent. He said it was 90 percent.

Mr. OBERSTAR. Ninety percent.

Mr. BRUNKENHOEFER. A significant number are settled between the employee and the representative of the employer.

Mr. OBERSTAR. Only 1 percent of cases go to trial.

Mr. BRUNKENHOEFER. That is my understanding.

Mr. OBERSTAR. How many cases does that represent? One percent is how many?

Mr. BRUNKENHOEFER. I have absolutely no idea how many FELA cases are filed.

Mr. OBERSTAR. Mr. Jungbauer, do you have any idea?

Mr. JUNGBAUER. In my firm, if I try, we have similar statistics. We have to work the cases right up to trial, and that is a difference by the way. In the old days, there was not so much friction between the railroads and us. We could settle cases early which saved money for everyone, but now because of certain polices in claims departments where the operating people are having something to say as well as claims on whether or not a case can settle, that is what I believe is driving things right down the courthouse steps also.

But I do believe, Mr. Chairman, it is a very small number that actually go to trial. Many, many cases go right to the courthouse steps, which is too bad.

Mr. OBERSTAR. Mr. Tolman, do you have any way of knowing how many injuries are never reported?

It is hard to prove a negative, but how many are not reported?

Mr. TOLMAN. No, I mean we don't have the statistics. I mean I think the credible witnesses on my left did a brilliant job presenting what is happening in the industry, and it is unfortunate that it shouldn't be happening like that.

The GAO did the study on those numbers that were presented today, 90 percent resolved before it got to court, 1 percent that did go to court, and we don't have the numbers even on how many or what they were actually looking at.

Mr. BRUNKENHOEFER. If I can interrupt, we have had regional meetings of where we will have 700 to 1,000 members, and I have

said, anybody who believes that they will be injured and not be fired that works for a railroad, would you stand up? It doesn't happen. So the perception among railroaders is if you have a reportable accident, you at least expect to be fired.

Mr. OBERSTAR. Well, management obviously has the responsibility to distinguish among various kinds of behavior, to identify unsafe behavior and safe behavior, and to educate employees, work with employees on safe practices.

Mr. Cook, are you aware of such practices within the railroad sectors? Do they have programs for employees on how to operate this, that or the other piece of equipment safely and conduct themselves safely?

Mr. COOK. Yes, sir. In all my years with the railroad, the number one priority was always safety. In the last few years, as a past union representative is when I started seeing this trend to where they started disciplining people vigorously because of any injuries, but they have had safety programs for years and made them their number one priority.

Mr. OBERSTAR. When Mr. Tolman says in the old days or Mr. Jungbauer, he means prior to 1992?

Mr. COOK. Yes, sir, that is right.

Mr. OBERSTAR. What caused this sort of demarcation point? What happened from 1992 on to change practices?

Mr. COOK. I don't really have a credible answer for you. All I know is what I have seen. I had never been injured in my career, so I didn't have to face it, but I did represent a lot of members who were injured and none of them, up until the last few years, were targeted, stalked or intimidated until they were fired. That was their intent they have started in the last few years.

Mr. OBERSTAR. Now Mr. Haskin and Mr. Knisely and Mr. Ehlenfeldt, the Federal Employers Liability Act, FELA as it is popularly known, enacted in 1908 was enacted at a time when railroading was the largest or one of the two or three largest employers in the Country. Railroading was the preeminent industrial activity.

A job on the railroad was highly sought after, a very good paying job, better than working in the steel mills and, for a good many Americans, better than working on the farm. They went to work for the railroad.

Railroads have, from time to time and I know in the last, oh, eight or ten years, suggested that these problems could be corrected. These problems of reporting and of assigning points and all could be corrected if FELA could be amended or rescinded, repealed and a worker's comp type program substituted forward. What would you think about that?

Mr. HASKIN. Mr. Chairman, in regards to my case, I have had a lot of time in the last six years since I was injured. Every day, four or five times a day, I am reminded that I got hurt, and so it is emotional at times for me to talk about it. It is something that I am very passionate about, that I would love to, if I can just make a difference and keep it from happening for one other person, then being here today or anything that I do is worthwhile.

I truly believe that, without FELA, the day that I was injured, who knows? I might not even be here today to talk about it because

I truly believe that once Claims showed up on the scene and took over the case, that that was the whole reason for we need to do something with him because his head hasn't quit bleeding.

I think, without FELA, it will be a graveyard in the railroad yards. I think there will be injuries, deaths, and I think the statistics will go straight through the roof when they are actually reported.

Mr. OBERSTAR. Thank you.

Mr. Knisely?

Mr. KNISELY. Yes, sir, Mr. Chairman, I believe that we really need FELA desperately because as I believe it is one of the only programs that the railroad pays attention to when workers are injured. If we were going to go to workman's compensation, I believe there would be caps on what the workers would be allowed to get as far as being compensated for lost arms, legs, catastrophic injuries.

I just believe that the railroads pay much more attention to FELA, and the actual employees have much better ability and protection because the railroad does have to pay attention to FELA. So, therefore, I believe it is much more important to have that than workman's compensation which I think could become corrupt easier than the FELA system.

Mr. OBERSTAR. Thank you.

Mr. Ehlenfeldt?

Mr. EHLENFELDT. Yes, sir, I believe the reason they have FELA, especially in the rail industry, is when an accident does occur, a lot of them are pretty serious since the heavy equipment. When you do get hurt, you are probably going to have a good likelihood of getting hurt bad. I just feel that I guess I have to ask a question. Why would the difference between FELA and the labor act that they would like it to go to? Why would that matter of it being treating people like human beings?

If somebody was hurt, why should it matter if they are subject to FELA or subject to State industrial tax or State industrial? Why would that matter?

Why would this man have to sit there? He is lucky he is not dead for getting hit in the head and Mr. Haskin.

I don't really see why should that cause somebody to act like a decent human being to take care of somebody that is hurt?

I don't really understand the reason why they would want to get. Why would they want to get rid of it if everything is cool, if everything is okay? I don't really see what. That is our only protection is the way I see it.

Mr. OBERSTAR. Thank you.

Mr. Buchanan.

Mr. BUCHANAN. Thank you, Mr. Chairman.

I want to thank all our panelists today for coming in.

I am a guy that has been in business for myself for 30 years, and I have had my fair share of issues over the years, but primarily it has been the workman's comp field. So this is something new for me today as I have to try to understand it.

Let me just ask you. You had mentioned, Mr. Jungbauer, the thing about 1 percent go to trial. That doesn't unreasonable. Are you saying that is high, low? You made that comment.

Mr. JUNGBAUER. The reason I make the comment is if some people that are tort reform advocates say that civil cases such as FELA clog up the court systems. The fact is they don't. The fact is that business litigation clogs up the court systems a lot more than civil cases do. So it is not a strain on the court system.

As far as statistics that tort reformers might want to say that, oh, there is so much spent on this and that, if railroads would just be safe, carriers would be safe early, they could put lawyers out of business. Put me out of business. I don't need to be here. I can find something else to do. Just be safe.

Mr. BUCHANAN. I am the first one. I have had a lot of employees, and if we have someone that gets hurt, we are motivated to make sure they get back. We take care of them, do the right thing. I would think the railroads have that mind set. I don't see why they wouldn't want to deal with that in a positive way, but maybe I am wrong on that.

But I can tell you that the proliferation, at least in the State of Florida, with trial lawyers has been enormous. It has put a lot of small businesses out of business. I was Chairman of the State Chamber two years ago, and we represent 137,000 businesses. But I can tell you a lot of lawyers in my case have created a lot of value, but it just seems like there is a lot of issues that sometimes get abused, not many but some.

I was just trying to get back to the 1 percent comment you made. I think in the system that doesn't seem because you are not always in workman's comp either able to resolve all those issues all the time. One percent seems kind of normal or low. I don't know if that is. I was only trying to get my understanding.

Mr. JUNGBAUER. I think it is a low number. If 50 percent were going to trial, we would really be clogging up the court system. The fact is most cases can be settled. As I testified to earlier, if we can get claims people that will actually talk to us, we can settle cases early.

In the old days, like at Burlington Northern, there was a guy Jack Lambrick, one of the best guys around. The biggest case I ever settled, I settled with him in 15 minutes because we had a trust with each other.

Sioux Line, Chuck Nelson was one of the best in the Country. If I even made a flinch with my eyebrow, it could cost me money. He could read me so well.

Those were good, honorable, wonderful people. If we can get back to that type of relationship of trust, lawyers can still represent their clients.

The best thing is injured people won't go to lawyers if they have a trust relationship with their carrier, with their employer. So if I was the employer and wanted to put lawyers out of business, I would just treat my employees better.

Mr. BUCHANAN. Well, I think that should be the mind set, and that is what we have tried to do is do everything we can.

As I was in the automotive retailing business part of my career, we had a lot of people dealing with the equipment and automobiles. So, safety and putting a lot of emphasis on that because we couldn't afford to have our people be out of work, and so we would try to deal with it as aggressively as we could.

Mr. Cook, let me just ask you in terms of your experience, what happens when someone gets hurt with the company you are with? How do they deal with it?

What happens? What do you do when someone gets hurt?

Mr. COOK. Mr. Buchanan, in my case, I reported to my immediate supervisor. They took me to the nearest local hospital, major hospital in Orlando. I sat in a wheelchair for nine hours. I had my vitals taken twice.

About six hours prior to the nine hours expiring, we were told that I would be five or six hours being seen, and I told the supervisors after nine hours and twenty-one and a half hours on duty, if my back wasn't hurting from my injury, it was now hurting in addition because of sitting in this wheelchair.

So this is what happens. I could have been taken to another hospital, but instead we stayed in that one place which was a major hospital in Orlando.

It was after that, that weekend, I was on my off days. They had told me to take an extra day off when I was due back to work to see how my back was doing, to attend a safety seminar which I did.

When I tried to return to work the next three days is when I was besieged by these test teams who were ordered to do whatever they could to fail me to make me appear to be a person that was an excellent employee by record to a lousy employee within a matter of three days. That is what happened.

Mr. BUCHANAN. You were working with CSX, is that it?

What do you think? Why are they motivated? Why is the company motivated to do that in your opinion?

Mr. COOK. In my opinion, we found out later what it was. It was what is called the action plan. They are ordered, the CSX officers, to label five bad actors in each terminal.

You generally will not know, and I didn't know that I happened to be on that list, but the only reason I was on the list was because I got injured. It was the first one in my career. I did everything to avoid it.

But their orders are to increase the FRA testing, which is not meant to be disciplinary, and use it as a disciplinary tool in an effort to terminate you. That is going to be the final step.

Mr. BUCHANAN. In your case, you are a good employee. Why would the company be motivated to do that?

I am just trying to understand, myself. If I have a good employee, and I have had employees for 30 years that I have dealt with. If I have a good employee that is productive, I don't understand why it is in the company's best interest to terminate you and not get you back to work right away.

Mr. COOK. Well, I agree with you, but in reality what they have done with this action plan and this point system or whatever you may want to call it, they have a created a method so that to terminate a person that is injured will send a message to following employees: Don't report that injury unless you want to have the same thing happen to you.

Mr. BUCHANAN. Mr. Haskin, what is the procedure with your company if you get hurt? Do you feel like they have the employees' best interest in terms of safety and your health?

I know you had a pretty tough incident, but I was just curious about from your standpoint.

Mr. HASKIN. You know with having a father and a grandfather that worked for the Union Pacific for over 70 plus years combined or 80 plus years combined, when I was a young boy, I thought they did. I really grew up that way and thought it was a great place to work and felt the same way when I hired out. It shortly changed thereafter where I kind of saw how the changes were, the discipline, the intimidation when it came to injuries.

Union Pacific, constantly on their web site, or they at least did when I was working—I assume they still do—would track FRA reportable injuries on the front page for each region. In my case, Kansas City was at the top of that list or was probably a number one when I was injured.

You might say, well, what is big about an award? Well, these managers, the manager that handled me that day that I was injured has since been promoted twice and is now superintendent of a major city or major region. I think it is incentive to them.

Obviously, we don't know any financial or have any facts of financial gains for them but as far as promotions, I think my case speaks for itself, that this manager went right up the ladder. He had a pretty well stalled career for six or seven years prior to my incident and since then has been promoted to superintendent.

I think it sends a sign to other managers that you be tough because in my case I know for a fact that how they treated me kept at least five to ten other people that had minor, smaller injuries than I did from reporting it because they were scared to death that they were going to be terminated. They would rather not report a sprained ankle or what have you because they didn't want to lose their job over it.

Mr. BUCHANAN. So what you are saying is if someone had a minor injury that got reported, they would be terminated. Is that what you are saying at this company?

Mr. HASKIN. One hundred percent. I was also in 2003, and I will make this quick. In 2003, I became after the railroad told me. After they let me work for two years on a narcotic pain medication, they told me that I could no longer work. I became. I wanted to be active, and I wanted to do something about it because I knew that they couldn't intimidate me financially because they already told me I couldn't work.

They couldn't hurt me any worse than they already had with the headaches and everything else physically that I went through every day. So I decided that I was going to be somebody that they couldn't intimidate.

I personally watched the same little business and industry clinic that employees were taken to with the doctor, the specific doctor that they wanted to see. I watched that to where injuries weren't reported. They might fill out an accident report, and it is the same as I did.

I filled out an accident report, but the manager specifically said we are going to put this down as first aid. I was given first aid the day that I was injured. Okay, so it is not a reportable injury to the FRA if it is first aid. That is why none of the medication was prescribed to me.

But one of my first cases that I had as a local chairman was an employee that sprained his ankle in the Kansas City yard, and he called me and said I sprained my ankle. I was like, well, you need to fill out an accident report. They have already told me they are going to fire me or they are going to have an investigation if I fill out this report. Anyway, I was like, so we talked.

Long story short, they had him come to work for three days, and he sat in the crew room while they called another employee to work his job and that way it didn't have to turn into an FRA reportable injury. He got paid by sitting on a couch in the break room for three days, three tours of duty, just so they would not have to report it to the FRA.

Mr. BUCHANAN. That is unbelievable.

Mr. Knisely, let me ask you, in your incident, did you receive prompt medical attention on behalf of the company or what happened there?

Mr. KNISELY. Excuse me. Yes, sir, I did receive prompt medical attention. I was taken to the hospital that the railroad normally takes their employees when there is any kind of an incident. Like I say, they tried to coerce me not to make out a medical accident report which is required by the FRA to do.

When I told them that, yes, in fact, I needed to go to the hospital, they did in fact take me. However, after I reported my injuries, even though they had records, they wanted to make an example out of me to send a chilling effect to any other employee that heard that I was injured so that they would keep them from reporting injuries which are required by the FRA to report.

Mr. BUCHANAN. How did they coerce you?

You said they coerced you. What do you mean by that? What did they do?

Mr. KNISELY. Saying things like: Oh, well, you don't feel that bad, do you? Gee, it was night time. Let me look. Oh, I don't see. I don't see any blood coming out of your head. There is no way that you could have been hit. Well, let's just do this as a precaution.

I was limping on one leg. I still had a lot of adrenaline going through my system and all the bruises hadn't come to the surface yet.

But that was their form of saying, well, gee, you don't really, this isn't really that bad or anything. So that was the way that they went about handling that situation at the scene of the accident.

Mr. BUCHANAN. Thank you.

Mr. Ehlenfeldt, what is the safety policy in your situation with the company? What was involved there?

Mr. EHLENFELDT. The safety?

Mr. BUCHANAN. When you had your incidents, how did the company respond?

Mr. EHLENFELDT. Well, they basically put me on trial inside the office, trying to tell me that, just asking me questions on what happened, and then they tried to tell me how it could possibly happen.

Basically, the crew that was with me, the engineer, he had over 30. Maybe he had even 40 years experience, and the brakeman that was with me on that job was probably about the same amount of seniority. Both of them, I wasn't going to turn in the injury be-

cause I was too scared to turn it in, but they could see that I was in pretty bad shape.

So I had to drive about an hour because we were working at a remote location. When I told the superintendent there, the way he handled it was to drill me with questions about what happened, why did this happen, where did it happen, and tried to basically.

They offered to take me to the doctor's office, but I thought that I had just strained myself and figured I would be able to feel better if I just was able to lay down for a day or so.

They called me and asked me more questions on not really how I was feeling or anything but of what happened, how I could possibly get hurt.

When I finally found out that I really had severe problems, then when I returned to work for light duty, the local supervisors there would pull me aside and ask me why, different questions about why it was taking me so long to come back to work, when my next appointments were, why I would take so long to get certain appointments with a specialized surgeon, when my specific appointments were and why they had to be during time when I should be at light duty and why. It was just a big harassment about two or three times a week.

I believe that if a guy gets hurt, from what I have been told by fellow employees, the railroad, the Burlington Northern anyway, they tried to assess any answer for an injury, that it is the employee's fault no matter what it is.

A recent injury that happened at Hauser, Idaho, in the last year or so, a fellow was walking at night, fell in a hole, injured his ankle, and they brought him into the office and questioned him for two or three hours before they would let him get medical attention. By that time, they had filled the hole, took pictures of where supposedly he had fallen in this hole. That is just kind of the way. That is the way they treat you.

Mr. BUCHANAN. Well, thank you for your testimony. I want to thank all the witnesses.

That is it for me, Mr. Chairman.

Mr. OBERSTAR. Thank you, Mr. Buchanan.

Ms. Brown, the Subcommittee Chair.

Ms. BROWN OF FLORIDA. Thank you, Mr. Chairman.

These are certainly some horror stories. I guess I want to start with you, Mr. Cook, but before that, I want to ask Mr. Haskin. When you had your accident, you indicated that you laid on the ground for two and a half hours and they didn't take you to the hospital or anything?

Mr. HASKIN. Actually, there was a maintenance away truck that was within 100 yards of where I was injured, and they took me over there and laid me in the bed of the maintenance away truck for the two. It was two hours.

Ms. BROWN OF FLORIDA. Why didn't you say something?

You felt intimidated. I mean you were bleeding. You were injured. You needed medical attention.

Mr. HASKIN. Right. Well, at the time, I was asked that question. I know my dad asked me that question.

Ms. BROWN OF FLORIDA. Your mama had to make sure you got some help the next day. I don't understand why you didn't speak up. Maybe we can get to the root of this.

Mr. HASKIN. Right. When I was injured, and obviously when you only get five minutes, you can't tell all the details. I could have went on for 15 and added a bunch more horror details in there, but I tried to bring out the most important things.

When I was laying in the back of the maintenance away truck and, as I said, the director of operations was on scene within five minutes after this happened and walked over. Showed up and walked over to the car that I was injured on first. Looked at for I don't know how long it was. I mean I was a little groggy and didn't know how bad it was. Then came to me and says.

Ms. BROWN OF FLORIDA. You were bleeding?

Mr. HASKIN. I was bleeding, laying back, laying down there. They didn't have any first aid equipment in the truck. The only thing they could find was a towel that the maintenance away employee had in his front seat, and they applied that to my head.

Ms. BROWN OF FLORIDA. I understand that the company wasn't responsible, but why did you not say, listen, take me to the doctor?

Mr. HASKIN. Yes, ma'am.

Ms. BROWN OF FLORIDA. You felt intimidated?

Mr. HASKIN. Well, the manager showed up and instead of saying, are you okay, the first thing he said was, how in the hell did this happen?

Ms. BROWN OF FLORIDA. Okay, and your response should have been: I need help. Take me to the hospital.

Mr. HASKIN. Right.

Ms. BROWN OF FLORIDA. I would have done it.

Mr. HASKIN. Absolutely.

Ms. BROWN OF FLORIDA. But you felt intimidated?

Mr. HASKIN. Absolutely. I knew that I had watched enough other people, employees that I knew, that when you get hurt on the Union Pacific, it is pretty well written law that you will have an investigation. No matter how the accident happened, you will have an investigation.

I was scared. I was scared that I was going to lose my job. This is what I wanted to do since I was eight years old.

Ms. BROWN OF FLORIDA. Yes, sir, I understand that.

Let me find out. There are four of you that testified. Can you give me a couple of things?

Give me your status, where you are now. I think several of you said you got fired. Did you get reinstated? Did you get money? I mean did you get taken care of and how would you recommend that we improve the system?

Then I have other questions for the other speakers, but we will start with you, Mr. Cook.

Mr. COOK. Ms. Brown, my status is, in September of 2006, I could no longer physically work. I couldn't climb, sit long hours or anything else that had to do with engineer duties which is what I had been doing for 36 years.

I had to apply for railroad retirement disability. That is where I am. I continue to go to doctors and chiropractors. They are not optimistic that I am going to ever get any better.

I have exhausted all the medical changes I have. Not as serious as some of these guys are, but still I am not able to do my job because of my injury.

Ms. BROWN OF FLORIDA. I understand that. So you are getting railroad retirement as we speak?

Mr. COOK. Yes, ma'am.

Ms. BROWN OF FLORIDA. All right, and Mr. Haskin?

Mr. HASKIN. As I had said, December 1st, 2003, the railroad, the medical director sent me a letter stating that I had to have the doctors okay me to work or say that it was safe for me to work on that medication. None of them would.

Ms. BROWN OF FLORIDA. I applaud them too. If you weren't eligible, you should not be working. You should not have been working.

Mr. HASKIN. Absolutely, and in hindsight that was a lot of the questions of why the Union Pacific medical director okayed me for two years to work on narcotic pain medication. Obviously, I wasn't going to pull myself out because this was what I wanted to do forever, and I truly believed in my own heart that I was safe to work.

In hindsight, looking back into the picture, there were times that I know that I wasn't attentive as I what I needed to be. So they told me that I couldn't work anymore.

I was still local chairman at the time and continued to be. I took the local chairman's position after, in January of 2004, after they told me I couldn't work. I needed to do something and continued to do that until 2005.

In 2004, my case went to trial. Speaking of FELA, and I know that that has been or FELA has been brought up a lot. In my case and you have heard my testimony, and the railroad knows all these facts. They knew them all at the time.

It was kind of ironic. In December of 2003, they finally took responsibility that it was their fault to cause my injury, but for the two years prior to that, they denied it, completely denied it.

My case went to trial in April of 2004. My attorney had been doing this for 27 years, and the day before trial he told me this is the first time I have never had not one nickel offered to settle this case, not one nickel.

I had no choice but to go through, went in front of a jury and my peers, a 10 day trial. We put on 10 days worth of evidence. The railroad came back and put on 45 minutes worth, and the jury awarded me $3 million.

Ms. BROWN OF FLORIDA. Okay. Mr. Knisely?

Mr. KNISELY. Yes, ma'am. I am sorry. Could you repeat the question, please?

Ms. BROWN OF FLORIDA. What is your status now?

Mr. KNISELY. I am on occupational.

Ms. BROWN OF FLORIDA. How can we improve the system?

Mr. KNISELY. How can I improve the system?

Ms. BROWN OF FLORIDA. No. We, Members of Congress, what can we do?

Mr. KNISELY. Okay. First of all, I would say, and I want to thank everybody for doing all the work they did on the bill here, but I would recommend that we keep FELA. Do not allow workman's compensation because of the great potential for abuse.

I would say not only make the railroads themselves, meaning the company, liable for intimidation and those types of practices but possibly make the people, the immediate supervisors, have some kind of liability now because they are protected under the financial blanket of these very wealthy railroads. That is what I would do.

I would make not just the railroads liable, but I would say if a train master or superintendent or local management was found to do things against the law, as in my case they tampered with tape, actually took out sections of tape which I would say would be illegal. The court did not approve of it, obviously.

I would say make them liable also. I think that would help a lot as far as the harassment goes among the employees and the middle management people.

Ms. BROWN OF FLORIDA. You got fired also, sir?

Mr. KNISELY. That is correct, ma'am.

Ms. BROWN OF FLORIDA. What was the end result? You took them to court and what was the end result?

Mr. KNISELY. Okay, we settled out of court right before our court, as a matter of fact. The end result was there was a settlement. There is a confidentiality agreement which I am not supposed to talk about.

Ms. BROWN OF FLORIDA. That is fine, but how would you encourage other employees because I don't understand why let's say the person sitting next to you didn't speak up when he needed to go to the hospital?

What we can do to ensure that if someone is seriously injured, that they will ask for assistance?

Mr. KNISELY. What you could do is hopefully pass these laws that are in this bill, saying that an employee is protected if they do report their injuries and afford some sort of protection to the employee that they can't be fired until it is proven somehow through not a company court but through some sort of substantial. I don't necessarily know if it has to be a court system but some kind of a substantial panel that the railroad doesn't own themselves.

Ms. BROWN OF FLORIDA. Okay, the last person.

Thank you, Mr. Chairman, for giving me a little extra time.

Do you think an ombudsman would be helpful to have on the job, the last person?

Mr. EHLENFELDT. I am not sure. I am not sure how they would, what the best policy would be, but I believe that the way they have it set up now is that your local management team in different terminals, you are basically stealing their money if you file, if you get hurt on the job.

Ms. BROWN OF FLORIDA. You are speaking of bonuses?

Mr. EHLENFELDT. Yes, and I think they take it. Instead of working as a job to take care of your fellow employee, I think they take it personal. I am sure there are a few good train masters or first line supervisors, but for the most part they are well aware that if you do get hurt on the job, it is going to affect their pay.

I don't know how you would have to go about eliminating that, but that is a big problem, I believe.

Ms. BROWN OF FLORIDA. What is your status now?

Mr. EHLENFELDT. I am just fired. I have not been offered any other jobs. After my first back surgery, I went and got good enough to pass the test for the physical ability test and went back to work for a couple of years. Then I was burnt, and they fired me, and that was it. So I was fired March 13th, 2006.

I work a part time job now, and my wife makes enough money to pay the bills. Thank God, she has insurance because they had cut my insurance. I had to pay 550 some dollars every month just to cover myself. I couldn't afford to do that, so she at least has coverage for me and our family.

Ms. BROWN OF FLORIDA. Yes, sir.

Mr. Chairman, are we going to have another round?

Mr. OBERSTAR. Yes.

Ms. BROWN OF FLORIDA. Okay.

Mr. OBERSTAR. Thank you.

The railroads have established hot lines for their employees to use. Are you aware of procedures?

First of all, are you aware of the existence of a hot line, aware of procedures for calling and of what might happen if you do use that hot line or do you know of anyone who has used the hot line and what has happened when they have done?

Mr. Tolman? Mr. Brunkenhoefer?

Mr. TOLMAN. Yes, I have heard some war stories on the hot lines. When a particular individual reported an incident to the hot line, the very next day a manager approached him and accused him. What are you doing not working with us? You are going to do stuff like that.

I mean the harassment and intimidation in the industry is very prevalent based on these stories. Until the railroads recognize that we have a problem and we need to address it by working together and cooperatively, these will continue. I don't even know which railroad that was in particular.

It is a good idea to have hot lines, obviously, to call in. Confidentiality isn't always covered. I mean you can't always. People recognize each other's voices, et cetera, et cetera.

The thing is the railroads, some of them recognize that they should change and have stepped up to the plate, but there is an awful big, big plate to step up to. That plate is a round circle, and when you are only doing a small percentage of it, a small percentage of the railroads or a little piece of it in one area, one geographical area or another, you are not going to resolve the problem.

The CEO of any one of these major railroads could make a recommendation that we need to change this culture. However, the superintendent in ABC State doesn't know what the superintendent's directive is. The message doesn't trickle down. Until the message really trickles down from the CEO to the superintendent or the train master that adversely affected these individuals here, we are going to continue having this problem.

Some of the railroads have stepped up to the plate, I said. One of the issues at BNSF, after going through this process, I was surprised that it even existed. They have a 72 hour soft tissue injury reporting. So if you get a back injury or a soft tissue injury, you have up to 72 hours to report it.

You have to report it immediately, but you have up to 72 hours if your knee feels better tomorrow. But if you say it initially, you are covered, so they won't fire you for not reporting the injury. Now that is an issue that should be right across the board unequivocally.

CP Rail, terrific new culture there, they understand that we are doing things wrong. They understand that labor has a piece to offer here and understand that profits can be better for all of us. Growth can be better for labor unions. Growth can be better for the railroads if they move in those directions. Now those are the things that we need to do.

Some of the other railroads have stepped up to the plate and listened to our general chairman, who have stepped up and said this guy has been harassing and intimidating on this particular property, and they fired him. Those are the things that have to be done to change the culture, and hopefully we get there, Mr. Chairman. Thank you.

Mr. OBERSTAR. Thank you.

Mr. Brunkenhoefer?

Mr. BRUNKENHOEFER. Just two things, one is that for my particular union, nobody is perfect, but Norfolk and Southern has moved forward to try to help solve the problem, and so we don't want to condemn everybody all the time everywhere. There are some people that at least look like they have tried to take a step forward.

On a carrier which I really don't want to name unless pushed to, I got a complaint from the field. I wrote a handwritten letter, faxed it to the vice president of operations. I said: Attached is information. This is wrong, and I know you are the kind of guy that is not going to tolerate this.

So he sent it back a division. They fired that superintendent, and they fired the guy who blew the whistle. So it left a real good message. Yes, they took care of the manager, but they took care so everybody in that terminal knows what happens if you complain to the boss. Yes, the supervisor got fired, but the worker got fired too. So why have a hot line?

Mr. OBERSTAR. That was the next question. While they have and profess to have policies, is there any disciplinary measure taken against managers and supervisors, demoted, fired, that the opposite as you just said applies to the workers?

Mr. Cook, are you aware of any such. Mr. Tolman did mention that just a moment ago.

Mr. COOK. Not on our railroad, Chairman Oberstar. In fact, with the action plan, they are encouraged to target, stalk and intimidate you until they do fire you.

Mr. OBERSTAR. The CSX Safety Action Plan is what you are talking about?

Mr. COOK. Yes, sir.

Mr. OBERSTAR. It instructs supervisors to identify and target their five most "at-risk employees" for monitoring.

Mr. COOK. Right.

Mr. OBERSTAR. How do you classify that? How do you describe that?

Mr. COOK. Well, I don't know how they——

Mr. OBERSTAR. Does that qualify as harassment?

Mr. COOK. Well, what they are going to do according to the terms of that plan is that you will not know that you are one of those at-risk persons, but if you get injured, you are going to be at risk. You are going to be one of the five.

If you try to move to another terminal to avoid scrutiny, you are going to be placed on the new terminal's list. In your original terminal, there will be a vacancy, and they will add another bad actor. So they are going to keep a list of people that they are going to target.

Mr. OBERSTAR. It sounds to me like the old days of blackballing in the iron ore mining industry.

Mr. COOK. Yes, sir, it does.

Mr. OBERSTAR. They have a list. If you are an at-risk person, you don't know it. It doesn't take long before someone has reported what you said at the pool hall or in the barber shop, and then you are out.

Mr. COOK. That is right.

Mr. OBERSTAR. Ms. Fallin, any questions?

Ms. FALLIN. Thank you, Mr. Chairman.

I just came into the meeting, so I missed out on a lot of the discussion, but I was interested in some of the comments made about the harassment and intimidation as I have just heard a little bit of the testimony. I guess not knowing a lot about this issue because I missed part of the testimony, but I would think that the union leadership might be able to protect against some of the harassment and intimidation.

Now I don't know how the system works, but is there not a better way for the union membership to be able to protect the employees once they are a member of that group?

Mr. BRUNKENHOEFER. There is an expression. I come from Houston. It is called you can beat the rap, but you can't beat the ride which means in the inner city that they can arrest anybody and take them to the police station.

In the case of what we have to do is when we have an employee, it takes any place from one to three years to get them before a tribunal, and so you are working with a person who is injured. You are working with a person who is vulnerable with having bills come to. You are working with a person that will be glad to come back after a very short period of time, almost anytime, because the foreclosure notice comes in the mailbox long before we can get the hearing done, and so that delay, it works against a solution.

Now if you get down to the end, you may win. But by that time, you have probably compromised. The cases that we have, that we end up having to go all the way through the process, those are by far our weakest people that have no hope because if they have any hope at all, if you will go back and sign a document that says, gee, it was all my fault, your house note is paid that month. Your kids have dental care.

So the process is so strung out that it works against us, but we try the best we can.

Ms. FALLIN. How can we streamline that process where it doesn't take one to three years?

Mr. BRUNKENHOEFER. Well, if I can kind of move off, we would like to get the root of what the issue is.

We believe that the carriers have an award called the Harriman Award. This is an award they give to themselves that is based on FRA documentation, but it is garbage in, garbage out. The railroads report to FRA. Then FRA takes those same numbers that they have and say you are the best railroad based on the numbers that you gave me.

Then you are able to go to Hartford and go before your insurance people and say, I am a safe railroad and I am an award winner. The difference between the premiums that they have to pay and the premiums that the best railroads have to pay get incentivized, the process by which it goes back then down to the line managers who, at not all railroads but at some railroads, are given again once a situation of a quota.

From Tulsa to Dallas is my territory. I live in Oklahoma City. I get the boss who sits down and says, you get five injuries, you are okay. If you get a sixth injury in your territory, we are going to whack you $10,000 off your bonus.

And so, that is supposed to be your incentive to go out and enforce safety. Instead, it is our belief that it is an incentive to cover up. The process works to the advantage, that to us, it is no different than an Enron, that you get bonuses for the trades that you didn't do.

This case is there is a tremendous amount of pressure for the guy who is also a supervisor trying to raise kids and pay college and all. Over here is $10,000, and over here is an employee that if I can talk him in whatever method out of filing that report, that is my kid's college education. That is Norman or Stillwater or wherever.

So they become incentivized, and so they are put in a bind. In other words, I don't want to maybe not report, but if I do report that he is injured, then I am not going to get my money. It is layer upon layer.

It is not one simple thing that says it is an interpersonal relationship. If you work for a small company, the odds are you have a very good relationship with your employees and know them at first hand. So you know which ones are good and which ones are bad.

But when you work for somebody that has 50,000 employees, the process is significantly different. So the person in Oklahoma City is really taking orders from Chicago, and to me that is part of the problem.

What we have to do is take the incentives out of the system that rewards what I call fraud and reward. The guy who is the biggest fraud gets the biggest reward, and the guy who tells the truth gets his pay cut several thousand dollars. The incentive ought to be who reports the most and who gets those situations corrected. Instead, we punish the ones who tell the truth.

Ms. FALLIN. Okay, thank you very much.

Mr. OBERSTAR. Thank you. I think that was a very revealing response.

Ms. Brown, the Subcommittee Chair.

Ms. BROWN OF FLORIDA. Thank you.

I want to change the subject just a little bit, but before I do that, Mr. Ehlenfeldt, I want you to give us your resume. We are going to spread it around because I think we can do some employment here. He is not working. Somebody is going to offer him a job hopefully.

Now I have a question for Broken Rail. You and I had a little talk in the hall, and I want you to know that I am very concerned about the influence that the hedge funds are trying to have over the railroad industry and the way it operates. If hedge funds, like the Children's Investment Fund, were to get their way, they can tell what would happen to the railroads' ability to make capital investment and safety improvements.

In the Brotherhood of Locomotive Engineers and Trainmen, there is an article, and it quotes and the Times-Union also reported that they, that the hedge funds caused this Dutch bank to break up. While the investors got money, we lost 550 jobs in Jacksonville, Florida.

I guess my question for you, do you think that hedge fund investors care anything about union workers or anything other than how they invest their money?

Mr. BRUNKENHOEFER. I think they care as much as Michael Ward does.

Ms. BROWN OF FLORIDA. Now Mr. Ward is not here to defend himself.

Mr. BRUNKENHOEFER. Neither are the hedge funds.

Ms. BROWN OF FLORIDA. I will meet with them, but I ask you and perhaps you are not going to answer my question.

Mr. BRUNKENHOEFER. I will be glad to answer the question.

Ms. BROWN OF FLORIDA. Well, answer it.

Mr. BRUNKENHOEFER. Yes, ma'am. The hedge funds are essentially about the governance of a corporation. It is not unique to CSX that people feel that the current management is not doing well. There is a term that is used some of the time. It is called greenmail, to get a settlement to make the hedge funds go away.

Our particular problem involves only one employer, and that is one in your district. They have led us to believe, through over a long period of time, that they do not particularly want the members of our unions to be their employees. They have been rewarding Mr. Tolman's union with what we believe are jobs. He will disagree, and I will have a respectful disagreement.

So we have tried to work through the issue. In the process of wanting to work through the issue, we have been met by silence. We don't talk, and it is not us that is not talking.

So we have somebody that comes in and says, we would like to talk to you. We would like to have dialogue with UTU, and let's see about changing management in such a fashion to get a management in place that wants to have dialogue with us. We are shut out of the process.

Ms. BROWN OF FLORIDA. Okay. My question to you, and Mr. Oberstar constantly raises this issue all the time. It is very important that we know history. My question for you is when it comes to the hedge funds because they have come in and destroyed 550 jobs in Jacksonville, Florida. My question to you is do you have any information how hedge funds view unions, period?

Mr. BRUNKENHOEFER. It depends on the hedge fund. I know that I had lunch with a fellow by the name of John Snow, and Mr. Snow and I had a lengthy conversation in a friendly way about UAW and Chrysler and their next contract. Mr. Snow also leads a hedge fund.

Some of them are horrible, horrible. Some of them sit down at the table. That is how I want to say Weirton Steel was saved. There are other groups, and so it will depend, hedge fund by hedge fund.

Our circumstance is we have a group of people who will talk to us. We have another group of people who will not talk to us. I think it is kind of automatic that when that happens, you are going to turn to someone who wants to sit down and have a conversation with you, and so that is what is going on.

Ms. BROWN OF FLORIDA. Well, I think conversations go both ways.

Mr. BRUNKENHOEFER. Yes, ma'am. We will be more than happy to sit down and talk.

Ms. BROWN OF FLORIDA. All right. I yield back, Mr. Chairman.

Mr. BRUNKENHOEFER. I would like the privilege to come to your office and listen.

Ms. BROWN OF FLORIDA. I don't have any other questions for this panel. Does anyone else in this panel want to make any closing remarks?

Yes, sir. I am sorry. I didn't have a question for you, but you wanted to make a comment.

Mr. JUNGBAUER. If I could, yes. There are a couple other things that I think would be nice to be addressed.

One is what is called the availability policies that a lot of railroads are putting into place. What these are is they are trying to have quotas for people to work a certain number of days, a certain number of hours. The real problem is employees that want to go back to work after they are injured and if the railroad says if you don't work X number of hours, you are not an employee anymore. Now what kind of a rehab program is that?

You ask the question, can unions do anything about it? If they won't talk to the unions. I have people I have represented, and we have said to union people, can you do anything about it? BNSF says they will not talk about availability policy. They won't do it. They like it. They won't talk about red-green that we talked about before.

The things that we are finding out, these abusive programs, we have to get court orders or have whistleblowers give them to us to find out about them. So it is really frustrating to try to represent folks and help them to get better, help them to move on when these carriers are so mean to them, so rotten.

Ms. BROWN OF FLORIDA. In closing, what do you recommend that you think needs to happen to improve the system?

Mr. JUNGBAUER. Well, number one, I think that passage, the bill that has passed the House with Section 606 and it needs to be passed by the Senate. I would hope that this hearing, if you can get the message to the Senators, I can't imagine any Senators out there saying I am in favor of harassment. Go run on that next term.

They shouldn't be in favor in harassment. They shouldn't be in favor of carriers saying we want the right to harass our employees to prevent them from getting medical care. So that is number one.

Number two, we have to see how well the——

Ms. BROWN OF FLORIDA. Excuse me. So you are saying step one would be to pass the safety bill?

Mr. JUNGBAUER. Yes.

Ms. BROWN OF FLORIDA. Okay.

Mr. JUNGBAUER. Definitely.

Ms. BROWN OF FLORIDA. You think there are provisions in there that will strengthen the problems that we are discussing today?

Mr. JUNGBAUER. There are some. With regard to the employees who are denied medical care, yes. With regard to other employees, it is the previous bill that can work.

What I am worried about, frankly, is that you have a very short statute of limitations, 180 days, and if you have to turn your report into the Secretary of Labor, what if the Secretary of Labor doesn't want to help? Are you left of limbo?

I am not sure of that. I have to go back and look at the bill. So I think you may need to look one more time in another session if this isn't working. I would hope, though.

The last thing I would say is if the members of you, when you talk to carrier officials, ask them, will you promise us today that you will go home and you will eliminate these programs of harassment? Just promise us today that you will do that.

I think that would be because they will listen to these folks. See, if you passed bills, they would go home and say, fix it. But they are not going to fix something unless they know what the sense of Congress is. We need to know the intent of Congress. Once we know that, they will listen, the courts will listen and everything will be safer.

Thank you.

Ms. BROWN OF FLORIDA. Sir, thank you very much. I assure you I don't believe one of them will tell me that they are doing what you are suggesting.

Mr. JUNGBAUER. As long as you ask them the question, that is good.

Ms. BROWN OF FLORIDA. Thank you.

Mr. OBERSTAR. I want to thank this panel for your candor, your straightforward, heartfelt testimony.

I will affirm that our Section 606 in the Rail Safety Bill goes a long way to addressing the issue of harassment, gives new authority to the Federal Railroad Administration. It was language that was not adopted idly or easily. It was thoroughly discussed, debated, negotiated with the minority on the Committee, and we have a consensus bill. That is why it passed with such an overwhelming vote in the House. I hope the Senate will act upon it.

I want to thank again the panel for your testimony today. I think it is very illuminating.

We will dismiss this panel and call the next panel: Mr. David Brown of CSX, Mr. Mark Schulze for BNSF, Mr. C.J. Wehrmeister of Norfolk Southern, Mr. Robert Grimaila for the Union Pacific, Ms. Faye Ackermans for the Canadian Pacific, Mr. Hamberger and

Mr. Sherman Joyce, President of American Tort Reform Association.

I ask all the witnesses to stand while Mr. Miller gets your names out there for you and your water. Raise your right hand.

Do you swear that the testimony you are about to deliver to this Committee will be the truth, the whole truth and nothing but the truth, so help you God? Thank you.

I want to say to this panel that you have been very patient throughout this long day. We didn't anticipate being here, starting with this panel at nearly 4:00, but that is the way the House floor works. You have had an opportunity to hear all the preceding testimony, and now is your opportunity to respond.

We will start with Mr. Hamberger.

TESTIMONY OF DAVID BROWN, VICE PRESIDENT AND CHIEF TRANSPORTATION OFFICER, CSX CORPORATION; MARK SCHULZE, VICE PRESIDENT OF SAFETY, TRAINING AND OPS SUPPORT, BURLINGTON NORTHERN SANTA FE CORPORATION; C.J. WEHRMEISTER, VICE PRESIDENT, SAFETY AND ENVIRONMENT, NORFOLK SOUTHERN CORPORATION; ROBERT GRIMAILA, SENIOR AVP, SAFETY, ENVIRONMENT AND SECURITY AND CHIEF SAFETY OFFICER, UNION PACIFIC CORPORATION; FAYE ACKERMANS, GENERAL MANAGER, CORPORATE SAFETY AND REGULATORY AFFAIRS, CANADIAN PACIFIC RAILWAY; ED HAMBERGER, PRESIDENT, AMERICAN ASSOCIATION OF RAILROADS; SHERMAN JOYCE, PRESIDENT, AMERICAN TORT REFORM ASSOCIATION

Mr. HAMBERGER. Thank you, Mr. Chairman. I do appreciate it.

Mr. OBERSTAR. Who, I might say, does a superb job on behalf of the railroads as the President of their association. He is very attentive. He attends these hearings. He is learning to develop a new set of iron pants.

Mr. HAMBERGER. Yes, indeed. Speaking of which, I want to thank you and Chairwoman Brown and Congresswoman Fallin for being here as well.

Notwithstanding the fact that it is not 1992, I do want to emphasize that these are good, honorable, wonderful people who do their job every day to try to make this industry safer, and we appreciate the opportunity to be here and to, as you put it, tell our side of the story.

You opened the day today, Mr. Chairman, by talking about your father and his commitment and your commitment to safety, and we share that focus on safety. For railroads, operating safely is not an option; it is an imperative.

Railroads are currently at the forefront of advancing safety from a technology standpoint as well as an operational standpoint, and the overall U.S. rail industry safety record is excellent. In aggregate, 2006 was the safest year in the history of the industry, and 2007 is on track to be even better.

According to the U.S. Department of Labor, railroads today have lower employee injury rates than other modes of transportation and most other major industry groups including agriculture, construction, manufacturing and private industry as a whole. We have

an employee injury rate well below those of most major foreign railroads.

Let me just get right to a couple of themes that have been running through this hearing today. The first one is the claim that railroads intimidate and harass rail employees when the employees are notifying the FRA of an injury or illness or when reporting a hazardous condition. Likewise, it has been claimed that railroads regularly and as a matter of course deny, delay or interfere with medical treatment given to employees. These claims are not accurate.

Let me be clear. Railroads reject the use of harassment and intimidation against their employees and agree with your opening statement, Mr. Chairman, that it is just not right that an injured employee is not given immediate medical attention. That violates FRA regulations. It violates internal operating procedures. It violates the internal regulations and safety plans of each of these railroads. There is a zero tolerance policy within the industry for violation of these policies.

Now my colleagues on the panel will describe in more detail the many programs and initiatives the individual railroads have established to ensure accurate reporting of workplace injuries and timely treatment of injured employees.

Of course, no industry, especially one with some 185,000 employees, is completely free of mistakes or transgressions, and therefore my colleagues can also attest to the fact that swift disciplinary action will be taken against any supervisory employee who withholds or interferes with medical care to injured employees or who intimidates and harasses employees.

The second theme running through the hearing today is that we need to establish a culture of safety through cooperative relationships with our employees and not a command and control environment. At the outset, I think we have to agree that any organization has to have some sort of command and control. Given the danger of freight railroading, that has given rise to very detailed rules and the need for meticulous adherence to those rules.

The safety of the individual employee, his or her fellow employees on the job and, of course, the communities in which we operate, given the materials that we are forced to haul through those communities, demand adherence to strict operating safety procedures. At the same time, there is a need for cooperation and collaboration to get everybody involved, to get the bottom of safety issues and get to the root cause of safety problems.

Each of our railroads has a myriad number of programs in place in cooperation with labor and is striving to reach that proper balance of collaboration and command and control. That is true in any environment, in any institution around the Country, in any part of the economy.

There has been some talk about the Federal Employers' Liability Act, and I would be remiss if I didn't finish by mentioning it myself. This 99 year old statute serves as the railroad industry workers' compensation system.

The vast majority of employees in the United States are covered by, as you pointed out, Mr. Chairman, no fault worker's compensa-

tion systems where workers are compensated for work-related injuries regardless of the fault; not so for railroad employees.

In order to receive compensation under FELA, railroad employees must prove their employers' negligence caused the injury. If the employee's negligence is found to have contributed to that injury, compensation is reduced accordingly. Under FELA, when a rail employee is hurt on the job, he or she and the railroad become adversaries, where each side is incented to blame the other for the injury.

From a safety perspective, nothing could be more counterproductive. This adversarial relationship breeds mistrust, hampers and delays investigations and fosters the blame game that you talked about earlier, Mr. Chairman, rather than the collaborative approach that we want to see, where the employees and the railroads can sit down and address the root cause of accidents or near accidents.

Now I don't care how many of these cases go to trial or how many of them get settled or how many of them hire lawyers. That is not the point. The point is the adversarial relationship that is inherent in a negligence-based worker's comp system.

It is something that I think you could learn a lot about, frankly, from Faye Ackermans, and I hope you will ask her to talk to you about the difference that she lives with every day because, of course, she operates both north of the border in Canada where there is a worker's comp system that is not negligence-based and, of course, they operate major mileage here in the United States under FELA. I can't get into it, obviously, but I hope you will take the time to ask her what difference that means in the culture of each of those operations in Canadian Pacific.

My time is up. I do want to thank you for staying here today to listen to these men and women who have come here to talk about the effort that they put in every day to make our industry safer and thank you for everything you do to help our industry as well.

Mr. OBERSTAR. I thank you, Mr. Hamberger. Was there something else you wanted to add in your opening? Your time really has not expired.

Mr. HAMBERGER. I appreciate that.

Mr. OBERSTAR. The five minutes has gone but if there is more.

Mr. HAMBERGER. These are the experts, and I would prefer to yield back the balance.

Mr. OBERSTAR. Okay, thank you.

Mr. Brown.

Mr. DAVID BROWN. Mr. Chairman and Committee Members, thank you for this opportunity to address this very important matter.

I am David Brown, Vice President and Chief Transportation Officer of CSX Transportation. My responsibilities include ensuring a safe operation on CSX's 23-State system. I have over 26 years experience in the railroad industry. I have been with CSX since May of 2006 and have considerable experience with railroad operations and safety reporting protocols.

I would like to discuss CSX's safety programs, training, technology and capital investments that we have made to make our

railroad even safer and especially our parallel commitment to the fair and ethical treatment of all of our employees.

First, a little bit about recent safety improvements because we are proud of what we have accomplished: Our managers and employees are expected to perform their work and interact with each other consistent with our core values, very important to us, and they include safety. One injury is one too many, and our ultimate goal is an accident-free, injury-free workplace.

Our employees, through safety programs that I will talk about in a minute, are achieving great success. For example, FRA reportable train accidents have improved 44 percent since 2004. Human factor-caused train accidents—these are the accidents caused by human error—have improved 56 percent since 2004. FRA reportable injury rates have improved 46 percent in that same period. During the first nine months of 2007, 149 fewer employees on CSX were injured than during the same period of 2006.

CSX employees are delivering service more safely and successfully than ever in our history. CSX safety improvements do not mean we are satisfied. To reach our safety goals requires continuous improvement, and we want to send every employee home in the condition in which they report to work.

We have a variety of key programs that support continuous safety improvement. These programs include management-labor safety committees at the local, at the division, regional and system levels. Training on operating safety rules for our employees is key. We do root cause analysis of accident injuries to learn how to prevent them.

Formal leadership training for supervisors and labor safety coordinators is ongoing, and full time labor safety coordinators at each of our 10 divisions are an integral part of our safety process. We have also enhanced safety through capital investments and improvements to our infrastructure.

Also, we have an innovative program to handle rule infractions. Adherence to safety and operating rules is essential to maintain safe railroad operations. Improved compliance has been a key factor in the safety improvements that I mentioned earlier.

The individual development and personal accountability policy, IDPAP, builds on our belief that the vast majority of our employees want to do the right thing and do their jobs in a professional manner day in and day out. Their heart is really in the right place.

The policy states clearly that managers must provide fair and consistent treatment to all employees using alternatives to formal discipline wherever appropriate when an infraction occurs. For all but the major offenses, the policy provides for a progressive approach and includes a non-punitive opportunity to correct isolated instances of unsafe behavior.

In recent past years, we have modified our policy to focus even more on education when an infraction occurs, so that we can move forward with improved performance.

Let me be very clear. CSX is fully committed to the complete and accurate reporting of all workplace injuries and accidents, and we are equally committed to ensuring that no harassment or intimidation occurs that may limit reporting in any way.

We will continue to focus on these important matters and have made changes in several areas. Training is ongoing for managers in the proper and timely reporting of injuries or accidents. We are also continuing to communicate our policies that clearly forbid intimidation or harassment of employees to prevent reporting or proper medical treatment.

This training makes it clear that managers should not discuss reportable criteria with an injured employee or treating hospital personnel. They should not try to change a doctor's recommendation and should not discuss discipline or rules infractions when arranging treatment for an injured employee.

We also have directed that internal investigations of any report of intimidation or harassment are immediately investigated. We have a zero tolerance policy, and we conclude that investigation within a 30 to 60 day time frame, depending upon the complexity of the incident. In addition, discipline where appropriate will be assessed within 30 days when a case is decided.

CSX maintains an ethics hot line, as we heard talked about earlier today, that any employee, manager or outside party can access by calling a widely-known, widely-published toll-free number. This call then is received directly by or internal audit group, which investigates each and every call to the hot line. Some of those investigations have led to discipline against management and employees who have not followed proper protocols for reporting injuries or who have engaged in isolated instances of intimidation or harassment. Those actions have included dismissals, demotions, reductions in compensation, reprimand and coaching and counseling where warranted.

I hope my comments are helpful to this Committee. We regret that any incident of intimidation or harassment has occurred with respect to injury reporting and pledge our continued vigilance to prevent future occurrences. CSX's core values state it best: people make the difference. And our employees are our most valuable resource.

CSX would also invite the Committee to examine the overwhelming data related to the company's significant and sustained improvements in safety, service to our customers and re-investment into the rail infrastructure over the past few years. These results are evidence of a commitment to safe, reliable and efficient rail transportation.

CSX is similarly committed to fair and equitable treatment of our employees. Throughout this period of continuous improvement, the company has worked to improve relationships with employees while fostering a safer workplace. That work will continue.

Thank you.

Mr. OBERSTAR. Thank you, Mr. Brown. We appreciate your statement.

Mr. Schulze?

Mr. SCHULZE. Thank you, Chairman Oberstar, distinguished Members of the Committee. My name is Mark Schulze, I am Vice President of Safety, Training and Operations Support for the BNSF Railway Company. In my previous position, I was general manager of transportation on BNSF's Texas division. Thank you for the opportunity to be here today.

In my testimony to you, I want to make three key points. First, safety in the railroad industry has improved enormously over the years. That is not a product of managed reporting, that is a fact. Ten, 20, 30 years ago, more employees were getting hurt and there was more risk in rail accidents.

Second, our railroad safety plans are important. At BNSF, we develop our safety processes with a thoughtful balance between employee empowerment and accountability. Railroading is and always will be a unique work environment. The factory work force stretches across vast distances. In many instances, our employees are independent operators, substantially self-directed in their work. The routine work of handling heavy moving equipment in an outdoor environment makes adherence to uniform safety rules even more important. That adherence to safety processes and eliminating at-risk behaviors can be life or death critical.

Third and most importantly for the purposes of this hearing, there is no place in our railroad for harassment or intimidation, neither for meeting safety goals nor for managing employees. BNSF has zero tolerance for harassment, intimidation or discrimination. Our position on that is clear.

At BNSF, safety is our number one priority. A safe railroad aligns with every aspect of our corporate vision; return, corporate citizenship and being a valued employer. Our safety vision is to operate accident-and injury-free. This is about our employees going home after work injury-free, not about managing to statistics. We believe our vision is achievable, because we believe every accident is avoidable.

All employees in BNSF are empowered to take responsibility for their own safety and the safety of their colleagues and our communities. They are expected to take that initiative to stop work processes when they feel safety may be compromised, and they do. Like all U.S. railroads, BNSF is required to comply with all safety regulations of the Federal Railroad Administration. We utilize a federally-mandated operations testing program to confirm that our employees are working safely and in adherence with those requirements. Tests under that program occur in the normal operating environment and require employees to show understanding of the concepts involved in our operating rules. The majority of our employees show clear demonstration of those requirements.

To assist our employees in properly understanding those safety processes and policies and improve their performance, BNSF offers state of the art training. The vast majority of our employees are committed to working safely, and our safety program is aimed at respecting that commitment. However, with any human organization, a small percentage of employees are either risk-takers, distracted or do not maintain awareness of consequences for their actions. We are focused on identifying those employees who present risk to themselves and others through an employee review process.

As with any solid risk management program, this process allows us to appropriately focus our safety resources. This employee review is a problem-solving process that does not impact an employee's employment record, nor is it in any way related to discipline. Coaching, training and understanding the employee's perspective are at the heart of this process.

In a safety-critical work environment, accountability for compliance with safety processes matters. Our goal at BNSF is to consistently but fairly apply employee accountability so that the seriousness of safety rule violations is appreciated. Our accountability policies are designed to encourage all employees to be actively engaged in safe work behaviors and in ensuring a safe work environment.

Formal discipline, whether an employee personal record notation, suspension or termination, represents a very small percentage of follow-ups to rules violations. The vast majority of rules infractions are handled through coaching and counseling by supervisors. BNSF additionally has alternative handling agreements that include training and other non-disciplinary, non-punitive responses to identified or self-reported rules violations in lieu of formal discipline.

Lastly, BNSF's injury handling and safety reporting policy clearly outlines supervisory responsibility regarding injury reporting and medical treatment. Our injury handling and safety reporting has been communicated extensively to supervisors in a number of ways. Employees can report harassment or intimidation many ways, such as to the Federal Government, internal management or even an anonymous third-party toll-free hot line. All concerns are then investigated by appropriate personnel and reviewed by senior management.

Taken together, we believe we have processes and procedures and a culture that rejects harassment and intimidation and promotes a cooperative approach to safety. Much of our safety program was developed in cooperation with labor unions over the years, and we will continue to improve our processes with their input and commitment to safety. In fact, General Chairman Pat Williams of the BLET was wanting to testify also at this meeting just to talk about the extensive labor cooperation that we do have, the general chairman, local chairman and local level.

At the same time, we do not believe the management of employee expectations and accountability is harassment or intimidation. Thank you.

Mr. OBERSTAR. Thank you, Mr. Schulze.

Mr. Wehrmeister?

Mr. WEHRMEISTER. Chairman Oberstar, Ranking Member Fallin, Members of the Committee, thank you for the opportunity to testify here today. I am Charles Wehrmeister, Vice President, Safety and Environment, of Norfolk Southern Corporation. My responsibilities include personal injury safety, highway-rail grade crossing trespasser initiatives, and environmental and hazardous materials training and response initiatives.

At the outset, I would like to state unequivocally that any type of supervisory conduct which delays medical treatment of injured employees or has the effect of discouraging the reporting of accidents or injuries is absolutely prohibited at Norfolk Southern and is not tolerated. Safety at Norfolk Southern begins with our corporate vision, and that is to be the safest, most customer-focused and successful transportation company in the world.

First, please note that I have identified safety at NS as a process. It is not just a program or a list of responsibilities neatly cataloged in a dusty three-ring binder. It is a living, breathing process.

It is our culture, a way of life for a committed group of men and women 30,000 plus strong. Safety is the way Norfolk Southern people do business.

It is also about prevention. Even before an injury occurs, our goal is to prevent incidents and injuries by being proactive rather than reactive. Safety has been an evolutionary process at Norfolk Southern, and we have developed in stages over the years from a very top-down process to mutual participatory safety and on now to an even higher level of safety awareness that I call voluntary safety, in which our people actually participate, just because it is the right thing to do.

As a result of our employees taking ownership of their safety process, NS's people have earned the E.H. Harriman Gold Medal Award each year for the past 18 years. As you know, this award is presented to railroads for their outstanding performance in safety. In the last 7 of 11 years, an NS employee has also received the Harold F. Hammond Award, which is presented annually to an individual railroad employee in North America for outstanding achievement. The 2006 winner was Kenneth Cheek, a mechanical department employee from Bellevue, Ohio.

At the Harriman ceremony this year in May, in a video presentation, Mr. Cheek talks about the commitment Norfolk Southern people have for each other and for their safety process. A copy of that transcript is on my expanded presentation.

Norfolk Southern's people celebrate our safety success each year at a big expo and awards meeting, unique, I believe, unto our industry and perhaps all of American industry, usually held in March of each year. Chairman Oberstar, Ranking Member Fallin and Members of the Committee and staff, I would like to issue an invitation to you to join us and we would be truly honored to have you in attendance.

The keystone of our safety process and injury prevention effort is our bedrock Six Point Action Plan outlined on page 5 of my prepared statement. Our efforts are reinforced also by NS's strict adherence to our Internal Control Plan, adopted pursuant to FRA regulations, which prohibits all employees from taking actions to delay the receipt of proper medical care for injured persons. This ICP expressly prohibits any form of intimidation or harassment that would have the effect of discouraging the reporting of accidents or injuries. Furthermore, the plan imposes disciplinary action against an employee or supervisor who commitments any such harassment or intimidation.

Some years ago, a joint United Transportation Union-Norfolk Southern task force was formed to review Norfolk Southern policies and procedures in this area. NS encouraged UTU to bring to our immediate attention any instance in which it believed an employee injury had not been handled appropriately. UTU has done so one to three times a year. Each time, we have conducted a thorough investigation. All supervisory officers involved, and in some cases, the employees bringing the complaints as necessary, were interviewed personally by Norfolk Southern's Executive Vice President of Operations and our Vice President of Labor Relations. NS believes this process has been constructive and the United Transportation Union has told us that it does, too, and that our investiga-

tions, they have told us, have provided thorough and honest responses to the issues we were asked to address.

In many of the cases, Norfolk Southern determined the handling of the employee injury had in fact been appropriate and complied with company policy and our ICP. However, where we found that it had not, appropriate discipline was assessed against our supervisory officers.

In conclusion, I would like to reiterate that Norfolk Southern Management indeed has zero tolerance for any delay in providing medical care. We have learned from our past mistakes, and I am personally convinced the message has gotten through to all levels of supervision. Procedures are in place to ensure that supervisors understand that an employee's health and safety are our first priority.

Thank you very much.

Mr. OBERSTAR. Thank you, Mr. Wehrmeister.

Mr. Grimaila?

Mr. GRIMAILA. Chairman Oberstar, Ranking Member Fallin, my name is Bob Grimaila. I am the Chief Safety Officer for Union Pacific Railroad, and I thank you for the opportunity to testify today.

At Union Pacific, safety is our first priority. This means that ensuring every one of our 53,000 employees does their job in a safe manner and returns home safely every day. Our safety program is a commitment to a vision and process aimed at creating a total safety culture. Our goal is zero accidents, and we have systematic practices and policies for managing our programs and reporting. Unfortunately, accidents do happen sometimes. Our internal control plan, our ICP, and our safety policy specify how our managers are to handle personal injuries and the associated reporting.

This ICP is posted system-wide and it spells out the complaint procedures available to all employees to report a potential violation of policy or an instance of suspected harassment. Reporting is done on a confidential basis and with the assurance of no retaliation.

We are committed to complete and accurate reporting of all accidents, incidents and injuries arising from the operation of the railroad. UP will not tolerate harassment or intimidation of any person who seeks medical treatment or reports an accident. Disciplinary actions, up to and including termination of employment, will be taken against any employee who commits a violation of this policy. In fact, we have issued 61 cases of discipline and have dismissed 4 high level managers in just the last few years for violations of this policy.

Today we are moving beyond the traditional command and control approach to safety. I will briefly describe three programs we have in place now at Union Pacific. First, as you know, we are required by the FRA regulations to test employee competency in our operating rules. I have covered our program improvements in my written testimony, showing that we have moved to a progressive system with a much greater emphasis on coaching and training, rather than discipline. In a process that was developed in partnership with our labor people, rules offenses are now regularly handled with coaching and training and employees gain credit for demonstrating rules compliance.

In addition to gearing our testing program to favor constructive coaching, we are also working to share the day to day responsibility for safety management with our employees. Our total safety culture, or TSC, is a peer to peer safety engagement process. Its goal is to fundamentally change the safety culture at the railroad. TSC has employees watching out for each other in a manner that reinforces safe behavior, and in a voluntary and non-punitive way. It is a formal observation and feedback process where an employee will observe and comment on another employee's behaviors at work. They look for and identify and correct unsafe behaviors rather than looking for rules violations or taking exceptions.

This is done without direct management involvement, but with full management support. Where this peer to peer concept has been implemented, it has produced dramatic safety improvements, as employees actively watch out for each other. Union Pacific's North Platte, Nebraska service unit is currently engaged in one of the most progressive safety programs in the history of the rail industry. We found that accidents are often preceded by close calls or near hits. Through a pilot program developed, again, with our unions and with the FRA, a confidential close call reporting system has been established. Employees are free to report a close call without fear of discipline. The data gathered is used to develop a safer operating environment. This means that safety information that would otherwise not be reported is now collected, and it allows the local team, labor and management, to identify and manage risk on a proactive basis. While this type of close call reporting system has become common in the airline industry, it is revolutionary in the rail industry. We are finding that it enhances partnerships, trust and communication across all parts of the organization.

We will always need programs to ensure our employees are competent in the rules and that they can demonstrate safe behavior at work. We are working diligently to do this by creating a total safety culture with our employees. We are doing this in partnership with our employees. The programs I have mentioned today are evidence of steps we are taking to form a safety culture based on collaboration, respect and trust.

That concludes my statement. I would be happy to answer questions. Thank you.

Mr. OBERSTAR. Thank you very much. That is very enlightening testimony.

Ms. Ackermans?

Ms. ACKERMANS. Chairman Oberstar, Ranking Member Fallin, my name is Faye Ackermans. On behalf of the Canadian Pacific Railway, thank you for the opportunity to address this Committee.

For the past decade, as General Manager of Safety and Regulatory Affairs, I managed the safety function at CP. This included train accident cause finding, FRA reporting, FELA claims, safety program development and delivery, operating rules and practices, regulatory and security oversight.

While on the surface it looks like my job has been to make the railway a safer place to work, in fact my most important job has to been to change the safety culture at CP. I have concentrated on two areas: changing attitudes on how we deal with the mistakes

people make at work, and putting processes in place to reduce the potential for human error to cause accidents.

All humans make mistakes every day. At CP, we have systematically tried to understand how and where human error plays a role. We developed a world-class set of investigation tools, which we call the investigation of safety-related occurrences protocol. This protocol is designed to investigate all aspects of the work system, determine multiple causes of occurrence, determine appropriate and effective corrective actions.

ISROP has improved the quality of both our investigations and our corrective actions. The impact of ISROP within the mechanical department at three locations in Canada is currently being evaluated by the Federal Railroad Administration . A final report is expected in 2008.

You have heard today the railroads described as militaristic or command and control. In this culture, rules are created, people are trained to follow the rules, and when a rule is broken, punishment is required to ensure the person who broke the rule won't do it again. CP has been slowly moving away from this model. We have introduced an understanding of the human factor into our safety processes: how and why people make mistakes; what systemic changes can be made to avoid or trap errors. This has made us much more conscious of where processes may be vulnerable or where defenses may be lacking.

This is a journey. The progress we have made is still fragile. There are wide disparities within CP on acceptance and use of this approach and the various tools that we have introduced. There is much more work to do. But we are trying to move from a culture that blames the individual who ultimately makes the final error in the chain of accident causation to one where we ask system-based questions; such as what defenses failed, how did they fail, and how can the system be made more resistant.

However, we are not talking about a system free of accountability. Rather, we need to create a balance between necessary discipline and an environment where employees freely report incidents without fear of unreasonable, adverse consequences. This is what is known as "Just" reporting culture, based on the concept of justice. CP is actively pursuing the "Just" reporting concept in two ways. The first is the FRA-supported confidential close call reporting system, which you have just heard from Mr. Grimaila. The United Transportation Union, the Brotherhood of Locomotive Engineers, Teamsters, and CP management are partnering with FRA in this effort. We will be the second FRA-supported C3RS pilot site, and we very much appreciate the efforts the FRA has made to advance and support this program.

Equally, we are pleased with the contributions made by our labor colleagues. C3RS holds great potential to improve safety in this industry.

The second is an internal dialogue at senior levels of the operating department begun one year ago about the future role of formal discipline and how to change our discipline practices. We have sent senior staff from operations, safety, human resources and labor relations to educational seminars on "Just" reporting culture. In early October of this year, we also introduced the topic to the

top 125 operating and safety officers at our semi-annual safety conference. This effort I call a work in progress, don't know where it is going to lead, but we are looking for some answers.

When accidents do happen, CP has policies and procedures in place, as required by FRA, for reporting personal injuries, train accidents and serious rules violations. These policies articulate whistleblower protection and consequences for both managers and employees of interfering with these reporting procedures. CP also has policies and processes to deal with unacceptable behavior or performance. Our positive behavior and performance development policy is designed to identify and change unacceptable performance behavior to recognize good performance and to acknowledge an employee's satisfactory achievement of change and development. Its focus is on coaching and improving performance.

Where informal coaching fails to achieve the desired changes, formal coaching may be used. This step is intended to clarify responsibilities and confirm performance expectations. An employee who demonstrates success and consistently fulfills their responsibilities for 24 months is removed from the automatic progression to the formal discipline process under the collective bargaining agreements. If formal coaching fails to improve behaviors or technical job performance issues, the next step is formal investigation/discipline under the applicable collective bargaining agreements.

Finally, I want to touch a bit on CP's safety performance. CP's vision is to be the safest, most fluid railway in North America. We are achieving results. In the past decade, train accidents have fallen by 61 percent and personal injuries by 72 percent. Human factor train accidents on CP are currently about one-third the rate seen in the rest of the U.S. rail industry. CP's safety success is a testament to union-management commitment and involvement in hundreds of safety, health, training and business process activities. Safety is not a bolt-on activity or afterthought. It is how we do business. Our employees recognize our efforts. On employee insight surveys conducted by an internal consultant every two years, safety gets high marks. Seventy percent of our employees agree or strongly agree with this statement: "I feel that workplace safety receives appropriate attention here."

Safety culture or shared beliefs and values is the manifestation of the day to day practices that employees encounter as they go about their work. CP has been striving to create a more people-centric approach to safety. This is a long journey. Culture change takes a long time. But I believe we are focused in the right direction.

Thank you.

Mr. OBERSTAR. Thank you very much for your testimony.

Mr. Joyce?

Mr. JOYCE. Chairman Oberstar, Representative Fallin, thank you very much.

I am here today not as a railroad person. You have heard from a number of the leading experts on the railroads. I am here to talk about our litigation system. In particular, I would like to highlight some of the overarching challenges that we see within our legal system and how they have manifested themselves within the FELA, a sense about how this unique statute dealing with railroad

employees and their employers and workplace injuries changes the nature of that relationship and how this Committee might improve the FELA or even consider replacing it with an alternative.

Very briefly, and Mr. Hamberger touched on this, but prior to the enactment of the FELA nearly 100 years ago, all workers in this Country, not just railroad employees, faced almost insurmountable burdens to receive compensation when they were injured in the workplace. For railroad workers, however, the FELA in 1908 did make that better. It improved their status, and it was considered a progressive reform and helped them at that time.

We believe, however, that that status as a progressive statute was, in fact, quite short-lived. Literally at almost the same time, workers compensation laws were adopted around the Country. To amplify the points made earlier, the FELA continues to be a fault-based system, requiring the proof of negligence on the part of an employer with respect to the injury of an employee. By contrast, there is no need to prove negligence in a workers compensation context. A worker simply needs to demonstrate that there was an injury, and that that injury occurred within the scope of employment.

Now, workers comp systems are not perfect, and they are certainly not free of litigation. Litigation about what constitutes the scope of employment is not uncommon. We do believe that it is beyond debate, that workers comp is the clear trend in the law.

Moreover, while the FELA allows for settlements, we heard discussion about that, at its core the FELA does something that is also, I think, quite significant and has been discussed as well. That is the creation of an adversarial relationship between employer and employee. The compensation mechanism under FELA litigation has several problems that I will mention very briefly.

As a general matter, litigation creates delays. As a general proposition, it takes longer to compensate people when they go to court. That includes cases that may settle on the courthouse steps. Tort litigation also as a secondary matter is uncertain. Frequently we see in all areas that an award of X amount in one set of circumstances may be far less or far greater under identical circumstances in a different case.

Last is efficiency. A recent study that we have reviewed finds that less than 25 cents out of every dollar expended goes actually to compensating injured parties.

FELA's shortcomings, though, are not limited to those broader policy issues. No doubt, Members of this Committee have heard about some of the most egregious abuses in our civil justice system, the Milberg Weiss case over securities litigation, and Judge Janice Graham Jack down in Corpus Christi, Texas with some silicosis litigation. I won't go into details on these cases. They have a common theme, though, and that is that these lawsuits demonstrated that some small number of plaintiffs' lawyers put the interests of their own selves and their firms ahead of compensating any injured people. These lawsuits were driven for their benefit and not for the benefit of injured parties.

We have seen in the FELA context, according to public records cases, a case where four employees at the United Transportation Union pleaded guilty to racketeering for accepting payments of as

much as $30,000 from personal injury lawyers. More recently, we have seen out of West Virginia a case involving CSX, a plaintiff named Rodney Chambers and his lawyer, alleged to have committed fraud against CSX by submitting a medical report. That medical report was certified by a Dr. Oscar Frye. Dr. Frye has never been located and the address he gave in Huntington, West Virginia is fictitious. CSX is bringing a separate legal proceeding against Robert Gilkison and his employer, the Pierce Law Firm, which at one time was Mr. Chambers' counsel, at the time of the Dr. Frye episode. Interestingly, one of the co-conspirators' was a Dr. Ray Herron, who came under criticism as one of the doctors mentioned in the silicosis lawsuits in Judge Jack's lawsuit down in Texas.

ATRA believes very strongly that it is important to recognize that the adversarial nature of employees in the railroad context is unique. As you consider both regulatory and litigation issues, that needs to be taken fully into account. We also would point out that in enacting compensation statutes, this Congress twice, under the Federal Employees Compensation Act, as well as the Longshore and Harbor Workers Compensation Act, has enacted reforms more akin to workers compensation, with its no-fault type structure.

As you look at this situation and consider the interests of both management as well as employees, we strongly encourage you to weigh the distinctions between the no-fault systems that are out there and, what we believe, is an antiquated system: FELA. No system is so good that it can't be changed. We believe at a minimum it should be improved. We would be pleased to work with you on alternatives to the FELA.

Thank you.

Mr. OBERSTAR. Mr. Joyce, thank you. Do you have some suggestions? Do you have some written ideas for legislative changes to the FELA system, short of repealing it?

Mr. JOYCE. We would be happy to provide you some. I didn't come with any today, but if you are interested, we would be happy to develop those.

Mr. OBERSTAR. For the record, I would appreciate having that.

Mr. Brown, we have in our files the CSX Safety Action Plan for the southern region. It instructs supervisors to identify and target their five most at-risk employees. How is that not an intimidation program?

Mr. DAVID BROWN. Thank you, Chairman Oberstar.

That program was briefly in effect in 2006 on part of our system. I think you heard mentioned earlier, sometimes a well-intended program can have unintended consequences. So as we began that program, looked at it, really were focused on the understanding that in any group of employees, on any team of employees, you always have some who have strengths and weaknesses. You want to focus on developing people around their weaknesses, so the team gets stronger.

After we saw how that went into practice and the issues that came from that in terms of the allegations of intimidation and harassment, certainly not our intentions whatsoever, we quickly moved away from that. We put that program aside, it doesn't exist any longer.

Mr. OBERSTAR. It is no longer company policy?

Mr. DAVID BROWN. No, sir. It was only in effect for a few months until that sort of grassroots result occurred. We just said, well, let's move on from this. We are focused on leadership development. We are really focused on returning results through our leadership in a very positive, engaging type of coaching style leadership that some of my colleagues mentioned here today. That is where we are moving forward.

Mr. OBERSTAR. We have heard a great deal of testimony, and we have a great deal of information in our Committee files as a result of inquiry and investigation done over a period of time about a points system. Now, Mr. Brown, you are moving away from, or have abandoned the action, Safety Action Plan, because of, as you call it, unintended consequences. How many of you still have in place a points system that rates employees with point rating up to a certain maximum where they then become a problem employee?

Mr. SCHULZE. We do at the BNSF Railway. We have a system in place today.

Mr. OBERSTAR. You do have a point system?

Mr. SCHULZE. That is correct. It is the employee review process that I referenced.

Mr. OBERSTAR. Mr. Wehrmeister?

Mr. WEHRMEISTER. We do not. At Norfolk Southern, we endeavor to annually have a performance appraisal done between employee and supervisor in the privacy of an office, not on the train, not out in the shop, where in a pre-arranged fashion, the supervisor takes time to assemble materials that he or she knows that have to do with the employee. We meet with individuals who have not been injured and we meet with individuals who may have been injured to talk about their performance overall and how the supervisor and the employee might jointly improve. It has very positive results.

Mr. OBERSTAR. You don't rate employees under this process by how many accidents they have had?

Mr. WEHRMEISTER. We do not, no, sir.

Mr. OBERSTAR. Or whether they have frequently been in accidents? You don't do that?

Mr. WEHRMEISTER. We do not, sir.

Mr. OBERSTAR. Mr. Grimaila, at UP?

Mr. GRIMAILA. Mr. Chairman, we do have a tracking system for rules compliance. It does not include any points for tracking of personal injuries.

Mr. OBERSTAR. How do you track the individual, then?

Mr. GRIMAILA. Under the provisions of Part 217 of the FRA, we have an employee testing program for rules compliance, and we note the success or lack of success in their ability to demonstrate competency on the rules.

Mr. OBERSTAR. But when an employee has an injury that is reported, you don't put a point alongside his name or a marker?

Mr. GRIMAILA. That is correct, we do not use points or a marker that has anything to do with the personal injury, no.

Mr. OBERSTAR. Mr. Schulze, what is the purpose of the point system at BNSF?

Mr. SCHULZE. The employee review process, we believe, is a solid risk management process, somewhat modeled off other safety lead-

ers in other industries. Dupont has an employee process, a little less formal than what we have. We believe it gives us a way to identify individuals who might be exhibiting at-risk behaviors, whether through human factor accidents, certain types of injuries or through rules violations.

It is a non-punitive, non-disciplinary piece. It is where we can sit with the employees, go through coaching, counseling and additional training, whatever they need. Whatever might be distracting them or whatever help they might need.

Mr. OBERSTAR. Each of you are denying the existence of what the employee panel said in fact exists.

Mr. SCHULZE. Denying—what was that?

Mr. OBERSTAR. The existence of a point rating system that finds and rates problem employees. You are denying what they said earlier, denying the existence of what they said earlier, is that correct?

Mr. SCHULZE. No, when you first asked, I said we do, at the BNSF Railway, we do have a point system.

Mr. OBERSTAR. Yes. But you are saying you don't use that to rate employees for punishment or use it for other purposes. But the employee panel said that is exactly what the railroads are doing, rating the employees and then finding them to be problem persons and to eventually be dismissed.

Mr. SCHULZE. It is not part of their discipline. It is not on their employee transcript. It is a way to identify people that we might need to work with through, again, additional coaching, counseling, training, whatever they might need in order to——

Mr. OBERSTAR. What happens under, how many points does an employee have to get to be subject to counseling?

Mr. SCHULZE. Currently on the transportation side, it is 89.

Mr. OBERSTAR. Eighty-nine points. At that point you call, not you but the human resources person calls that employee in and counsels the person how to operate more safely?

Mr. SCHULZE. The employee's supervisor would work with that individual. They would have monthly interviews, discussions that would take place either during the 6 month period or 12 month period, depending on the tenure of the employee.

Mr. OBERSTAR. Okay. We have a few more minutes before we will have to go and vote. Ms. Fallin.

Ms. FALLIN. Thank you, Mr. Chairman, and thanks to all of you for coming today and presenting your testimony. In my former State, I headed up a commission to reform workers compensation for our business industry in our State. My number one goal was to prevent the injury in the first place. That is my best form of protecting the workers, and helping to lower workers compensation cost or any type of injury cost in the workplace itself. So I was interested in your comments about how you have programs in place to allow injured workers to report injuries, or even to report any type of safety concerns or even potential mishaps that might occur on a job that can be at risk for injury.

I was interested in the Chairman's comments about the point system and how you rank injuries and how you help evaluate different job classifications that might be at risk for injury. Just thinking back, as an employer myself who had maintenance workers who worked in one of the jobs I used to work in years ago, that

I wanted to know who was at risk for injury, so I could prevent the injury in the first place. As I said earlier, it helps you to lower your costs on your insurance premiums and also helps protect your workers, which should be your number one goal, because that will help you as a business with your profit margins and with your employee relations.

So I guess in listening to the comments about a point system or how you evaluate risky levels of professions within your railroad industry, why wouldn't you want to protect your employees and find out those different job skills that might be vulnerable to having accidents?

Mr. GRIMAILA. There is no reason not to do it. In fact, it is incumbent upon us to understand that the person driving that train, perhaps hauling hazardous materials, is qualified, has demonstrated competency, and that we know they have a good working understanding of the rules. That is what we do with our testing programs. We need systems like that to keep track of and watch for risk emerging in that type of operation.

Ms. FALLIN. Are there any statements that were made by the previous panel that gave testimony that any of our witnesses on this panel would like to make comments on?

Mr. SCHULZE. I guess I will take a couple. On one, on the bonus system, there was perhaps a hypothetical that talked about an employee that had operations between Tulsa and Dallas, and the employee said, or the supervisor said, you get five injuries, you get six, you lose $10,000 of bonus. I am assuming that could have been pointed toward our railroad, because we operate between those territories.

We don't have an incentive compensation or a bonus structure anything like that. There is a portion of all management employees and a large number of our union employees that their overall compensation, a small percentage of it, is tied to safety. And that is tied to the overall corporate safety number. So the frequency ratio or severity ratio that the FRA tracks, whatever that is for the company, all management employees and a large number of scheduled employees participate at a certain level. It is not tied down to the individual local level how many injuries might take place on a local territory. So we would like to make that clarification.

Ms. FALLIN. Yes, Mr. Joyce?

Mr. JOYCE. There was discussion in a previous panel about how many lawsuits go to verdict, and whether that was unusual. Our experience across different areas of our civil justice system is that really very few do, in fact, go to verdict. I would take a little bit of issue with the idea that a case has to go to verdict to have a potential clogging effect. The reality is that a lot of cases go considerably pretty deep into the whole process before a settlement may be reached.

And again, just coming back to the overarching point about workers compensation, I think there was a sense of, well, we are never going to get as much. The reality is that there is a certainty to workers compensation. It can always be adjusted. And the clear trend, as I discussed a moment ago, is very much in the employment context. That trend is clearly toward the no-fault type of situation.

Ms. FALLIN. Let me follow up on that. I heard one panelist say on the previous panel that it took one to three years to get a claim settled. Do you have suggestions on how we could help injured workers get their medical care quicker and their settlements quicker?

Mr. JOYCE. Well, I think that the workers compensation system is quicker. It tends to be. We saw data from, I think a web site of a law firm that represents FELA claimants, saying that they take up to two years generally to bring, or 22, 23 months to bring a claim. I think clearer, simpler processes, recognizing that there is a need to compensate someone. There are tradeoffs involved, obviously, and the potential higher awards that you can see through a court verdict are a consideration. But balanced against that is the need not to have to prove negligence on the part of an employer. I think it has been judged overall to be a pretty reasonable tradeoff.

Ms. FALLIN. Sir, did you have a comment?

Mr. WEHRMEISTER. Thank you, Ranking Member Fallin. Yes, please. Reference was made on the previous panel by one of the gentlemen about an incident surrounding an incident on Norfolk Southern. For the record, I would like to point out that that happened some six plus years ago, and as that gentleman pointed out, there was indeed a mutual settlement amongst the parties and a confidentiality agreement was signed.

Notwithstanding that fact, though, and for the benefit of this Committee, if it be of help to you, I have the tapes in hand that were spoken of. If deliberation on this matter requires your seeing the tapes, I would like to convey them today and/or provide them later with as many copies as may be necessary for the Committee.

Ms. FALLIN. Thank you very much.

Mr. OBERSTAR. We will receive that for the record, and we are going to have to recess at this point. We have two votes, motion to recommit and a vote on passage, following which we will reconvene the hearing. You all can take a respite break.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting with again, apologies to witnesses and to all in attendance for the interruptions. Little comfort to you, those are the last votes of the day and of the week. Doesn't change your lives any. It may change ours.

Mr. Schulze, BNSF has a points system, which we described earlier, and you cited the maximum is 89 points. But within that system, as I understand it, it assigns 40 points to an employee for reportable injury, 5 points for a non-reportable injury. How did you come to this rating system? What is the value of 40 and what is the value of 5?

Mr. SCHULZE. I am not entirely sure how the exact numbers, how we did come up with those. But I do know through the safety assurance compliance program that is joint FRA, labor and BNSF, in the early 2000 time frame, it was discussed. We used to have reportable and non-reportable injuries at the same level, point level. At that time, labor had a concern that that was going to put under the table those non-reportable, those first-aid type injuries. So we discussed through that process in the early 2000 time frame, making the non-reportable point system lower.

That is something that is currently under review. We keep looking at best practices and trying to improve it the best we can.

Mr. OBERSTAR. I understand from one of your colleagues that had a point system and reviewed it and said it had unintended consequences that they are terminating it. Are you moving in that direction? Are you moving in the direction of terminating the points system?

Mr. SCHULZE. It is not something that is under discussion right now. We are looking at refining it, trying to make it better. We believe it is a valuable tool. We are open for discussion to make sure it is the best tool.

I have not heard any employee discontent about this. We regularly meet with labor, either safety coordinators, which are union appointed leaders, on each of our divisions, that BNSF pays for them full-time to focus on safety, either through our local chairman, general chairman that we meet with regularly. ERP has not been a system that they have taken much umbrage to.

Mr. OBERSTAR. Well, you are certainly hearing from different employees than we have been hearing from since the outset of the inquiry into this matter. Clearly, they have told us that they don't report, they even fear discussing the points system for fear of retribution. I don't know of another industry that has, maybe some that do, but I have been engaged in industrial safety issues for a great many years, in mining safety issues, mining industry, a wretched record until there were a few strikes that shut the company down and shut down production lines, because of hazardous practices. And the industry changed.

But establish a point system that moves an employee from green status to a red status and then according to reports that we have, if an employee gets hurt on the job, goes to the doctor, gets prescription strength Tylenol, the action goes unreported but the employee gets 40 points. It is a bizarre and byzantine system, don't you think?

Mr. SCHULZE. The accident goes unreported? I am sorry?

Mr. OBERSTAR. Yes.

Mr. SCHULZE. And still gets—the injury goes non-reportable?

Mr. OBERSTAR. That is what they have told us.

Mr. SCHULZE. And it still gets points?

Mr. OBERSTAR. And it still gets point.

Mr. SCHULZE. No, that is—that wouldn't take place. A non-reportable injury under the current system is five points. And not all reportable injuries get 40 points. Say for instance, you were in a van accident——

Mr. OBERSTAR. Can you think of a better way to manage relations with your employees than to give them a point system based on an injury?

Mr. SCHULZE. It is just one process of many that we utilize. As we have discussed, safety is very important to us. We have a lot of processes and programs out there. This is one of them that we believe is a solid part of any risk management program.

Mr. OBERSTAR. But if I were an employee who was subject to a rating system, for example, when I worked in a ready-mix concrete block factory, and because things were—accidents happen when a lot of things go wrong. Not always, but that is frequently. There

was a lot of things going wrong, and I got my hand caught in the mixer blade, a mixer, big two-ton mixer. I ripped a fingernail off my finger and a lot of other things. Old Zip Rawley put me in his truck and rushed me into the hospital, not to the company doctor, because they didn't have a company doctor.

But that would have been a reportable injury. Now, under your points system, if I had had this happen and I was worried about my job, I would have said, oh, hell, I will just shove it back and wrap some bandage around it and not report it.

Mr. SCHULZE. But that is where, again, we make that clear distinction, this is not part of discipline, it is not part of the employee transcript. This is simply an opportunity to spend time with the employee, find out if there are any issues, take time to coach, counsel, train. It is a discussion. It is not harassment and intimidation.

Mr. OBERSTAR. Well, that is the way it is seen, and that is what we heard from the previous employee witness group. And it seems that CP has moved away from, Ms. Ackermans' testimony reported, from a command and control culture of blame to a system based approached, in which there is an inclusiveness and an involvement that management and labor in emphasizing interior dialogue and positive behavior and performance. Have you looked at their system?

Mr. SCHULZE. We regularly benchmark against all the Class I railroads. We believe our partnership with labor is very strong. Again, I mentioned the meetings we had last week with the safety coordinators, also some general chairmen. Next week again in Kansas City, I am meeting with the general chairman specifically to talk about safety.

Mr. OBERSTAR. Will you talk to them about the point system?

Mr. SCHULZE. I sure will, if that is something you would like.

Mr. OBERSTAR. I think you should. I think it is giving railroad safety a bad name.

Mr. SCHULZE. We will discuss it again.

Mr. OBERSTAR. Do all of the railroads represented at this table have a hot line, confidential hot line? You are all nodding. For the record, they are all nodding. The record is not visual, it is verbal, so we will say yes.

But one of the previous panel said, oh, when we call in, everybody knows our voice, they know who we are, it is not confidential at all. How can you assure confidentiality?

Mr. WEHRMEISTER. I can only speak for our workplace at Norfolk Southern, Mr. Chairman. We have a number of multiple avenues or channels available to the employee. In our ICP, we outline that there are avenues, both through the FRA and through the labor organization, if an employee chooses to go that route. But additionally, to speak with their supervisor or to the system director of safety. And we outline the telephone number.

We think that we have evolved a culture such that anonymity is not necessary. But in the event that there are some employees, and there well may be some in our workplace, who do believe that that is necessary, we have a completely confidential ethics hot line, a 1-800 number that employees can call in that is divorced from the rest of the operating department and is controlled by our internal audit department. All of that is published to our employees for

their knowledge. Coincidentally, in this regard, in our workplace, we have an initiative that happens to be going on right now, an eight-hour safety training workshop that includes many modules and a great deal of training.

But perhaps of interest to this Committee, one of the modules that is given, that is presented to all of our train and engine service people and dispatchers out in the field and the facilitators, perhaps, believe it or not, are agreement personnel, unionized personnel and a supervisor, teams of two who teach a subject that is called in this booklet and has its own slide presentation that goes with it, Intimidation and Harassment. This module, the entire booklet, in fact, the eight-hour training program, was built by three local chairmen and three assistant superintendents, field supervisors working in conjunction with the safety department. There were a few items, like security, that we just have to cover.

But people themselves came up with the topics in that training program, our folks and their peers as well as their peers' supervisors, let folks know of the availability of these and what their reporting requirements are and what the supervisor is expected to do for respectful treatment in the event that an employee is in fact injured.

Mr. OBERSTAR. That is a training manual for both supervisory personnel and line?

Mr. WEHRMEISTER. This is for all of our agreement personnel for some 15,000 or 18,000.

Mr. OBERSTAR. Will you leave that for the Committee?

Mr. WEHRMEISTER. I would be delighted to, yes, sir.

Mr. OBERSTAR. I would like to go through it.

Chairwoman Brown.

Ms. BROWN OF FLORIDA. Thank you, Mr. Chairman.

Mr. David Brown, would you believe that that is my brother's exact name, too, and he works at CSX? David Brown. I bet your checks are never mixed up.

[Laughter.]

Ms. BROWN OF FLORIDA. I do have a series of questions. I know you all heard the other panel, and those were some horror stories. Can you respond to it? Also, expand more on what we can do to move the industry forward. I am very excited about the railroads and what could happen in our Country as far as the next 25 years. But we cannot have this culture that has existed in the past that the employees feel intimidated, this man was bleeding and he was afraid to say, take me to the doctor. It is hard for me to understand that.

But I guess you have your life and your family and you think that you are going to lose your job, it may be a factor. So can you help me out here? We can start with Mr. Hamberger.

Mr. HAMBERGER. Than you, Madam Chairwoman. I believe that H.R. 1 that was just signed into law in August provided for an additional parallel whistleblower protection through the Department of Labor. While I happen to believe that the current system provides plenty of access, this is yet another way for the employee to be protected if they do blow the whistle, so that there is not retribution, and if there is, that there would be punishment meted out

to the railroad. So I think that that provides another layer of safety, if you will.

I guess the other option, the other alternative I mentioned, just going back to the FELA issue, is just to ask the Committee to take a look at that and think about whether or not getting rid of that adversarial underlying negligence-based workers comp system might also lead to more collaboration and cooperation than the adversarial approach that that necessarily breeds.

Ms. BROWN OF FLORIDA. So you are saying that the way the system is presently set up, it is negative for an employee to report an accident?

Mr. HAMBERGER. Well, I think, and I don't want to be incendiary here, but I do have a number of pieces of advice from lawyers to our employees. You have to remember that FELA is a fault-based statute. You must put something in your accident report to show that your accident was caused by something the railroad did wrong. Giving a statement can hurt your claim. You are not legally entitled to be compensated for your injury unless it was caused by the fault or negligence of the company. And this is the kind of advice and kind of system that fosters legal advice.

But it is the system that leads to advice that you should not make any statements, either orally or in writing, as to how the accident occurred until you see your lawyer or union representative. So it sets up just an underlying conflict, instead of sitting down and getting to the root cause of, if there are three slip and falls, let's sit down and find out what is at the bottom of it. On our side, we are saying they are acting badly, and on their side, they are saying there is something wrong. It just doesn't lead to collaboration, to that culture change that Ms. Ackermans was talking about.

The other thing I think that is going on is that each of the companies here is trying to move to a proper balance. As I mentioned, I think you have to have some command and control. At the same time, there has to be collaboration. I think they are all trying to find that proper balance for their particular company. So I think we are moving very much into a culture of safety.

Mr. OBERSTAR. Would the gentlewoman yield?

Ms. BROWN OF FLORIDA. Yes, sir.

Mr. OBERSTAR. You touched on a very important line of inquiry, a very important issue. If I understand your response, and the responses of other members of the panel, you are saying that the FELA creates this adversarial condition between employer and employee, that workers comp, which is essentially a no-fault system, and we have already discussed the FELA position, you seem to be advocating for a workers comp approach.

But workers comp is managed State by State. Would you be willing to accept the development of a national workers comp system that applies only to railroads?

Mr. HAMBERGER. Yes.

Mr. OBERSTAR. I think we might be able to write one.

Mr. HAMBERGER. We would have some thoughts on that to share with you, sir.

Mr. OBERSTAR. Thank you.

Ms. BROWN OF FLORIDA. Thank you.

Mr. Brown?

Mr. DAVID BROWN. Thank you, Congresswoman Brown. Yes, I would say a couple of things. As far as progress we have made, what can we do, I think as I mentioned in my statement, we have made real progress. We feel very strongly about the positive progress that has been made, and we would reiterate the importance of the Committee looking into how that progress is occurring. Look at today's momentum, where we have come in the last three years and how that has occurred, and then working together how we are going to move forward.

Just like Mr. Wehrmeister has mentioned, that sort of collaborative training that has been developed, certainly at CSX we have done the same types of programs, so that we sit down with employees and learn together, educate ourselves so that our employees are better educated. We have developed our leadership abilities to be more positive, more effective and engaging.

Another area that I think is of particular concern to you is that we continue to build our performance financially, so that we can reinvest and make our railroads safer, through new technology, through improved infrastructure, through updated equipment and the things you have seen us doing here in the last several years. It is paying real dividends in terms of performance improvements, and it is our plan to continue that. Thank you.

Ms. BROWN OF FLORIDA. Would you just follow up, because as you heard the question that I asked earlier about the hedge fund, and in particular, they are trying to, what they are trying to do to the industry. How would that affect the railroad's ability, CSX in particular, for capital investment and safety improvements?

Mr. DAVID BROWN. I am not sure I can comment specifically about the hedge fund's intentions, but I will just say that our railroad is getting to the point now where we are just able to make the kind of capital investments that we really need to make to progress into the future, not only to maintain and improve our current infrastructure, but importantly, to build capacity so that we can grow in the future. Anything that undermines that level of financial performance, the availability of those capital funds, will have a negative impact on our ability to move forward with safety, as well as serving the Country through safe rail transportation in the future.

Ms. BROWN OF FLORIDA. Mr. Hamberger, would you like to respond to that? Perhaps you have a broader picture.

Mr. HAMBERGER. I do not have a comment on any specific hedge fund or private equity fund. I think on the one hand, the fact that private equity funds or private investors see the railroads as a place to invest is a good thing. I think from a policy standpoint, what this Committee needs to be cognizant of and aware of and take a look at is what is the goal, what is the aim of those investors? Is it to invest, as Mr. Brown just said, to expand capacity, to improve safety? Then in fact, that is a good thing. If it is not, conversely, I would think from a policy standpoint that it would be something that would concern the Committee.

Ms. BROWN OF FLORIDA. I think some of you others heard the response, some of those horror stories, and I think some of them were talking about some of your railroads. Can you respond to that?

Mr. WEHRMEISTER. As far as intimidation and harassment?

Ms. BROWN OF FLORIDA. Yes, sir. And not reporting accidents.

Mr. WEHRMEISTER. I think that overall, in our workplace, we have come to learn, with the collaboration that Dave Brown just mentioned, that discipline is education that makes punishment unnecessary. Now, does that mean that there will never be a disciplinary hearing again? Surely, it does not. But working collaboratively with, for example, the Brotherhood of Locomotive Engineers and Trainmen, and the United Transportation Union, and subsequently other labor organizations who have joined, we have a new discipline policy. It is a tribute to what can be done by working together, called the System Teamwork and Responsibility Training.

What it pledges is something that perhaps did not happen in previous years to 2000 when this began. Again, other labor entities have come on since then. For example, it points out in policy fashion, employees will not be disciplined for failing to report an injury immediately if, as soon as the injury manifests itself, the injury is reported. We may not have done that in years gone by. Employees will not be subject to formal disciplinary hearing for sustaining an injury. It goes on to say, from time to time, there is a case that needs to be looked at, and the vice president in that group needs to approve that, so that we try to get to the cause of it.

There is a steering committee that includes labor, and some of those folks are in the room today, from the START program or steering committee, and management as well, to guide it. In order to foster it, in order to proliferate it, virtually every quarter our executive vice president of operations takes it upon himself and does not farm it out to a designee, and goes along with the vice president of labor relations to bring together each division's local chairpersons, general chairpersons, representing the labor organizations, as well as local supervision, so that everybody is in complete understanding with where we are at and where we want to go, and they talk out issues.

I hope that is responsive to your question.

Ms. BROWN OF FLORIDA. Yes, sir. Does anyone else want to respond?

Ms. ACKERMANS. I would like to talk about your question about how would the industry move forward. I have had the advantage of working within two completely different safety structures. I see the weaknesses and strengths of both systems. One of the strengths of the Canadian system, when it comes to union-management collaboration is a requirement for the union participation in safety and health activities. They can't withdraw from safety and health activities. They are expected to stay at the table.

What we have observed in the U.S. over the years is you will have a dispute over something else that happened in the workplace, and the reaction of labor, on occasion, has been to withdraw from the joint safety and health activities. That just brings that activity level to a halt. So there is a simple lesson that could improve safety here, is if there was mandatory participation.

Ms. BROWN OF FLORIDA. Do you have that in writing? Do we have that information?

Ms. ACKERMANS. I am not sure if it was in my testimony or not. I can certainly give you citations for the Canada Labour Code where it exists.

Ms. BROWN OF FLORIDA. That would be very helpful for us to take a look at.

[Information follows:]

The following links were provided by the witness subsequent to the hearing:

http://laws.justice.gc.ca/en/showdoc/cs/L-2/bo-ga:l_II//en#anchorbo-ga:l_II – Part II – Occupational Health and Safety of the Canadian Labour Code

http://laws.justice.gc.ca/en/showtdm/cr/SOR-86-305//?showtoc=&instrumentnumber=SOR-86-305 - Safety and Health Committees and Representatives Regulations (SOR/86-305) of the Canadian Labour Code (entire document)

Thank you all very much. Yes, sir, you wanted to respond?

Mr. SCHULZE. I would just like to echo the comments that have come out. It has to be a collaborative relationship. We have discussed that before, the power is in, obviously, working together. We have certain agreements that are in place, whether it is alternative handling, which is non-disciplinary, non-punitive. We are going to build upon those. In the collaborative partnership, it has to be personal. Everybody has to take this personally, that the employees are empowered and supervisors are engaged. It has to be done at the local level. That is where the power of safety is, at the local site safety teams. They are the ones who see the risk in a given area.

Lastly, it has to be leadership driven. We have to heave leaders that, again, we stamp out any harassment or intimidation that takes place on the system. When it is identified, we need to address it, we need to confront it and address it strongly.

Ms. BROWN OF FLORIDA. Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you very much. A very productive line of inquiry.

How can you assure with such widespread operations that you are making every effort to identify front-line supervisors who are pressuring employees not to report? Some of you in your individual statements describe situations where disciplinary action was taken. Is there a consistency in how this issue is managed? How can you assure that actually it is being carried out?

Mr. GRIMAILA. We believe that a consistent message throughout the organization, starting at the top, and making very clear what the expectations are, is the most important start. And that is what we have. The other thing is to be persistent. We have to continue to drive the message through, provide the training and examples, as Mr. Wehrmeister put out, and just stay after it with that. And demonstrate with our actions that what we are saying is what we are doing. That is the path we have taken right now.

Mr. OBERSTAR. Does that suffice for the other three?

Mr. WEHRMEISTER. Our eyes met. Mr. Chairman, in our workplace, part of our ICP is the declaration that we will audit our injuries both from a field perspective, if I may, those supervisors who control or have charge of the folks in the field. But we have another layer from our safety and environmental department of folks who go out twice a year and they audit the personal injury forms for reportables, accountables and first aid, and check it against our casualty claims files; in other words, if there is a payment to an employee, to ensure that we are not speaking from two different mouths. In other words, no injury report and there would be a payment. If we have a discrepancy, we certainly clear that up.

Additionally, our general managers and superintendents are very active in ensuring that all of the right things are done with our reporting. FRA is very active and audits us at least once annually on a system basis. They don't just go through the reportables, they go through the accountables, the first aid, we put everything down in our workshop, and I know the other railroads do, too. They look at it all, even if it is not a reportable, per se.

Mr. SCHULZE. I would say on the BNSF it is very similar to what each of these gentlemen said. We do cross-correlate data bases to

ensure that we have all the information. We get the information from the field, what happened injury-wise. We get information from the claims department, much like what Mr. Wehrmeister is saying. And we also have medical department information. We correlate those data bases to make sure that they are all synched. If any one of them is out of order, we make sure that it is a reportable injury and we address it with a supervisor.

Mr. DAVID BROWN. And similarly on CSX, pretty much an approach around our leadership style, our approach to leadership, so that it is a top-down message about the importance of being a positive, engaging leader. The fact that when you don't deal with facts, you can't create sustainable improvement. That is really what we are trying to accomplish.

Self-auditing, we do look at our records, we audit ourselves. We also cooperate fully with FRA in any auditing of records. Our hot line produces, occasionally does produce a complaint. We investigate those fully, take the appropriate action. We have trained all of our leaders, all of our managers. That is an ongoing process.

Obviously, there is some awareness around allegations of intimidation and harassment through the history that has led up to this hearing today. So we paid particular attention to make sure all of our leaders are aware of that and very much informed about all of the various issues that could be considered out of bounds. We made those boundaries firm and we expect our leaders to stay within them. Thank you.

Mr. OBERSTAR. Were any of you surprised then by the testimony that was given earlier by the injured railroad employees? Did this come as a surprise to you? They described very thorough practices on your part?

Ms. BROWN OF FLORIDA. Mr. Chairman, will you yield to me for one moment?

Mr. OBERSTAR. Yes, I yield.

Ms. BROWN OF FLORIDA. That young man at the end, Mr. Ehlenfeldt, who is fired and unemployed, what company was he working with?

Mr. SCHULZE. He was with BNSF.

Ms. BROWN OF FLORIDA. Can you address that?

Mr. SCHULZE. I am not sure how much I can address. That is, it is going to be under litigation in the next couple of weeks. So a lot of the facts will come out through the judicial system. I will say to some of it, we do have disciplinary policies that are generally progressive discipline. So the discipline that he was assessed for a certain event might trigger something differently for another person similar to, say, your driving record. I grew up in the State of Nebraska, you had 12 points, if you got to 12, your license was suspended. If you are at 11, got a speeding ticket and got your 12th point, you would lose your license. If you were at 1 or 2 and got a speeding ticket you wouldn't lose your license.

Ms. BROWN OF FLORIDA. But you indicated that the point system was not in place.

Mr. SCHULZE. The employee review process?

Ms. BROWN OF FLORIDA. No, the Chairman asked you about the point system.

Mr. SCHULZE. Yes. That is separate from the discipline process.

Mr. OBERSTAR. Points are separate from discipline, he says.

Mr. SCHULZE. Yes, the employee review process did not correlate to the discipline.

Mr. OBERSTAR. Ms. Ackermans, can you describe for us the legal structure in Canada that governs on the job accident injury and treatment thereof?

Ms. ACKERMANS. In Canada, the provinces each have workers comp no-fault systems. So they have adjudication rights over, did something really happen in the workplace or not. It does not go to the court systems as it does in the workers comp systems that I heard today, about the State systems. So the workers comp boards themselves adjudicate.

Mr. OBERSTAR. So the railroad is subject to each separate provincial workers comp law?

Ms. ACKERMANS. Right. And it is based on the province in which you reside. So your injury can happen in one province, but it is where you reside, that is where the resolution occurs.

Mr. OBERSTAR. So if you live in Quebec and you are injured in Alberta, you have to go back?

Ms. ACKERMANS. You wouldn't get that far in the railway system.

[Laughter.]

Mr. OBERSTAR. Yo have to go back to Quebec to be adjudicated?

Ms. ACKERMANS. It is where you live. And of course, in the railway system, people don't travel more than a couple hundred miles from their home on the railway system. Most of the injuries occur in the province where you reside.

Mr. OBERSTAR. Those are huge, sprawling provinces. The province of Ontario covers seven States.

Ms. ACKERMANS. Just about. So given that, given also that the workers comp administration actually is different in every province, in some provinces the assessment is based on a percentage of payroll. In other provinces, it is based on your particular injury rate. In other provinces, it will be based on a full-blown assessment of the future costs and will be assessed, everything up front. Some of it is a pay as you go.

So we have a myriad of systems that we work within. The reporting requirements may be different. They are similar in terms of what needs to be reported, but the timing is different. The lowest common denominator is 48 hours that we have to report a serious injury to a workers comp board in one of the provinces. So we made that our internal reporting target, is to try and get everything reported within 48 hours in order to meet that one provincial jurisdiction.

Mr. OBERSTAR. Thank you.

Well, I want to thank the panel for their testimony, for contributing a great deal of time and effort to the presentations that you have made. It has helped us to sharpen the focus. Mr. Joyce, we will expect written comments from you.

Mr. Hamberger, it will be interesting to get your thoughts on a national workers comp type of system. And we will invite the brotherhoods to submit their thoughts on it as well.

Certainly there are clear problems, Ms. Brown elucidated, as each of you and the previous panel said, resulting from an adversarial structure. On the other hand, there surely has to be a firm

standard by which to measure. A point system, to me, is fraught with the type of internal problems that were reported by the previous panel. If the railroads and the brotherhoods could work that out amongst themselves, that would be the best outcome. But if not, then, as we have done in aviation and elsewhere, then it is appropriate for Congress to legislate.

Mr. HAMBERGER. Mr. Chairman, if I might be so bold.

Mr. OBERSTAR. The gentleman is recognized.

Mr. HAMBERGER. Thank you. I think that we would be really pleased to sit down with the brotherhoods, I think, if you or your staff were sort of the——

Mr. OBERSTAR. Mediator?

Mr. HAMBERGER.—raconteur, that it would be very helpful to make sure that we sat down and moved forward. That would be a great service.

Mr. OBERSTAR. We will explore that.

Mr. HAMBERGER. Thank you.

Mr. OBERSTAR. The Committee stands adjourned, with great appreciation to the witnesses.

[Whereupon, at 5:47 p.m., the Committee was adjourned.]

Committee on Transportation & Infrastructure

Hearing on "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads"
Thursday, October 25, 2007

Statement – Congressman Jason Altmire (PA-04)

Thank you, Mr. Chairman, for holding this hearing today on the impact of railroad injury, accident, and discipline policies on the safety of American's railroads. I wish to extend a warm welcome to today's witnesses. Thank you for your time and willingness to provide us with your expertise and experiences.

Based on the submitted testimony, I am concerned that some of the management programs in place have unintended consequences when it comes to efforts to improve safety at railroad work sites. For example, certain workplace safety programs are designed and implemented in a way that creates a system that discourages the reporting of injuries and accidents, rather than reducing the actual number of incidents from occurring in the first place. Further, I am concerned about whether workplace injuries and accidents are being adequately reported.

Workplace safety is something that we should all strive to improve and we need to ensure that the proper policies are in place – as well as enforced – to reduce the number of railroad injuries and accidents. I hope that today's hearing will provide insight into current practice and provide the committee with guidance on how to proceed in the future.

Thank you again Mr. Chairman. I look forward to hearing from today's witnesses and yield back the balance of my time.

# # #

Statement by Congressman Jerry F. Costello
Committee on Transportation and Infrastructure
The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads
October 25, 2007

Thank you, Mr. Chairman. I am pleased to be here today as we discuss the impact of railroad injury, accident reporting and discipline policies on rail safety.

I firmly believe that no employee should ever feel intimidated or threatened, especially when it comes to injuries and accidents and the safety of our rail system. The allegations of intimidation brought forth are numerous and troublesome and strongly affect the safety of our railroads.

I am Chairman of the Aviation Subcommittee and the FAA has undertaken many initiatives to promote voluntary reporting programs and these non-punitive principles have proven quite effective in the regulatory environment. I am interested in hearing from our witnesses, in particular the FRA, to see what disciplinary actions are being taken and if they are working to improve reporting requirements similar to what the FAA has done.

I also want to point out that I am pleased HR 2095, the Rail Safety bill, which recently passed the House of Representatives, included Section 606 which I authored to provide for prompt medical treatment to railroad workers. This is an important safety and quality of life issue for rail workers and ensures that our rail workforce is properly being treated.

With that, I welcome our witnesses and look forward to their testimony.

1 Harry E. Mitchell

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
10/25/07

--Thank you Mr. Chairman.

--Safety is supposed to be out top priority for all modes of transportation, including railroads.

--The Federal Railroad Administration ("FRA") is charged with ensuring that this remains the case.

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--Increasingly, however, we are finding disturbing questions about the degree to which the FRA is meeting this obligation.

--The Department of Transportation Office of Inspector General recently reported that the FRA was investigating less than two-tenths of one percent of all accidents and incidents involving railroads.

--Even more disturbing, we are receiving reports from railroad employees that they

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have been discouraged from reporting injuries, or worse, harassed for doing so.

--At a time when the FRA is finding evidence of underreporting of employee injuries, this is something that clearly needs to be investigated.

--I want thank the Oversight & Investigations staff for all the hard work they have put into today's hearing.

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--I am looking forward to hearing from today's witnesses.

--I yield back.

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR, CHAIRMAN
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
OVERSIGHT AND INVESTIGATIONS HEARING ON
THE IMPACT OF RAILROAD INJURY, ACCIDENT AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICAN'S RAILROADS
OCTOBER 25, 2007

I would like to welcome everyone to our hearing this morning. We are here for a critical examination of rail safety, a little more than a week after the House passed H.R. 2095, the Federal Railroad Safety Improvement Act, by a vote of 377 to 38. This historic and important legislation mandates a number of safety enhancements and increases the number of rail safety inspection and enforcement personnel.

Today, we consider the issue of railroad injury, accident, and discipline policies on the safety of America's railroads. The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years. These reports have documented a long history of underreporting incidents and accidents and non-compliance with Federal regulations in the railroad industry. The underreporting of railroad employee injuries is significant aspect of this problem, and employees frequently report that harassment of employees who are hurt on the job is a common railroad management practice.

Why do they do this? Well, one reason is that it makes their accident statistics look better than they really are, but it also denies us a full understanding of the nature and extent of safety problems in the railroad industry, which is vital to improving safety. Moreover, it's just not right for people who are hurt on the job to be intimidated by their managers.

Since our Oversight and Investigations staff began contacting railroad employee groups about the injury accident reporting issue, we have received several hundred e-mails and reports of alleged harassment of railroad employees who have reported injuries. Other reports involve cases where employees were cautioned by managers not to file an injury report, in order to avoid future problems or disciplinary action. More than 200 individual cases, with documentation, of alleged management intimidation following injury reports have been provided to the Committee.

Our staff reviewed all of the most recent Federal Railroad Administration ("FRA") "Comprehensive Accident/Incident Recording Keeping Audits" conducted under Part 225 of the FRA regulations. In the latest audits conducted at major railroads, the FRA found 352 violations of Federal law for underreporting, with the largest category representing failures to report employee injuries. It is important to recognize that this represents <u>only</u> the number of underreported injury events that

the FRA was able to identify by auditing the railroads' own records, but this number does not represent the actual number of injuries that may have never been officially reported by employees. Thus, it is perhaps just the "tip of the iceberg."

In preparing for this hearing, the FRA Associate Administrator for Safety stated that she believed that supervisory pressure on employees to not report injuries is a significant issue. When the agency receives complaints on this subject, FRA does investigate these reports. However, the Associate Administrator maintained that FRA simply does not have the resources to investigate the extent of the "harassment" issue. Hopefully, by dramatically augmenting the FRA safety inspection staff, as provided for in H.R. 2095, we can begin to address this tremendous lack of FRA investigative resources and start to correct the railroad accident underreporting problem.

It is of concern to us that many railroads have management programs and policies that may, perhaps unintentionally, inhibit or intimidate employees into not reporting on-the-job injuries. Thus, many injury accidents, that are required to be reported to the FRA, may be never reported as a result. We have reviewed numerous cases where railroad managers sometimes bring pressure to bear upon employees in three common ways:

1) "counseling" employees not to file an injury report in the first place, subtly suggesting that it might be in their "best interests" not to do so;

2) finding employees exclusively at fault for their injuries and administering discipline; and

3) subjecting employees who have reported injury accidents to increased performance monitoring, performance testing—events which are often followed by subsequent disciplinary action up to, and including, termination.

In fairness, during our discussions with the senior executives of the major railroads and in the testimony we will hear from them today, it certainly appears that they are dedicated to the prevention of injuries. But, it is also clear that many railroad safety management practices may create unfortunate and "unintended consequences." Whether intended or not, the consequence is that many employees perceive intimidation to the extent that those who are injured in rail accidents are often afraid to report their injuries or seek medical attention for fear of subjecting themselves to discipline, increased scrutiny, and ultimately termination from employment.

We must find a way to create a more open and non-punitive environment when it comes to dealing with the reporting of railroad incidents and accidents. We must find a way to promote an environment where railroad workers feel free to come

forward and report important safety problems, without fear of being blamed for things that are often out of their control.

I think that perhaps the railroad industry could learn some important lessons from commercial aviation, where incident and accident reporting occurs today in an environment largely free of the fear of retribution. About 20 years ago, air transportation and the FAA shared a similar reporting culture, which was quick to assign blame to individuals and to apply severe discipline.

In the 1980's, scientists at the National Aeronautics and Space Administration ("NASA") and leading universities demonstrated persuasively that more than 75 percent of all incidents and accidents in air transport have some sort of human-related causal factor. More importantly, however, this research demonstrated that accidents almost always involve multiple and interrelated causal factors. While the final "pilot error" may have been the most salient or obvious causal factor in an accident sequence, there are almost always many other factors that either caused the pilot to make the error, or allowed a simple error to progress to a catastrophic conclusion. In this philosophy of accident causation, it makes little sense to blame a complex accident sequence on a single human operator, when there were many other factors that led the operator down a path toward making the "final" error.

Simply pronouncing an accident due to "human factors" or "human error" sheds very little useful light on why an accident occurred. Humans are "human," we all make mistakes, and sometimes the mistakes we make are a function of problems in the working environment. Thus, punishment or discipline for an honest, unintentional, human error is often not the right answer. Finding out why a mistake happened by openly looking at all the factors in play is the right answer. That is not happening often enough in today's railroad safety culture.

I look forward to hearing from all of our witnesses today. I hope our deliberations today can help point the way to a stronger and healthier railroad "safety culture."

Statement of
Faye Ackermans
General Manager, Corporate
Safety & Regulatory Affairs

Before the U.S. House of Representatives
Committee on Transportation and Infrastructure
Hearing on "The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America's Railroads"

October 25, 2007

Canadian Pacific
401 9th Avenue SW, Suite 500
Gulf Canada Square
Calgary, Alberta
T2P 4Z4

On behalf of Canadian Pacific, thank you for the opportunity to provide this Committee with information about CP's approach to safety.

Canadian Pacific Railway (CP), founded in 1881, is the sixth-largest Class I railroad in North America. It provides rail and intermodal freight transportation over a 13,300-mile network in Canada and the U.S., serving the principle business centers in the U.S. Midwest and Northeast as well as Canada.

CP's rail assets consist of the Canadian railway division, and its U.S. rail assets operated by two wholly-owned indirect subsidiaries, Soo Line Railroad Company ("SooLine") and Delaware and Hudson Railway Company, Inc. ("D&H"). On October 4, CP completed the transaction to acquire Dakota, Minnesota & Eastern Railroad Corporation and its subsidiaries ("DM&E") which will expand CP's network by approximately 2,500 miles and increase its access to U.S. Midwest markets including agri-products, coal and ethanol. Approval of that transaction is pending before the Surface Transportation Board ("STB").

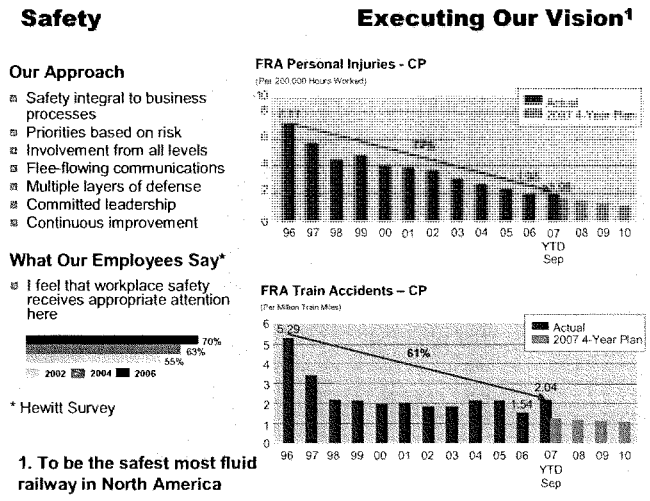
CP has earned a solid reputation as being a good, cooperative neighbor. "Community" is a part of our core values and is considered the responsibility of every CP employee. CP works with local communities to jointly address concerns and areas of common interest.

Executing Our Vision

CP's corporate vision is to be "*the safest, most fluid railway in North America.*" The safety culture at CP is an integral part of Execution Excellence and we are achieving results. The safety and health of Canadian Pacific employees and the safety of our operations is of paramount importance to everyone who works for this company. A decade ago, CP re-aligned its management team and in the process created a consistent, visible focus on safety that has achieved extraordinary results. From 1996 to year-to-date 2007, CP train accidents and personal injuries fell by 61% and 72% respectively. Furthermore, in seven of the ten years from 1997 to 2006, CP achieved the best system-wide train accident rate among the North American Class I railways. In 2006, the CP train accident rate was 1.54 accidents per million train miles. This was well below the U.S. rail industry rate of 3.6.

CP's safety success is a testament to union/management commitment and involvement in hundreds of safety, health, training and business process activities. We have been building a safety-conscious culture where safety is built into our business processes. It is not a "bolt-on" activity or afterthought – it is how we do business. We have consistently approached safety management using the seven key principles listed. All of them are important factors in our safety success. Our employees recognize these efforts. On employee insights surveys conducted by an external consultant every two years, safety gets high marks; 70% of our employees agree/strongly agree with the statement "I feel that workplace safety receives appropriate attention here." There has been a significant

improvement in this metric over the last few years and we want to continue to improve these results.



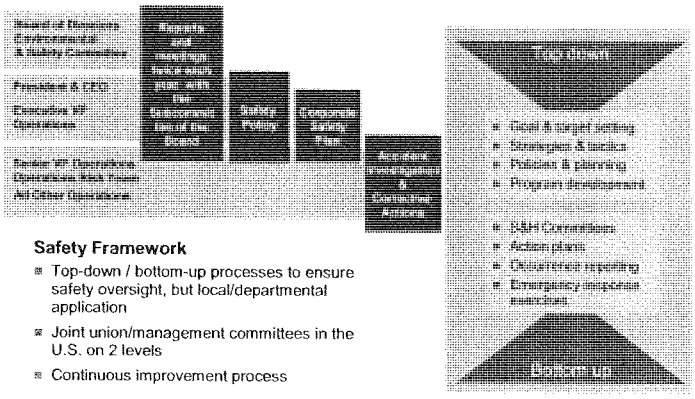
Safety Framework

How did we get here and how can we ensure continuous improvement going forward? Since 1996, CP has consistently used a framework for workplace and operational safety that involves all levels of employees and management. This framework is founded on the belief that if CP can engage everyone in its workplace, at all levels, we will achieve continuous improvement in all aspects of safety, whether they are regulated or not.

The top-down safety focus starts at the Environmental and Safety Committee of the Board of Directors. Top-down activities include goal and target setting, developing the strategies and tactics, creating the policies, plans and oversight activities and developing the programs and tools needed to effectively integrate safety into day-to-day operations.

The bottom-up action planning directly engages over 1,000 employees who are members of about 100 work-place Health and Safety committees with outreach from these committees to all employees. These committees each produce an annual safety plan with activities targeted at local needs and concerns. They are also responsible for monitoring and auditing the effectiveness of the planned activities. These local plans are one layer of safety plans. CP integrates several layers of safety plans each year, including Service Area Plans, with the Corporate and Work Place Plans.

Safety Management Oversight



Corporate Social Responsibility Report on www.cpr.ca

Part of the annual safety framework cycle includes processes to monitor the effectiveness of the plans, including incident trend analysis. Plans and activities are adjusted as needed to continuously improve the processes and initiatives.

In addition to the work place committees, CP has senior union and management staff on Safety Committees. In the United States, there are Safety Advisory Boards for the major functional teams with participation from Union General Chairmen and senior managers. In Canada there are two layers providing senior union/management focus; Policy Committees for the major functional teams and a Master Committee. This committee structure and the processes we have built into safety management oversight, ensures a consistent approach with a constant focus on improving all aspects of safety.

The Safety Framework has been institutionalized at CP and will continue to set the platform for ongoing continuous improvement .

CP has also published a Corporate Social Responsibility Report for several years. The current version can be accessed on-line at www.cpr.ca

Safely Operating a Railway

Turning now to train operating safety, I want to discuss some of what it takes to operate a railway safely. There are four major elements – track, equipment, train operations and the outdoor environment – with a fifth element - the human factor - overlaying all of the basic elements. It has been said that railroading is an outdoor sport – we operate in all types of weather through all types of terrain and it greatly influences our approach to managing safety. Most of our effort goes into preventing accidents. In the distant past, the primary prevention defenses were manual - things such as planning, inspection and maintenance.

Safely Operating a Railway

Proactive Elements

Human Factors

Training & qualifications
Communication
Medical Fitness for Duty
Fatigue management
Error trapping strategies
Supervision & Peer observations

Track	Equipment	Train Operations	Environment
Technology			
• Rail flaw detection • Geometry and gauge • Vision technology ◦Joint bars ◦Ties	• WILDs • Bearing detect. ◦Acoustic ◦Hot Boxes • Truck performance • Vision & laser technology for wheels/axles	• Signal systems • Control systems • ATCS • Digital cameras	• Slide detectors • Ground radar • Wind detectors • Weather Watch
Maintenance, Inspection, Practices, Planning & Regulations			
• Joint mtce. • Rail grinding • Manual insp. and repair • Track renewal programs	• Safety insp. • Repair • Design standards	• Marshalling standards • Visual inspections • Brake tests • Documentation • Rules & proc.	• Winter plan • Response and recovery

Post Accident

Superior Train Accident Investigation Process and Multi-cause analysis & corrective Actions (ISROP)

These activities continue to form the fundamental base of our pro-active prevention processes. They include things like track inspection, maintenance and renewal, equipment inspection and repair, train brake testing, and operating rules and practices. In the past few decades, technology started to play an increasingly important role with the wide spread introduction of signaling systems, computer control systems and the first generation of way-side detectors. Technology now plays a much more significant role in our prevention efforts. In fact, we are on the cusp of a revolution in new technology that will do a much better job than humans ever could of inspecting track and equipment.

When a train accident occurs, CP has a very structured approach to determining cause and corrective actions. CP has a small team of professionals with expertise in track, equipment, track-train dynamics (including computer simulation) and failure analysis. Since this team is small, we have trained about 1,500 CP managers in train accident reconstruction and cause-finding methods. Policies, procedures and reference material

has been developed to assist the organization, and the team is available to assist in determining cause when required. They regularly provide analysis of failed components, computer simulations and advise to assist the organization.

There is also an internal requirement for certain train accidents and serious personal injuries to be reviewed by the Health Safety Security and Environment Committee (HSSE), both for cause and corrective actions. The HSSE is comprised of senior Operations staff. It is chaired by the Senior Vice President of Operations and meets weekly.

But what has really enabled CP to be the North American leader in operations safety is our focus on the human factor. All humans make mistakes – many mistakes every day, from forgetting to do something, misplacing something, misunderstanding an instruction or getting distracted. We have systematically tried to understand how and where human error has played a role in accidents and tried to improve those underlying elements that led to an error or a series of errors causing an accident. To assist in this effort, we have a world-class set of investigation tools, called Investigation of Safety Related Occurrence Protocol (ISROP) that encourages understanding of the multiple causes of human error accidents and promotes corrective actions that address all aspects of causality, particularly at the interfaces between people and processes.

Human Error and Safety Culture

Accidents in the railway industry will happen. Some are simply out of railway companies' hands, the result of unavoidable or unforeseeable situations such as an avalanche or a mudslide. Many accidents, however, are the result of human error and are rooted in a plethora of causes. Fatigue, inattention, absent or vague communication, poor judgment, deliberate rule violations, technical or operational errors, inadequate training, actions based on assumptions, complacency, and lack of teamwork are just a few of the human causes that can lead to accidents.

The culture of North American railroads is typically described as militaristic. In this culture, rules are created, people are trained to follow the rules and when a rule is broken, punishment is required to ensure the person who broke the rule won't do it again. Simultaneously, the punishment is supposed to send a message to other persons about the consequences of breaking rules.

For the past decade, CP has been slowly moving away from this militaristic model. We have been introducing an understanding of the "human factor" into our safety processes – how and why people make mistakes and what systemic changes can be made to avoid or trap errors. This has made us much more conscious of where processes may be vulnerable or where multiple layers of defenses may be lacking..

This is a journey; the progress we have made is still fragile. There are wide disparities within CP on acceptance and use of this approach and the various "tools" that have been introduced. And there is much more work to do. But generally, we are trying to move

from a culture that blames[1] the individual who ultimately makes the final error in the chain of accident causation, to one where we ask system-based questions such as: What defenses failed? How did they fail? How can the system be made more resistant?

CP's Human Factors Journey

Dr. James Reason[2] introduced the world to several key concepts about system error, including;

- Latent conditions - The system defenses built by management all have holes in them. These are dynamic holes – they get larger or smaller as the environment changes. These holes often go unrecognized until there is an accident.
- Active Error – These are the errors that breach the system defenses and ultimately, if all the holes in the system line up, result in accidents.

In meetings in 2001 and again in 2005, Dr. Reason reinforced some other key messages with senior CP managers including these principles:
- People are people and making mistakes is part of being human;
- The remedies are mostly in the hands of the system "builders" not the employees who make mistakes;
- We need to create a system that doesn't require violations to get the job done; and
- It is easier to change practices than it is to change values and beliefs, but changing practices will eventually lead to culture change.

CP has used these constructs to help frame our approach to understanding human factors and human error management.

The operating environment of a railway is dynamic, not static. Situations change from hour to hour and the humans executing their daily tasks need to recognize those changes, create a new work plan, recognize the new hazards, communicate to each other and execute the new plan. This is done smoothly and without negative consequences most of the time. Our efforts, described below, have been targeted at improving an already good record and providing ways to continue to strengthen the defenses in our processes.

Changes introduced include elements such as improved instructional material, train accident cause-finding tools; human factor investigation protocol and corrective action guidelines; peer-based job observations; error trapping strategies; on-the-job coaching and mentoring and fatigue management initiatives.

There has always been recognition that people played a key role in safely operating a railway – they needed to be trained and qualified; they needed to have ongoing skills upgrading; they needed to meet fitness for duty requirements; they needed to be supervised to ensure ongoing compliance with the rules. What we have been trying to

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[1] According to Reason, the blame game is about blame, shame, retrain, discipline and write another procedure.
[2] James Reason. Managing the Risk of Organization Accidents 1997

change is how we react to the errors that cause accidents and to identify and change elements of the processes that create the conditions that allow errors to become accidents.

Human Error Investigation

The internal investigation of various CP accidents in the late 1990's led to the development of a more comprehensive and human-factors oriented accident investigation methodology. In 2002, CP introduced the first version of the Investigation of Safety Related Occurrences Protocol (ISROP) to our Canadian operations. This protocol was updated and implemented system-wide in 2005. At this point in time, it's use is mandatory for certain accidents, and optional in all others.

ISROP is a set of tools designed to investigate all aspects of the work system, determine multiple causes of an occurrence and determine appropriate and effective corrective actions. While there are several tools within the protocol, four are of particular importance:.

- The first is an aid for the investigator to help determine what kind of error occurred. This is a key determination. Knowing the error type helps guide the corrective actions. Furthermore, most types of errors should not result in employee sanctions.
- The second is an events mapping process that links the various decisions made that led to the accident into a structured picture of what happened and how the various decision points relate to each other.
- The third is a structured approach to collect data using the SHELL model. This approach helps to organize and preserve the information into five categories – the Software such as the policies, the Hardware including all the equipment and materials, the Environment and its impact if any, the Live-wear (the people) both immediately and peripherally involved. The chance of overlooking or omitting key information is reduced.
- The fourth is a guideline for corrective actions. More effective corrective actions will result from understanding the type of error made and the types of latent defects in the system.

ISROP has improved the quality of both our investigations and our corrective actions. Clearly, as we get better at using the tools, we will continue to improve the quality of systemic corrective actions. The impact of ISROP within the Mechanical department at three locations in Canada is currently being evaluated by the Federal Railroad Administration. A final report is expected in 2008.

Corrective Actions

Here are examples of systemic corrective actions that have been made in the past few years. These were designed to trap future errors and were built based both on the type of error made and the type of latent condition identified during investigations.

Communication

A high percentage of human error train accidents and injury caused by train contact include an element of misunderstanding between members of a crew[3]; one person assumes the other knows the sequence of tasks; communication about location of a critical control point is misunderstood; a critical piece of information is missing; a step in the process is inadvertently skipped over and so on. CP has implemented a number of initiatives to lessen the potential for communication error . These include:
Special vests for new employees. Most CP employees where high visibility vests on the job. In 2005, we introduced a different colored vest for new train crew employees and a vest with special markings for new track workers. These vests are ongoing reminders for other members of the work team to pay extra attention while communicating and executing the task at hand
Job briefings. There is a formal requirement at the start of every shift for employees to have a job briefing that includes not only the work program but key safety elements and potential hazards. For some crafts these briefings are written and signed and for others it is verbal. The process also requires people working together to stop and re-do a briefing as conditions or the task changes. While job briefings have been a long-standing requirement, they have become much more formalized in the past 5-6 years.
Crew Resource Management training. Introduced in 2000, this is soft-skills training for new train crews to promote working together, professional behavior and how to problem solve in a crisis.
Specific communication protocols:

Voice communication of switch position. This requirement was introduced in 2002 and ensures a crew member on the ground and the member in the cab of a locomotive communicate switch position while at the switch, and thus lessens the opportunity for leaving a switch in the wrong position.

Communicating 3-point protection. This requirement ensures the crew member in the cab and the one on the ground have positively communicated to each other before the crew member on the ground is placed in a position of potential harm. This ensures both crew members understand what the other is about to do.

Understanding the right way to perform a task

Another frequent source of error is lack of understanding of a task, process or rule which results in misapplying a rule or using the wrong rule. These misunderstandings can be created during training, by written and verbal instructional material or through long-standing poor work practices. Our efforts to improve understanding include:
Improving instructional material. CP has made efforts to improve the quality of our instructional material, using writing techniques such as targeting a grade 6 education level, using actions oriented verbs rather than passive, using bullet points rather than paragraphs and "chunking" information. Examples include our General Operating Instructions and the Red Book for track maintenance.

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[3] The definition of "crew" in this context is all the people involved in the communication chain, irrespective of their craft.

On-the-job coaching. Formal classroom training needs to be supplemented by on-the-job training. CP has created processes to train the "coaches" who are peers and to track the coaching activity to help ensure new hires are better prepared for the workplace.
Peer-to-peer audits. CP's Health and Safety Committees have implemented two peer oversight programs where unionized members of committees audit compliance with operating rules. ORCA looks at radio communication and SOFA looks at switching activity. Data collected is confidential and trends are monitored to help determine where to direct safety efforts.
The "training train" for supervisors. Two years ago, operations supervisors received hands-on training in key procedures to ensure they understood the rules and the right way for employees to perform tasks, including the ergonomics.
Proficiency testing. Proficiency testing is a time-honored operation's supervisor oversight program that has been enhanced in recent years with additional safety (rather than rules) focus and better management oversight in terms of using failure data to better target opportunities for improvement.
Safety Rules and Safe Work Procedures Manuals. In 2003 CP implemented four craft-specific Safety Rules and Safe Work Procedures Manuals. These rule books are a fraction of the size of the earlier manuals and were written in simple, easy to understand language, using pictures and diagrams where appropriate. They were written by large teams of unionized employees and supervisors, both from Canada and the U.S., and vetted by hundreds of employees prior to implementation.

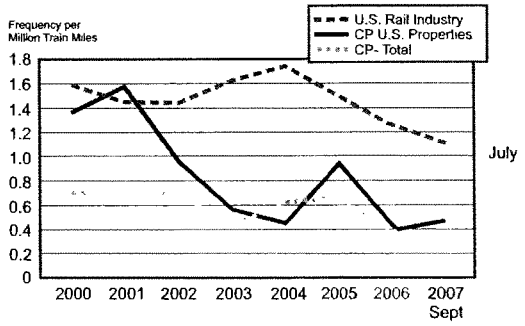
Work Place Cues

A third error-trapping strategy is to provide key information in the work place to trigger a reminder to an employee of a critical control point, event or procedure. Initiatives have included:
Paper documents Paper documents such as track maps in Timetables to ensure employees unfamiliar with a territory know where the critical control points are,
Way-side signs Way-side signage has always been used to remind crews to – for example – where to start to blow the whistle for a crossing. We have expanded their use to include some critical points such as the start of a mountain grade, at which point, special operating instructions apply;
Computer systems We have changed a computer system to enhance rail traffic control's identification of a situation where a train is likely causing broken rails; and
TGBO We now issue instructions to train crews in the order in which the crew will encounter restrictions on their trip.

Safety Results

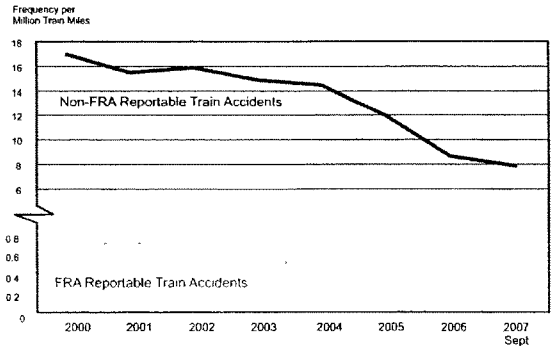
Over the period from 2000 to year-to-date 2007, CP reduced the frequency of operator caused accidents from 0.7 accidents per million train miles to 0.39, while the U.S. rail industry only began to see a reduction in 2005, after the issue became a focus for improvement by FRA

Train Accidents Caused by Crew Error



In addition to the 44% drop in rate for our FRA-reportable accidents, the non-FRA reportable accidents have also declined 53%. This metric is one we follow closely. In safety parlance, these accidents form the base of the accident pyramid, and to reduce the larger reportable accidents, you have to reduce the frequency of the smaller occurrences.

CPR Train Accidents Caused by Crew Error



But managing the "Human Factor" is a much more all encompassing process. In addition to elements already mentioned, it includes better employee selection processes, improved training and qualification processes, and better processes to manage fitness for duty including medical standards and managing fatigue.

Fatigue Management

CP's fatigue management efforts started in 1994 with a ground-breaking North American study of fatigue, called Canalert[4]. This was the first major scientific effort to study crew fatigue in North America[5], and it precipitated much industry activity. The period from about 1995 – 2002 saw the launch of many projects on many railroads, some successful and some not. In this time period, in addition to crew fatigue, CP also conducted projects for Maintenance of Way and Signals & Communication employees. By 2002, the pace of industry activity started to slow partly because we had no way of systematically measuring the effect on fatigue of the various programs and projects that were tried. The development of an overall fatigue hazard management framework was the brain-child of Dr. Drew Dawson[6], working with the Union Pacific, and has been subjected to a scientific peer-review process.

The framework has five levels – ensuring we provide adequate sleep opportunity; ensuring employees obtain adequate sleep; identifying and treating fatigue-related behaviors including sleep disorder conditions; identifying and trapping fatigue-related errors and finally, using accident investigation techniques to identify further corrective actions.

In late 2006, CP decided to adopt the UP/Dawson hazard-management framework. We are just beginning to use the software tools that we purchased and we will involve the unions at the appropriate time. As we gain experience with the FAID® software, its use will be expanded to the other parts of our operations – in the North East U.S. and in Canada.

CP views fatigue management as another defense strategy to minimize and trap human error. The emphasis here is on the word "manage". Fatigue is part of the human condition. It can never be entirely eliminated. But, we believe that tired people can operate error-free under the right conditions – where they are operating as a highly trained team, with good communication protocols and other procedures to "trap" error conditions.

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[4] This was a joint union/management project involving the Brotherhood of Locomotive Engineers, CP, CN and VIA Rail.

[5] Unbeknownst to us at the time, there was a similar effort underway in Australia.

[6] Dr Drew Dawson - University of South Australia and the Centre for Sleep Research

Managing Performance for Non-Union and Union Employees

Turning now to a discussion on the role of managing unacceptable behavior or performance, CP has a clear policy and processes to deal with circumstances where we believe a change is warranted. The Positive Behavior and Performance Development Policy (PB&PDP), is designed to identify and change unacceptable performance and/or behavior; to recognize good performance and to acknowledge an employee's satisfactory achievement of change, development or growth targets. It's focus is on coaching and improving performance -- that is, to help employees be successful.

Where informal coaching fails to achieve the desired changes, formal coaching may be used. This step is intended to clarify expectations and/or confirm performance expectations and may be a documented discussion accompanied by a written Positive Action Plan (PAP) developed jointly by the supervisor and the employee. The PAP outlines the expectations for change in the area of job performance or behavior requiring improvement and the specific steps the employee must take to meet the required performance. It also includes dates for review of goals. An employee who demonstrates success and consistently maintains the required behavior or level of job performance for 24 months, is removed from the automatic progression to the formal discipline process under the Collective Bargaining Agreement should s/he be involved in another incident.

Formal Discipline Pursuant to Investigatory Process Required by Labor Contract

If formal coaching (which may include a PAP) fails to improve the behaviors or technical job performance issues, the next step is formal investigation/ discipline under the applicable Collective Bargaining Agreement. If the transcript of the Collective Bargaining Agreement Investigation demonstrates an employee's responsibility for an incident and a supervisor determines discipline is appropriate, there is a progression of discipline as follows: first incident – 5 calendar day suspension; second incident within 24 months – 10 day calendar suspension; third and final incident warranting formal discipline within 24 months - dismissal from service.

For very serious performance or behavior issues, a supervisor may choose to use the formal discipline process without going through the informal and formal coaching progression . For major offenses, immediate dismissal may be warranted depending upon the gravity of the situation and the specific circumstances. Immediate dismissal could result if an employee is responsible for insubordination, theft, violation of the Drug and Alcohol Policy, gross negligence or unsafe or dangerous conduct on duty.

By the time an employee enters the formal discipline process, there have already been extensive efforts to clarify expectations, provide additional resources or training in the informal process over an extended period of time. Thus, an employee who has not demonstrated a change in unacceptable behavior or performance may move through the formal discipline process quite quickly.

Creating a "Just" Reporting culture

A discipline-free system or a system free of accountability does not work. Individual consequences are necessary to deal with egregious behaviors and outcomes. CP demonstrated this with a project in 1999 in a study carried out in Red Deer and Edmonton in Alberta, Canada. We conducted a special review of every incident that occurred over a six month time-frame to assist our understanding of how to approach human error investigation. To improve reporting, discipline was 'waived' for the six month period. There were a few employee – about 4 or 5 – who became "repeat" offenders since there were no adverse consequences.

What we need to create is a balance between a certain amount of discipline and an environment where employees freely report incidents without fear of unreasonable adverse consequences. This is what is known as a "just" reporting culture – based on the concept of justice, where discipline is meted out swiftly when warranted, but most accidents and injuries do not result in punishment. CP is actively pursuing the "just" reporting concept in two ways.

The first, is the FRA-supported Confidential Close Call Reporting System (C3RS). The United Transportation Union, the Brotherhood of Locomotive Engineers – Teamsters and CP management have signed an Implementing Memorandum of Understanding and requested a waiver from certain parts of 49 CFR Part 240, to implement C3RS on CP territory from the outskirts of Chicago, Il to just east of St Paul Mn. We will be the second FRA-supported C3RS Pilot site and hope to have the processes in place to start C3RS reporting by March 2008. We very much appreciate the efforts the FRA has made to advance and support this program and equally, are pleased with the contributions made by our Labor colleagues. CP is keenly aware of the potential to improve safety through better understanding of small events and accident pre-cursors.

In addition to participating in C3RS, CP began an internal dialogue at senior levels of the Operating Department in the fall of 2006, about the future role of formal discipline and how to change our discipline practices. We have sent senior staff from Operations, Safety, Human Resources and Labor Relations to educational seminars on how to create a "just" reporting culture. In early October 2007, we also introduced the topic to the top 125 Operating and Safety officers at our semi-annual Safety Conference, with the help of an external speaker.

We don't have all the answers yet, but we are looking.

Accident/Incident Reporting

As required by FRA, CP makes available the policy sections of our Internal Control Plan (ICP) to all employees. The ICP contains CP's policy and procedures for reporting personal injuries, train accidents and serious rule violations. It also articulates whistle blower protection and consequences, for both managers and employees, of interfering with reporting procedures. CP has an expectation that occurrences will be reported on the same day they occur, and will be recorded in our information system within two business days. We meet the two day target about 85% of the time. We also, from time-to-time, remind employees and managers of the requirements to report. For example, in the annual Safety meetings in early 2007, a presentation jointly developed by managers and union leaders on employee injury reporting, was delivered to all Engineering Services personnel.

Final Words on Safety Culture

To quote James Reason one more time, culture is "how we do business around here". The manifestation of a safety culture is shared beliefs and values. But what really shapes changes in beliefs and values, are the day-to-day practices that employees encounter as they go about their work. CP has been striving to create a more people-centric approach to safety, where occurrences result less often in blame and more often in recognizing improvements required to the whole 'system'. This is a long journey. Changing culture takes a long time, but I believe we are focused in the right direction.

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

November 7, 2007

Ms. Faye Ackermans
General Manager, Corporate
Safety & Regulatory Affairs
Canadian Pacific Railway
401 9th Ave. SW, Suite 500
Gulf Canada Square
Calgary, Alberta
T2P 4Z4, Canada

Dear Ms. Ackermans:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

Enclosure

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?

2. We've reviewed your safety programs and ICPs, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?

3. In general, do you think your railroads have a problem with underreporting of injuries?

4. Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidation exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?

5. Even though you claim to discipline supervisors when caught putting pressure on employees not to report, don't you think there are pressures that cause this type of behavior to continue?

6. Most of your operations are so widespread, how can you assure us that you are making every effort than you can to identify front-line supervisors who may be placing pressure on employees not to report injuries?

7. Do you simply rely on complaints after the fact to identify these managers, who are bad actors, or do you make an attempt to investigate management practices on a more proactive basis?

8. What policies do you have in place to provide disincentives to supervisors who engage in harassment and intimidation, and to catch this type of behavior?

9. Couldn't you utilize employee surveys on a routine basis to identify managers that are of concern to employees?

10. Have you recently fired or demoted front-line supervisors for failing to report accidents, or for harassing and intimidating employees to not seek the proper medical care? How did you uncover these cases? Was it through an audit or a complaint, or some other means?

11. Do you have an "availability policy" that requires that an employee be available to work for a specific number of days per year, which include days lost due to injury and sickness?

12. Are you moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factors causes in accidents? Have you implemented such programs on at least a trial basis? If so, how?

13. If you have implemented such programs, how have you seen that affecting employees on the ground?

14. Where do you stand on the implementation of C3RS system-wide?

15. The FRA has a standard 7-day reporting deadline for filing a report for a "reportable" injury. Do you have a different internal standard?

16. Do you all have a confidential "ethics hotlines" where an employee can call in and report anything that they are uncomfortable with?

    a. How are hotline cases pursued?

    b. Can this system really be confidential?

17. Do supervisors have any portion of their bonuses based on injury statistics in their management area? (If yes) What is the maximum amount that he/she could earn based on injury statistics alone?

18. It's pretty clear that you have good corporate policies on harassment and intimidation and also safety. However, there seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring? And, what are you doing to make sure that your corporate policies are being implemented correctly at the "local" level?

19. Are you motivated by the Harriman Award to drive down your injury statistics? Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics? Do you think that any of the metrics of the award should be changed to incentivize reporting?

20. Do you all have audit processes that links medical claims with injury reports? What do you do if someone puts in a claim but there is no injury report on file for them?

21. Do you have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?

22. Do you believe these types of point systems create "unintended consequences"?

23. Human factors research has shown that rarely is an accident ever due to a single individual or causal factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?

24. Do you have "Light Duty"-type programs where instead of marking off an employee for being injured, they come to work and basically do nothing but sit in a room all day? Do you consider this practice to be harassment?

25. Do you honestly think that <u>no</u> intimidation exists?

26. How do you explain all the cases that FRA finds for underreporting?

27. Ms. Ackermans, what motivated CP to pursue your proactive approach to "human factors" approaches to railroad safety?

28. Ms. Ackermans, why don't other railroads devote as much time and attention to the types of programs you have developed?

29. Ms. Ackermans, why don't other railroads devote as much time and attention to the types of programs you have developed?

Response to Questions from Chairman James L. Oberstar concerning "the Impact of Railroad Injury, Accident, and Discipline Policies on the safety of America's Railroads" October 25, 2007

Question 1

Since FELA is a negligence based statute, it requires the showing of negligence from a legal perspective. This has certainly contribute to, if not created, the present "blame" culture in the industry. Rail employees and unions often refer an injured employee to plaintiff law firms before the employee is even interviewed by the railroad on the circumstances surrounding an accident. This makes it very difficult for employee to be forthright in an investigation.

Question 2

CP does not believe that we have "...widespread underreporting..." of incidents. In the last FRA audit of CP, CP had complete files on all incidents although there was some discussion and differences in our respective interpretation of the regulations.

Question 3

CP does not believe there is a systemic underreporting of injuries.

Question 4

CP managers are directed to accept all incident reports without assessing their merit. This means that once a manager is in receipt of a report from an employee, he is given no discretion -- all reports must be input into the system. Nor does CP use injury reports to target additional efficiency testing.

Question 5

CP works hard to provide a safe work place and our policies support good safety practices. We are not aware of any reports of supervisors pressuring employees. If such pressure is identified, our Internal Control Plan specifically addresses possible consequences, up to and including termination of a supervisor.

Question 6

The contents of CP's ICP have been the subject of direct mailings to all employee residences and the policies and reporting procedures are including in various training programs. The ICP is posted on CP's internal web site and on bulletin boards in the work place. If any complaints are received, they are investigated by CP's Reporting Officer.

Question 7

CP's policy expressly states that reports of intimidation or harassment are to be forwarded to CP's Reporting Officer, who will investigate any complaints. CP also has both local Safety and Health Committees and Safety Advisory Boards. The union members on those committees are also empowered to bring up this and other safety topics at the regular meetings.

Question 8

The ICP contains both the language prohibiting the use of harassment and intimidation, and the consequences of doing so.

Question 9

Employees can communicate this and other safety issues through their Safety and Health committee member. Further, they may communicate such issues to the FRA. CP has not been cited by FRA for harassment and intimidation.

Question 10

There have not been any reports in recent years of a CP supervisor failing to report injuries promptly as required by policy.

Question 11

CP has availability policies for the running trades workers that are tailored to their specific circumstances ie yard employee, road employees, certain assignments or work/rest agreements. The process includes a monthly review of employee attendance compared to policy.. If an employee is injured and has work days lost due to injury, there is no further follow-up under the availability policy. If an employee appears to not meet the policy, the union local chairs are informed and the matter is handled by the union representatives. If subsequent months reveal no improvement, the employee is required to enter into CP's Positive Behavior and Performance Development Program.

Question 12

CP is moving towards Confidential Close Call Reporting (C3RS). The Brotherhood of Locomotive Engineers, the United Transportation Union and CP have all signed an Implementing Memorandum of Understanding that has been forwarded to FRA along with a request to waive certain parts of Federal Regulations under 49 CFR Part 240. While we are awaiting the approval of the waiver application, we are continuing to work towards an implementation date of February 15, 2008. CP is very pleased to be included in this process and is grateful for FRA support and union commitment.

Question 13

CP is anticipating a positive change in the level of trust between management and employees and we are also certain that the C3RS review processes will result in a better understanding of the real causes of incidents. Improving understanding is a necessary step in implementing more appropriate correctives actions.

Question 14

In CP's view, the current FRA pilot program for C3RS is too labour intensive to implement industry-wide. We believe other participants on the steering committee also recognize this and we are confident that the C3RS demonstration project will evolve into a more statistical-based reporting process that can be implemented through-out the industry. The current pilot is more a proof-of-concept to ensure the support of labour and management personnel in the industry for future implementation of a system-wide process. The C3RS project is an attempt to radically alter the safety culture of the U.S. rail industry, and the pilot project is needed in its current form to ensure future success of whatever program is proposed.

Question 15

CP's internal standard is two business days for any occurrence, whether reportable to the FRA or not. Reporting timeliness is measured monthly by Service Area and we generally achieve about 85% compliance. "Late" reporting occurs from a combination of employees reporting injuries late, managers forwarding reports late and administrative delays in putting the reports into our data system. The two business day standard meets the most stringent requirement of the various jurisdictions we operate in. In 2007, as part of CP's internal safety recognition process, and to encourage improvement in this metric, we created as new award for the Service Area with the best on-time-reporting record.

Question 16

CP has a confidential ethics hot line called the "A" Line. This is a toll free line that employees can call 24 hours a day, 365 days a year to report questions and concerns about ethical business practices. The line is managed by an agency outside CPR to ensure confidentiality and anonymity. Each caller is interviewed about the specific facts on an incident – dates, times, people involved, witnesses, locations, etc. The caller is given a tracking number to follow up, and is asked to call back in about two weeks. A written report is given to CPR's Internal Audit within one business day of a call. Internal Audit determines the type of inquiry or investigation required. As the inquiry or investigation progresses, the original caller can use the tracking number to get updates from an A-Line operator.

Question 17

CP's bonus system is comprised of two components – corporate and individual performance. Thresholds for corporate performance are set annually identifying financial targets for operating income. The individual performance component is based on an individuals ability to meet defined objectives in support of departmental Business Plans. These two components are combined for potential bonuses on an annual basis. The higher level positions have a greater portion of their bonus based on overall corporate achievements. Conversely, the bonus system places more emphasis on personal objectives for lower level positions.

A front-line supervisor typically qualifies for a bonus of up to10% of salary. The bonus is based on 50% for corporate achievements and 50% for meeting individual performance objectives. Individual performance objective for safety is 25% of which 40% is based on outcomes or statistics. The remaining 60% of the 25% is based on the supervisor actively promoting and encouraging safe operations. As an example, if a supervisor earns $75,000 annually, with a potential bonus of $7,500, only $375 would be based on actual

Question 18

CP does not believe there is much disconnect between our corporate policies and their implementation. As stated in our response to Question 6, the policy has been included in many communications to all employees.

Question 19

All industries have processes to recognize good safety performance. The Harriman award itself is not the reason CP puts so much time and effort into improving the safety of our operation. We do it to avoid accidents and injuries. But we take great pride in receiving an industry award that recognizes our accomplishments and we celebrate that occasion. Safety recognition is one of the ten overall strategies in our Safety Plan.

Question 20

CP has an Internal Audit department that reports directly to the Audit Committee of the Board of Directors. Internal Audit have committed to audit compliance to the ICP annually. Over time, all aspects of the ICP are tested by Internal Audit. In addition, the department with responsibility to manage claims and reporting ensures internal consistency of injury reporting and medical management of claims.

Question 21

CP does not have a written policy on this. Our practice is for a supervisor to either accompany an employee to the treating facility or present themselves out of concern for the employees welfare, and to stand by for updates on an employee's condition,

depending upon the severity of the injury. As a general practice, a supervisor is not present at time of exam, unless requested by the employee.
Further, CP supports the medical privacy of injured workers, with respect to treatment and records. Staff who manage this function and the records that are maintained, are both segregated from other staff to ensure employee confidentiality.

Question 22

Points based systems can be perceived as being very arbitrary and rigid. CP does not rely on such a system, but rather has the Positive Behavior and Performance Development Program.

Question 23

CP agrees with this statement. The issue of FRA accident reporting regulations requiring a singular cause was mentioned during my opening address at the 2006 AAR/ASL&RRA Safety Conference in San Antonio. FRA reporting requirements do not encourage multiple cause codes, and the reporting regulations are actually a hinderence to improving the use of multi-cause incident analysis techniques such as ISROP or the tools that are being used for the Confidential Close Call Reporting pilot project. However, changing the FRA reporting regulations and statistical reports to accommodate multiple-cause codes, and having the industry understand and use this approach, will require a great deal of effort. It may be something to be considered, but the cost/benefit of going in this direction needs to be carefully weighed against the cost/benefit of pursuing other safety or regulatory activities

Question 24

CP does not believe it is in an injured employees best interests to sit around in the work place and do nothing. We believe an injured worker who requires time off, will heal more quickly at home. We then put our efforts into bringing that employee back to work in a timely manner using a graduated work program, taking physical restrictions into account, until s/he is able to perform his/her full duties.

Question 25

CP believes it is very rare. Our ICP policy and the availability of the "A" line are effective mechanisms to deal with any instances. Further, we believe the health and safety committees are an avenue for any worker to use if they feel they have been intimidated.

Question 26

(See AAR response)

Question 27

My formal education includes an undergraduate honours degree in psychology and a Masters of Business. Work experience included several years in a research capacity in the pharmaceutical industry prior to joining CP. So, I came to the safety function at CP with a non-typical background and was perhaps more receptive to a humans factors approach than others in the rail industry. The triggering 'event' that started CP down the humans factors path was a request in 1997 by a General Manager in Engineering for the Safety team to help the Engineering team in one Service Area understand why a particular process to protect track workers from train movements had an alarmingly high failure rate – even though there had not been any accidents, there had been several close calls. We contracted with a human factors consulting firm to help us understand how to make our track protection processes less vulnerable to human error. Members of my staff realized how valuable this approach was and how much value there would be if we could integrate this approach into our safety programs and operating processes. At the first available opportunity when a staff opening presented itself in 1998, we re-configured the job description and hired a human factors specialist. This in-house expertise provided an ongoing stream of ideas and support to integrate human factors into our safety programs.

Furthermore, I began in 1998 to attend the International Rail Safety Conference. This is a small but very dynamic venue for rail industry, regulators and accident investigation professionals to share experience. There were several high profile human factors rail accidents in the U.K. and Australia that resulted in public inquiries, and for several years, human factors was a major topic at these sessions. In addition, in the U.K. following the Ladbroke Grove accident and the Cullen inquiry, there was a lot more money available for research projects on human factors in the rail industry. This research stream has also provided good ideas.

I also reached out to specialists to assist in educating senior managers at CP on why human factors was such an important part of safety management. This included members of the Canadian Transportation Safety Board and Professor James Reason.

Question 28

This is a difficult question to answer, but I believe the Canadian no-fault workers compensation system and the very limited litigation activity surrounding rail occurrences, has provided an environment which has allowed our approach to flourish. CP has consciously implemented certain programs such as ISROP in Canada first to ensure there would be fewer problems implementing it in the FELA environment.

Question 29

This is the same as question 28.

Written Statement of
Joseph H. Boardman,
Administrator
Federal Railroad Administration
U.S. Department of Transportation
before the
Committee on Transportation and Infrastructure
U.S. House of Representatives

October 25, 2007

Federal Railroad Administration
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(202) 493-6014

Written Statement of Joseph H. Boardman,
Administrator,
Federal Railroad Administration,
U.S. Department of Transportation,
before the
Committee on Transportation and Infrastructure,
U.S. House of Representatives

October 25, 2007

Chairman Oberstar, Ranking Member Mica, and other members of the Committee, I am very pleased to be here today, representing Secretary of Transportation Mary E. Peters, to discuss "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". The Federal Railroad Administration's (FRA) statutory mission and primary focus are to promote the safety of America's freight and passenger railroads, including protecting the employees who keep them running.

My testimony today will focus on harassment and intimidation of, and retaliation against, railroad employees who report or attempt to report on-duty injuries. As I begin this testimony, I want to emphasize that, in the vast majority of instances, employees promptly report injuries to their supervisors on the railroad, and those supervisors make sure that employees receive proper medical attention and that the injuries are correctly reported to the FRA. When they are not, late reports are filed and penalties are levied. Most of the time, the system works; and it usually works without our intervention. But careful and seasoned students of railroad economics know that the system works most of the time through the good will and integrity of individuals. Railroads, supervisors and employees are under pressure to show good results – the absence of injuries – and that is a reality that everyone in the industry lives with daily.

The underlying motivators driving harassment and intimidation are varied and powerful, and deeply engrained in railroad culture. FRA is working hard to combat harassment and intimidation within FRA's jurisdiction, not only through regulatory enforcement actions, but through efforts to effect positive culture change in the railroad industry.

FRA appreciates the efforts of the Committee in addressing this issue and in developing FRA's rail safety reauthorization proposals in H.R. 2095, The Federal Railroad Safety Improvement Act of 2007. I look forward to working with you on these proposals as the legislative process moves forward.

I. FRA's Railroad Safety Program

FRA is the agency within the U.S. Department of Transportation (DOT) charged with carrying out the Federal railroad safety laws. These laws provide FRA, as the

Secretary's delegate, with very broad authority over every area of railroad safety. In exercising that authority, the agency has issued and enforces a wide range of safety regulations covering a railroad network that employs more than 232,000 workers, moves more than 42 percent of all intercity freight, and provides passenger rail service to about 550 million riders each year.

FRA's regulations address such topics as accident reporting, track, passenger equipment, locomotives, freight cars, power brakes, locomotive event recorders, signal and train control systems, maintenance of active warning devices at highway-rail grade crossings, alcohol and drug testing, protection of roadway workers, operating rules and practices, locomotive engineer certification, positive train control, the use of locomotive horns at grade crossings, and many other subject areas. This body of regulations is based upon knowledge and experience acquired over more than a century of railroading in America. FRA currently has active rulemaking projects on a number of important safety topics, and is continually examining existing regulations to ascertain whether updates or amendments are necessary or desirable. FRA also enforces the Hazardous Materials Regulations, promulgated by DOT's Pipeline and Hazardous Materials Safety Administration, especially as they pertain to rail transportation.

FRA has an authorized inspection staff of about 400 persons Nation-wide, distributed across its eight regions. In addition, 165 inspectors are employed by 28 States that participate in FRA's State participation program who are authorized to perform inspections for compliance with the Federal rail safety laws. Each inspector is an expert in one of five safety disciplines: Track; Signal and Train Control; Motive Power and Equipment; Operating Practices; or Hazardous Materials. FRA also has 18 full-time highway-rail grade crossing safety and trespass prevention specialist positions in the field; these specialists focus on these critically important issues, which account for the overwhelming number of railroad-related deaths. Every year FRA's inspectors conduct tens of thousands of inspections, investigate hundreds of complaints of specific alleged violations of safety laws and regulations, develop recommendations for thousands of enforcement actions, perform full investigations of more than 100 of the most serious railroad accidents, and engage in a range of educational outreach activities on railroad safety issues, including educating the public about highway-rail grade crossing safety and the dangers of trespassing on railroad property. FRA also works closely with DOT's Federal Highway Administration and Federal Motor Carrier Safety Administration to improve highway-rail crossing safety and with DOT's Federal Transit Administration to improve commuter rail safety.

FRA carefully monitors the railroad industry's safety performance, and uses the National Inspection Plan and extensive data gathered through routine oversight to guide the agency's accident prevention efforts. FRA strives to continually make better use of the wealth of available data to achieve the agency's strategic goals. FRA, often in coordination with DOT's Research and Innovative Technology Administration, also sponsors collaborative research with the railroad industry to develop and introduce innovative technologies to improve railroad safety. Finally, under the leadership of the

U.S. Department of Homeland Security, FRA plays an active role in supporting Federal efforts to secure the Nation's railroad transportation system.

II. The National Rail Safety Action Plan

As detailed in the appendix to my testimony, the railroad industry's overall safety record has improved dramatically over the past few decades, and most safety trends are moving in the right direction. However, serious train accidents still occur; and, as we assessed this situation in early 2005, the train accident rate had stagnated.

As a result of these concerns, in May 2005, the U.S. Department of Transportation (DOT) and FRA, as the agency charged with carrying out the Federal railroad safety laws, initiated the National Rail Safety Action Plan (Action Plan), a comprehensive and methodical approach to address critical safety issues facing the railroad industry. The Action Plan's goals broadly stated are:

- Target the most frequent, highest-risk causes of train accidents;
- Focus FRA's oversight and inspection resources on areas of greatest concern; and
- Accelerate research efforts that have the potential to mitigate the largest risks.

As I have previously testified, the causes of train accidents are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. From 2002 through 2006, the vast majority of train accidents resulted from human factor causes or track causes. Accordingly, human factors and track have been our primary focus to bring about further improvements in the train accident rate. Overall, the Action Plan includes initiatives intended to:

- Reduce train accidents caused by human factors;
- Address fatigue;
- Improve track safety;
- Enhance hazardous materials safety and emergency preparedness;
- Strengthen FRA's safety compliance program; and
- Improve highway-rail grade crossing safety.

In testimony before this Committee and the Subcommittee on Railroads, Pipelines, and Hazardous Materials, FRA has detailed the substantial progress made in attaining Action Plan objectives, and the improvements that have been made. We are encouraged that human factor accident/incident rates have been in decline during 2006 and the current period.

Safety begins with good rules, good training and supportive technology. It is supported by firm expectations with respect to rules compliance and by systems of accountability that ensure expectations are met. FRA will continue to press for the basic

accountability that says, "we will follow the rules and we will report our failures honestly."

My basic message to you today is that, while we can hold individuals accountable to some extent, whether they are managers or employees, or FRA officials, in the end we will do best if we can find ways of moving beyond mere accountability and towards collective responsibility for outcomes that rests on mutual respect for one another as colleagues.

So let's talk about the most elemental feature of safety programs—the collection of data on accident injuries and other forms of societal loss. Let's talk about why, when the system of disincentives is wrongly aligned, railroads and their employees have great difficulty as an industry getting it righted.

III. Accident/Incident Reporting

A. Statutory Background

Laws governing the monthly reporting by railroads of "all collisions, derailments, or other railroad accidents resulting in death or injury to any person or damage to equipment or roadbed" date back to 1910, when the Accidents Reports Act was enacted.[1] In 1994, the Accidents Reports Act, along with other early railroad safety statutes was recodified at 49 U.S.C. 20901. This testimony refers to the current, recodified version of the Accidents Reports Act (49 U.S.C. § 20901).

Currently, each railroad carrier is required to file a monthly report with the Secretary of Transportation, under oath, listing "all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month."[2] The carrier is required to describe the nature, cause, and circumstances of each accident or incident included in the report.[3] The Secretary's enforcement authority under the Act includes the power to impose civil and criminal penalties.[4] The penalty for a violation ranges from $550 to $27,000.[5] The Act does not address harassment and intimidation of railroad employees.

Both the Accident Reports Act and the Federal Railroad Safety Act of 1970,[6] confer broad powers on the Secretary of Transportation to implement the provisions of the Accident Reports Act, including the authority to issue regulations and investigate

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[1] The Act of May 6, 1910, ch. 208, 36 Stat. 350 (1910), as amended, Pub. L. No. 86-762, § 1, 74 Stat. 903 (Sept. 13, 1960) (codified at 49 U.S.C. § 20901) ("Accident Reports Act" or "the Act").
[2] 49 U.S.C. § 20901(a).
[3] Id.
[4] See 49 U.S.C. §§ 21302, 21304, 21311.
[5] See 69 Fed. Reg. 30591-92 (2004).
[6] Pub. L. No. 91-458, § 208, 84 Stat. 974-975. As a result of recodification, the provisions of law contained in the Federal Railroad Safety Act of 1970 are now set forth in 49 U.S.C. chapters 201 and 213.

accidents or incidents resulting in serious injury to an individual or to railroad property.[7] These functions have been delegated to the FRA Administrator.[8]

B. FRA's Accident Reporting Regulations in General

FRA's accident reporting regulations, set forth at 49 C.F.R. Part 225 (Part 225) require that each railroad submit monthly reports to FRA summarizing collisions, derailments, and certain other accidents and incidents involving damages above a periodically revised dollar threshold, certain injuries to passengers and other persons, as well as certain occupational injuries to and illnesses of railroad employees.[9]

The reporting requirements of Part 225 concerning an employee injury are triggered, generally, when an event involving the operation of a railroad results in an employee dying, requiring medical treatment (beyond first aid), missing at least one day of work, being placed on restricted work activity or receiving a job transfer, or losing consciousness due to the injury.[10] The regulations also require that railroads keep records of so-called "accountable injuries."[11] These injuries are defined as "any condition, not otherwise reportable, of a railroad worker . . . which condition causes or requires the worker to be examined or treated by a qualified health care professional."[12]

C. Anti-Harassment Provision

FRA's current accident reporting regulations prohibit railroad actions calculated to discourage or prevent proper medical treatment or reporting of an accident/incident to FRA. While other actions by a railroad or railroad official may constitute harassment or intimidation, it is important to note that only actions calculated to prevent medical attention or accident reporting are violations of FRA's regulations.

FRA issued the anti-harassment provision of its accident reporting regulations after a notice-and-comment rulemaking proceeding that addressed the quality of information that FRA received relating to railroad accidents and incidents, as well as illnesses, injuries, and deaths of railroad employees, passengers, and other persons on railroad property. In pertinent part, this rulemaking required railroads to adopt internal control procedures to ensure accurate reporting of accidents, fatalities, injuries, illnesses,

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[7] See 49 U.S.C. §§ 20103, 20107, 20901, & 20902. During the 1994 recodification of the transportation laws, Congress repealed but did not recodify the text of 45 U.S.C. § 42, which authorized the Secretary "to prescribe such rules and regulations and such forms for making the reports hereinbefore provided as are necessary to implement and effectuate the purposes of [the Accident Reports Act]." Congress concluded that this section was unnecessary, provided that the Secretary prescribes rules, regulations, and forms to carry out the requirements of the Accident Reports Act under the authority of 49 U.S.C. §§ 20103 and 322(a). See H.R. Rep. No. 103-180, 502, 584 (1993); reprinted in 1994 U.S.C.C.A.N. 1319, 1401.
[8] See 49 U.S.C. § 103(c)(1); 49 C.F.R. § 1.49(c)(11), (m).
[9] See 49 C.F.R. § 225.11; 72 Fed. Reg. 1184 (2007); see also 49 C.F.R. §§ 225.5 (definition of "accident/incident") and 225.19.
[10] See 49 C.F.R. § 225.19(d); see also 49 C.F.R. § 225.5 (definition of "accident/incident").
[11] 49 C.F.R. § 225.25(a).
[12] 49 C.F.R. § 225.5.

and highway-rail grade crossing accidents.[13] In the notice of proposed rulemaking (NPRM), FRA noted that its ability to develop inspection strategies and measure comparable trends of railroad safety is dependent upon the accuracy of railroad injury and accident data.[14]

FRA also noted that the proposed rule was an outgrowth of a General Accounting Office (GAO) study that had reviewed FRA's safety programs to determine if they were sufficient to "protect railroad employees and the general public from injuries associated with train accidents."[15] Based upon its review of FRA's railroad injury and accident reporting data, GAO had concluded that the audited railroads were violating FRA's accident reporting regulations by under-reporting and inaccurately reporting injuries and accidents.[16] As a result of these findings, GAO made several recommendations, including that FRA require railroads to establish injury and accident reporting internal control procedures.[17]

Rail labor testified during the rulemaking proceeding that intimidation and harassment of railroad employees exists and manifests itself as follows:

> First, due to the railroads' desire to reduce the number of reportable injuries and illnesses, many railroad employees are reluctant to seek needed medical attention for fear of possible discipline or retaliation by their employer. Second, many employees who are injured on the job fail to report their injury to the railroad within the prescribed time period because, at the time the injury was incurred, they believed it was minor or insignificant. If and when the injury worsens, the employee is reluctant to report the injury because he or she may be subject to investigation or discipline, or both, for reporting late. Third, other employees request medical treatment that would render the injury or illness nonreportable to FRA, such as requesting that they be given nonprescription medication, because of intimidation or harassment by the employer.[18]

FRA's final rule (effective January 1, 1997) amended the railroad accident reporting regulations in several ways in order to enhance the quality of the injury and accident data relied upon by FRA in carrying out its rail safety programs.[19] Among other things, FRA adopted an Internal Control Plan (ICP) requirement mandating that each railroad develop, adopt, and comply with an ICP in order to "ensure that complete, reliable, and accurate data is obtained, maintained, and disclosed by the railroads."[20]

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[13] See 59 Fed. Reg. 42,880, 42,880, col. 1 (1994); 61 Fed. Reg. 30,940, 30,940, col. 1 (1996).
[14] 59 Fed. Reg. at 42,880, col. 3.
[15] 59 Fed. Reg. at 42,881, col. 1.
[16] Id.
[17] Id., col. 2.
[18] 61 Fed. Reg. 67,477, 67,479, cols. 1-2 (1996).
[19] 61 Fed. Reg. at 30,940.
[20] Id. at 30,943, col. 1.

In the final rule, FRA stated that "many railroad employees fail to disclose their injuries to the railroad or fail to accept reportable treatment from a physician because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with the reporting of such injuries."[21] Accordingly, the regulation requires that each ICP include a policy statement that not only declares the railroad's commitment to complete and accurate reporting, but also

> to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.[22]

FRA also provided that a railroad failing to adopt an ICP is subject to the assessment of a civil penalty and that any individual who willfully causes a violation of or noncompliance with any provision of Part 225, including the anti-harassment provision, may also face civil penalties.[23] In addition, FRA stressed that criminal penalties, including imprisonment, may be imposed upon any individual who knowingly and willfully makes a false entry in a report required by the accident reporting regulations.[24]

IV. Other Legal Protections Relevant to Allegations of Harassment or Intimidation.

Discriminating against an employee for (among other things) notifying, or attempting to notify, the railroad carrier or FRA of a work-related personal injury or work-related illness of an employee is prohibited under 49 U.S.C. 20109, as amended by section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.[25] The employee's whistleblower rights are enforced under the procedures set forth in 49 U.S.C. 42121(b) by the Department of Labor (DOL). FRA and DOL have already begun the process of coordination with respect to the administration of this new Executive Branch function.

V. Legislative Proposals to Address Harassment and Intimidation.

Section 606 of H.R. 2095 would prohibit a railroad from denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured on the job. If an injured employee requests transportation to a hospital, the railroad is required

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[21] Id., col. 2.
[22] 61 Fed. Reg. at 30,943, col. 3; see 49 C.F.R. § 225.33(a)(1).
[23] 61 Fed. Reg. at 30,944, col. 2; see 49 C.F.R. § 225.29; 49 C.F.R. pt. 225, app. A.
[24] 61 Fed. Reg. at 30,944, cols. 2-3.
[25] Pub. L. 110-53, § 1521, 121 Stat. 266 (Aug. 3, 2008) (codified at 49 U.S.C. § 20109).

to promptly arrange to have the injured employee transported to the nearest medically appropriate hospital. Section 606 also prohibits a railroad or other person covered under the statute from disciplining, threatening, or threatening to discipline an employee for requesting medical treatment, or for following orders or a treatment plan of a treating physician.

VI. Harassment of Employees and Safety Culture in the U.S. Railroad Industry

A. Influences on Company and Worker Behavior

The issue of harassment and intimidation occurs against a much broader background than the rather narrow scope within which FRA works to promote full reporting of accidents and incidents. In addition to the personal animosity sometimes encountered in any workplace, that background includes the possible effects of other Federal laws such as the Federal Employers' Liability Act,[26] the Railroad Unemployment Insurance Act,[27] and the Railway Labor Act (RLA),[28] which govern recovery for personal injuries, compensation for lost time, resolution of labor disputes, tort law in general, and bonuses and other rewards for avoiding injuries. All of those well-intended things have the unintended consequence of motivating people to find ways to avoid reporting injuries because significant financial consequences attend the reporting of injuries.

Rail labor relationships are complex and often involve conflicts. These conflicts are for the most part subject to the jurisdiction of the courts and RLA boards of adjustment. Employer actions that are perceived as harassment or intimidation may result from personal hostility or dislike, retaliation for actions taken by the employee, possibly including actions taken as a member or leader of a labor organization, normal discipline, normal investigations intended to identify how and why an injury occurred so recurrences can be prevented, ordinary investigative techniques intended to protect the corporation from what may be perceived as the potential for inappropriate claims, and even actions intended to mitigate damages for injuries that have already occurred.

Personal injuries, or the potential for such injuries and associated risk to the employee and liability to the company, may be involved to a greater or lesser degree in many of these conflicts. With the discrete exceptions of actions calculated to prevent proper medical attention or reporting of an accident/incident to the FRA, these are matters clearly outside the responsibility of the FRA and clearly beyond the ability of the FRA to prevent or remediate. Even where obstruction of proper medical care or an attempt to prevent required accident/incident reporting is involved in a case of harassment or intimidation, FRA's role is to promote future compliance with FRA's reporting requirements set forth in Part 225, rather than to provide a specific remedy for the employee.

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[26] 45 U.S.C. § 51 et. seq.
[27] 45 U.S.C. § 351 et. seq.
[28] 45 U.S.C. § 151 et. seq

As noted above, the Congress, through Public Law 110-53, has amended 49 U.S.C. § 20109 to provide a broader remedy that is personal to the railroad employee, and administered by the U.S. Department of Labor, for discrimination related to the employee's action in reporting an accident or safety violation or taking other specified actions. This provision provides significant protections against alleged actions of the sort that prompted this hearing. FRA has already begun working with the Department of Labor to ensure that our respective activities are well coordinated.

B. Impact on Railroad Safety

A safety culture that reacts to accidents and injuries by assigning blame to "bad actors" discourages full examination of the conditions and circumstances that lead to accidents and injuries.

Moreover, the quality of the injury and accident data relied upon by FRA in carrying out its rail safety programs is compromised.

C. Changing to a "Culture of Risk Reduction"

A culture of risk reduction uses precursor data in a collaborative, non-punitive way to reduce the risk of future accidents, and FRA believes it to be the most cost-effective way to significantly improve railroad safety. In order to create a culture of risk reduction, FRA is working to establish programs that will encourage employees to fully disclose information regarding precursors to accidents, or near accidents, without fear of blame. Such programs will allow FRA to gain a more complete picture of how and why accidents occur, and thus identify and reduce risks before accidents occur.

To date, two FRA-led demonstration projects in cooperation with the Union Pacific Railroad Company (UP) have been launched in an effort to support a positive change in safety culture in the railroad industry: the Close Call Confidential Reporting System (C3RS) and Clear Signal for Action (CSA) program.

C3RS aims to reduce the number of human factor accidents by cooperatively obtaining railroad employees' own reports on "close calls" (near accidents), analyzing the reports and getting at the causes of the near accidents that involved human factors so that, having been identified, the causes can be eliminated or reduced. This project is pertinent to this hearing for at least two reasons. First, the project collects the precursor data on a voluntary and confidential basis, so that data on the near accidents flows freely from employees without fear of discipline. Second, the project has identified various aspects of railroad culture as having an impact on safety. The pilot location has been on-line since February 1, 2007, so no firm conclusions may be drawn yet.

CSA is a peer-to-peer observation, feedback, and communication process that identifies and helps correct systemic safety issues. Both projects shield employees from discipline when errors or at-risk behaviors are reported or observed. Both projects are

designed to collect information, find sources of risk, and take corrective actions to reduce risks and proactively prevent accidents. Both projects are being conducted with UP and require coordination, communication and cooperation between labor, management, and government to achieve results, thereby discouraging blame and replacing blame with ways to proactively and cooperatively improve safety.

Additionally, FRA intends to launch a comprehensive Risk Reduction Program to stimulate the development of new industry efforts designed to proactively collect, manage, and respond to safety-critical risks before accidents or unsafe conditions occur. This initiative will aim to reduce accidents and injuries, and build strong safety cultures, by developing innovative methods, processes, and technologies to identify and correct individual and systemic contributing factors using "upstream" predictive data, helping to augment FRA's traditional behavior-based and design-specification-based regulations. This is analogous in many ways to a company having both a quality control program and a quality assurance program; both are needed to produce the best products in today's competitive environment. By having more of a safety focus up front before an accident or injury occurs, FRA believes that railroad employees and managers will work in a more cooperative way, without the punitive concerns that can follow actual occurrences. FRA believes that this will engender greater trust, reduce the atmosphere of conflict, and promote positive safety changes. Consequently, while continuing to strengthen its regulatory enforcement program, FRA will also include strong collaboration and partnership with the industry in pilot risk reduction demonstration projects.

FRA's 2008 appropriation request funds key elements of the Risk Reduction Program including risk reduction projects, such as close calls, as well as projects which use precursor data, such as collision hazard analysis or other high-level system safety programs. Additionally, the Administration has asked that language (from H.R. 1516) protecting certain information generated in carrying out risk reduction programs be added to H.R. 2095 so that a full and careful analysis of hazards is possible. Without this protection of companies' risk assessments, efforts to conduct meaningful risk assessments and bring about real risk reduction will fail. FRA is hopeful that these types of projects will demonstrate that the railroad industry is capable of changing the nature of the discussion of safety to one that is positive and open, much as the aviation industry did with the near miss program. FRA believes that, to reach our goal of zero injuries and fatalities, these efforts are necessary.

VII. FRA Enforcement Activities

The FRA enforces compliance with the accident/incident reporting regulations, including the provisions against harassment and intimidation, through a variety of means, including regular inspections, audits and complaint investigations. Instances of non-compliance are documented and civil penalties actions are recommended to the Chief Counsel's office as appropriate.

Since the beginning of FY 03, FRA and participating State inspectors have

conducted 13,993 inspections to assess industry compliance with FRA's accident/incident reporting regulations. These inspections resulted in the discovery of 15,364 alleged acts of non-compliance with these regulations by the Nation's railroads. As a result of these findings, FRA's Office of Safety recommended that appropriate enforcement action be taken by the Chief Counsel's office in 2,139 of these cases. As is standard practice, if the Chief Counsel's office accepts the recommendation and initiates enforcement action, the railroad or individual cited will have the opportunity to present mitigating information or information refuting the alleged violations before further action is taken.

Each of the seven "Class I"[29] railroads and Amtrak is audited by an FRA headquarters-led team of inspectors on a rotating basis every three years. These audits are comprehensive and involve an extensive review of each railroad's accident/incident recordkeeping and reporting records and practices for all reportable groups of accidents/incidents: highway-rail grade crossing; rail equipment; and death, injury, and occupational illness.[30] As part of the comprehensive audit, FRA also reviews the adequacy of each railroad's ICP, and each of its 11 required components.[31] Audits of the more than 600 shortline railroads, regional railroads and commuter railroads are conducted by FRA Regional office-led teams of inspectors.

Each allegation of harassment and intimidation received by FRA from railroad employees is assigned to one of FRA's eight regional offices and investigated by a local inspector. In investigating complaints from railroad employees alleging they were subjected to harassment and/or intimidation, FRA's Office of Safety recommends that appropriate enforcement action be taken by the Chief Counsel's office, after finding that managers did harass and/or intimidate injured employees. Again, as is standard practice, when the Chief Counsel's Office accepts the recommendation and initiates enforcement action, the railroad or individual cited has the opportunity to present mitigating information or information refuting the alleged violations before further action is taken. FRA is vigorous in its enforcement of these actions.

VIII. Conclusion

Harassment and intimidation calculated to avoid reporting of employee on-duty injuries create barriers to proper medical care and potentially threaten the integrity of FRA's safety data. But, more fundamentally, this conduct is symptomatic of an atmosphere of conflict that makes positive safety change very difficult.

Although courage shown by organizations and individuals provides a very important defense against falsification of safety data, we also recognize that it is important to address both the symptoms of the underlying malady and its causes. We address the symptoms through aggressive actions on complaints, regular audits of accident/incident data, and civil penalty actions where warranted. We seek to address the

[29] Carriers having annual carrier operating revenues of $250 million more after applying railroad revenue deflator formula. See 49 C.F.R. § 1201 General Instruction 1.1.
[30] See 49 C.F.R. § 225.19
[31] See 49 C.F.R. § 225.33.

underlying causes through safety programs that provide a counterweight to forces motivating people to underreport injuries. FRA will remain aggressive in its efforts to promote accountability and will seek to plant the seeds of cooperative programs that may help reduce risk while engendering greater trust.

We look forward to further discussions with the Committee on reauthorization of the Federal railroad safety program, to bring about the enactment of the Administration's railroad safety bill, and to increase the accuracy of the data relied upon by FRA in carrying out its rail safety program by reducing injury-related harassment and intimidation of railroad employees to make our Nation's railroad system even safer. Thank you.

Attachment

APPENDIX

The Railroad Industry's Safety Record

The railroad industry's overall safety record is generally positive, and most safety trends are moving in the right direction. While not even a single death or injury is acceptable, progress is continually being made in the effort to improve railroad safety. An analysis of FRA's database of railroad reports of accidents and incidents that have occurred over the nearly three decades from 1978 through 2006 dramatically demonstrates this improvement.[32] (The worst year for rail safety in recent decades was 1978, and 2006 is the last complete year for which preliminary data are available.) Between 1978 and 2006, the total number of rail-related accidents and incidents has fallen from 90,653 to 13,237, an all-time low representing a decline of 85 percent. Between 1978 and 2006, total rail-related fatalities have declined from 1,646 to 909, a reduction of 45 percent. From 1978 to 2006, total employee cases (fatal and nonfatal) have dropped from 65,193 to 5,193, a decline of 92 percent; the record low was 5,065. In the same period, total employee deaths have fallen from 122 in 1978 to 16 in 2006, a decrease of 87 percent.

Contributing to this generally improving safety record has been a 74-percent decline in train accidents since 1978 (a total of 2,925 train accidents in 2006, compared to 10,991 in 1978), even though rail traffic has increased. (From 1978 to 2006, overall train-miles (including passenger and smaller freight carriers) were up by 7.8 percent, but train-miles for Class I railroads have increased 29.9 percent. Additionally, Class I railroad ton-miles were up by 106.5 percent.) Further, the year 2006 saw only 28 train accidents out of the 2,925 reported in which a hazardous material was released, with a total of only 69 hazardous material cars releasing some amount of product, despite about 1.7 million shipments of hazardous materials by rail.

In other words, over the last almost three decades, the number and rate of train accidents, total deaths arising from rail operations, employee fatalities and injuries, and hazardous materials releases all have fallen dramatically. In most categories, these improvements have been most rapid in the 1980s, and tapered off in the late 1990s. Causes of the improvements have included a much more profitable economic climate for freight railroads following deregulation in 1980 under the Staggers Act (which led to substantially greater investment in plant and equipment), enhanced safety awareness and safety program implementation on the part of railroads and their employees, and FRA's safety monitoring and standard setting. (Most of FRA's safety rules were issued during this period.)

In addition, rail remains an extremely safe mode of transportation for passengers. Since 1978, more than 11.2 billion passengers have traveled by rail, based on reports

[32] See 49 C.F.R. Part 225.

filed with FRA each month. The number of rail passengers has steadily increased over the years, and since 2000 has averaged more than 500 million per year. Although 12 passengers died in train collisions and derailments in 2005, none did in 2006. On a passenger-mile basis, with an average about 15.5 billion passenger-miles per year since the year 2000, rail travel is about as safe as scheduled airlines and intercity bus transportation and is far safer than private motor vehicle travel. Rail passenger accidents–while always to be avoided–have a very high passenger survival rate.

As indicated previously, not all of the major safety indicators are positive. Grade crossing collisions and railroad trespassing cause virtually all of the deaths associated with railroading. Taken together, grade crossing and rail trespassing deaths accounted for 97 percent of the 909 total rail-related deaths in 2006. In recent years, grade crossing deaths were the greatest single group of rail-related deaths; in 1978, for example, 1,064 people died in grade crossing accidents, compared to 403 who died in rail trespass incidents. Since 1997, rail trespasser deaths have replaced grade crossing fatalities as the largest category of rail-related deaths; in 2006, 369 persons lost their lives in grade crossing accidents, and 517 persons died while on railroad property without authorization. Further, significant train accidents continue to occur, and the train accident rate per million train-miles has not declined at an acceptable pace in recent years. After increasing to 4.39 in 2004, the train accident rate declined to 4.11 in 2005 and 3.61 in 2006. The latter is near the all-time low despite significant increases in the volume of train traffic.

The causes of train accidents (e.g., derailments and train-to-train collisions) are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. The great majority of train accidents are caused by human factors and track. In recent years, most of the serious events involving train collisions or derailments resulting in release of hazardous material, or harm to rail passengers, have resulted from human factor or track causes. Accordingly, FRA's National Rail Safety Action Plan, initiated in May 2005, focuses heavily on human factors and track as the major target areas for improving the train accident rate.

CSX Transportation
Harassment and Intimidation Investigation

Draft

October 17, 2007

Executive Summary

This draft reflects current knowledge and interim conclusions in a continuing sequence of investigations and enforcement actions, so some conclusions may change as additional evidence is developed and the enforcement process is brought to a conclusion.

On August 4, 2006, Brotherhood of Locomotive Engineers and Trainmen (BLET) President and United Transportation Union (UTU) President wrote to CSX Transportation, Inc.'s (CSXT) Chief Executive Officer (CEO) concerning their "outrage that CSXT was engaged in targeted selective stalking, and harassment and intimidation (H/I) of its train and engine service employees who had reported on-duty injuries." They further stated they had a copy of a CSXT Southern Region 2006 Safety Action Plan that orders CSXT supervisors to identify "bad actors" at each on-duty location.

On August 9, 2006, CSXT's CEO replied via letter to the presidents of BLET and UTU denying the allegations. In response, BLET and UTU sent a followup letter to CSXT on August 15, 2006, further describing the allegations of inappropriate conduct.

In August 2006 the UTU and BLET made allegations to the Federal Railroad Administration's (FRA) Associate Administrator for Safety that CSXT officers were allegedly trying to manage the injury reporting numbers, instead of managing safety, by discouraging injured CSXT employees from reporting on-duty injuries or receiving the proper medical treatment and/or by retaliating against employees who reported injuries. The UTU and BLET provided to FRA copies of CSXT employee member complaints supporting these allegations. The UTU and BLET also provided this information to CSXT.

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Subsequently, FRA initiated an extensive one-year, systemwide, three-phase investigation to determine the validity of these allegations against CSXT. The FRA investigation involved more than 70 formal complaints against CSXT provided to FRA by the BLET and UTU. Of these 70 complaints, approximately 36 alleged H/I of CSXT employees by company officials. The remainder of the complaints addressed issues that did not meet the criteria for 49 CFR Section 225.33. Therefore, we did not conduct formal interviews with the employee or carrier officers for the remaining 34 complaints. In conducting its investigation, FRA interviewed 34 CSXT employees and 36 CSXT officers at more than nine railroad division locations across the CSXT system. As a result of FRA's investigation, CSXT has initiated personnel actions ranging from coaching/counseling to dismissing implicated company officers.

During the course of its investigation, FRA found several instances where, although CSXT did properly report an employee injury, the injured employees alleged that CSXT officers had initially urged the employee not to seek medical treatment. Employees stated that if they did seek medical care, carrier officers discouraged them from accepting any treatment, including prescription medication, that would cause the injury to become FRA-reportable under FRA's accident/incident reporting requirements at 49 CFR Part 225. Moreover, rail labor representatives and CSXT employees alleged to FRA that employees who reported injuries were

subject to retaliation by CSXT officers. For example, FRA received allegations that many such employees were placed under increased scrutiny and were subject to repeated observations and/or efficiency testing sessions. Because such practice results in increased odds that CSXT will detect a rule violation by the employee, many employees who reported an injury allegedly end up being charged with rule infractions and are subsequently dismissed from railroad employment. These employees believe that the real reason for their dismissal from CSXT was their injury, and if they had not been injured, they would not have lost their jobs. Employees also allege that they were wrongfully subjected to Federal "reasonable cause" drug testing only after their injuries became FRA-reportable, not based on whether a "reasonable cause" actually existed.

Phase 1

Phase 1 of the investigation involved allegations of H/I of CSXT Southern Region employees by means of excessive operational and efficiency testing after they had reported an injury. During this phase, FRA reviewed all FRA-reportable and nonreportable employee injuries from October 2005 through July 31, 2006, for the CSXT Southern Region, and compared this information with the operational testing data reported and recorded for the same period of time. In doing so, FRA requested from CSXT employee injury reports on 363 selected Southern Region CSXT employees to determine current status and to resolve whether employees who reported injuries were subject to increased testing as alleged. Based on documentation reviewed, FRA did not find evidence sufficient to support allegations that CSXT Southern Region employees who reported injuries were subject to increased testing by CSXT officials.

Phase 2

Phase 2 included a comprehensive audit of CSXT's accident/incident records to evaluate CSXT's compliance with FRA's reporting requirements as per 49 CFR Part 225. The audit included concentration on the proper reporting of highway-rail grade crossing accidents, of rail equipment accidents, and of injuries to all types of persons. Cross-referencing of injuries with CSXT Claim and Medical Department records was also accomplished. Inspection was also made of the CSXT's Internal Control Plan (ICP) to determine compliance with its various components. The audit found a number of probable violations of 49 CFR Part 225, some for failure to report employee injury cases, some for failure to properly report employee injury cases, and the remainder were for other compliance issues not pertinent to this report.

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Since its previous audit of CSXT in January 2005, FRA found significant improvement by CSXT in gaining compliance with the reporting of all highway-rail grade crossing accidents, and in other areas of accident/incident recordkeeping and reporting. However, going into this audit, FRA found it concerning that the subject of H/I had reemerged since FRA last addressed this issue with CSXT in 2003. Because of recent H/I complaints, this audit was also designed to include an in-depth inspection of CSXT's ICP Policy Statement and internal Complaint Procedure that relates to Intimidation and Harassment. As a result of this indepth inspection, the FRA Part 225 Audit Team found three separate areas of noncompliance by CSXT for which FRA recommended civil penalties be assessed, as indicated below:

(1) FRA found that the railroad had not expeditiously resolved complaints that several of their employees had made through the CSXT's Complaint Procedure relating to H/I at Section 225.33(a)(1).

(2) FRA found one especially egregious H/I case that CSXT had received through their Complaint Procedure that CSXT had investigated, and had found a violation of their Policy Statement had occurred. However, CSXT had not taken disciplinary action against the supervisor involved in this case.

(3) FRA found that CSXT was not in compliance with their ICP requirement relating to the completion of personal injury reports by their employees.

Phase 3

Phase 3 of the investigation involved interviews with CSXT employees and officers. During this phase, FRA conducted about 70 face-to-face interviews with CSXT employees who had experienced on-duty injuries, as well as with the CSXT officers who were involved in the employee injury cases to determine the validity of the H/I allegations. CSXT's Vice Presidents of Safety and CSXT counsel were present during FRA's interviews with the CSXT officers. These interviews were held across the CSXT system at several locations on CSXT railroad divisions.

Overall, FRA's interviews of the employees and the officers recorded similar findings at various locations on the CSXT system. One similarity was that both CSXT employees and the officers confirmed that CSXT field officers often discuss FRA accident/incident reportability with the injured employee en route to the treatment facility or at the treatment facility, and remind the employee of FRA reportability criteria. The interviews also confirmed that CSXT officers will sometimes "remind" an injured employee that a reportable injury would be a mark on his or her personal record and may have an adverse effect on his or her career. This behavior violates the law.

A second similarity was that both CSXT officers and employees confirmed that CSXT officers often transport an injured employee to CSXT offices following medical treatment for "fact-finding interviews," and to complete carrier reports to determine how the employee was injured.

While this practice is not a violation of the rule because the employee has already reported the injury and received medical treatment, the testimony of many employees makes clear that this practice serves to deter that employee and others from reporting future injuries. If an employee is injured seriously enough to be unable to return to duty, it would appear that the railroad's legitimate need to determine how the injury occurred could be adequately served after the employee has had some time to recuperate commensurate with the severity of the injury.

A third similarity is that under CSXT's current alcohol and drug testing policy, reasonable cause tests are conducted only if an employee has a reportable accident or commits a significant operating rule violation. Approximately 2 years ago, CSXT decided to conduct reasonable cause

testing solely under FRA authority. FRA allows Federal reasonable-cause tests to be conducted only after reportable accidents or specified rule violations. By discontinuing its company reasonable cause testing program, and by adopting FRA testing criteria, CSXT gave up its ability to conduct reasonable-cause tests for nonreportable accidents. An unintentional consequence of this self-imposed limitation is that it may appear that CSXT is using reasonable cause testing to discourage reporting of on-duty accidents. FRA will conduct a joint accident reporting/alcohol and drug testing investigation of this issue.

A final similarity was that both CSXT officers and employees confirmed that when an injured employee requests to be "marked-off" from performing service, this employee is often instructed by a CSXT officer to mark off sick or suspended. When this happens and lost days are improperly recorded to FRA, the accident/incident reporting regulation is violated. Sometimes employees mark off sick or suspended and the railroad nevertheless correctly reports to FRA the days lost due to injury.

The consensus of the investigative team was that certain CSXT officers were creating an atmosphere or culture that tends to have a chilling effect on employee injury/illness reporting and which ultimately sends a message to employees that if they report an on-duty injury, they would be subject to adverse consequences.

The investigation by FRA's Office of Safety into UTU and BLET's allegations concerning H/I is resulting in the recommendation to the Office of Chief Counsel of the assessment of 33 civil penalty violations against CSXT. FRA's Office of Safety will also be issuing 22 regional warning letters to individual CSXT officers and 3 Individual Liabilities with fines. Please note in each case contained in this report where civil penalty assessments are recommended, it is standard practice, if the Chief Counsel's Office accepts the recommendations and initiates enforcement action, that the railroad or individual cited will have the opportunity to present mitigating information or information refuting the alleged violations before further action is taken. Because neither the railroad nor the individuals have yet been charged or had the opportunity to defend themselves, these cases cannot be treated as proven.

Draft

FRA has learned that CSXT senior managers have made numerous managerial changes at problem locations. CSXT has also modified its ICP and reinforced its requirement that managers attend ethics training four times a year and management training twice a year. The management training workshops are designed for managers to improve their skills in two-way communication. Also, rail labor members are required to attend training once a year. Additionally, FRA learned that CSXT has taken disciplinary actions ranging from coaching and counseling to dismissing carrier officers. Indeed, in a letter dated October 4, 2007, CSXT's Executive Vice President and Chief Operating Officer described a number of disciplinary actions taken against more than 10 CSXT officers for engaging in H/I. The actions taken included coaching and counseling, demotion, and withholding of management incentive bonuses. In addition, CSXT Executive Vice President stated that "at least three managers have been terminated since 2005 at least in part for covering up an injury or for mishandling an injury report," and "Earlier this year the company adopted enhanced guidelines with time frames for

conducting injury reporting intimidation/harassment investigations and determining corrective action where appropriate."

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

OCTOBER 25, 2007

WRITTEN STATEMENT OF
DAVID BROWN
VICE PRESIDENT AND CHIEF TRANSPORTATION OFFICER
ON BEHALF OF
CSX TRANSPORTATION, INC.
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INTRODUCTION

Mr. Chairman and Members of this Committee: Thank you for the opportunity to address this important matter.

I am David Brown, Vice President and Chief Transportation Officer of CSX Transportation. My responsibilities include ensuring safe operations on CSXT's 23-state system. I have more than 26 years of experience in the railroad industry and have been with CSXT since May 2006. I have considerable experience in railroad operations and safety reporting protocols.

CSXT's operating team is divided into 10 operating divisions, with each division reporting to a division manager. Those managers report up through two regional vice presidents, who report to me. I report to Tony Ingram, our Executive Vice President and

Chief Operating Officer, who is also responsible for mechanical and engineering functions. CSXT operates an average of 1,300 trains per day, with four major lines of business: intermodal; merchandise; coal, coke and iron ore, and automotive.

This statement covers CSXT's safety programs, the training, technology and capital investments to make the railroad even safer, and our parallel commitment to the fair and ethical treatment of all employees. This commitment certainly must extend to employees who are injured or who violate safety and operating rules.

CSXT's managers and employees are expected to perform their work and interact with each other consistent with Core Values, which include "Safety is a Way of Life." One injury or one train accident is one too many, and the company's ultimate goal is zero injuries and zero train accidents. CSXT's safety programs are achieving success: during the first nine months of 2007, 149 fewer employees have been injured compared to the same period last year.

Since 2004, FRA-reportable injury rates have improved 46 percent. FRA reportable train accident rates have improved 44 percent in that same period, and human factor-caused train accident rates have improved 56 percent.

Another of the company's Core Values is "Right Results, Right Way." That means managers and employees work to improve financial, operating, and safety results properly, by hard work and approved methods. CSXT does not tolerate nor condone

achieving safety results or any other performance results through unethical or otherwise improper means.

SAFETY PROGRAMS

CSXT's safety improvements do not mean CSXT is satisfied. To reach the goal of an accident-free workplace requires continuous improvement, and our company wants to send employees home in the same condition in which they report to work.

A variety of key programs support this continuous safety improvement initiative. They are described in more detail in the documents provided this Committee and are summarized here:

Communications: Safety awareness is essential to prevent accidents and injuries. Every day and every job begins with a comprehensive safety briefing. This form of communication is amplified in other face-to-face meetings as well as through division newsletters and our intranet site.

Safety Committee Process: CSXT uses an overlapping safety process with safety committees at local, division, region, and executive levels. These committees include members from both labor and management. The goal is to quickly identify local safety issues and correct them as rapidly as possible. If, for whatever reason, a safety issue cannot be resolved at the local level, it progresses up the chain, ultimately to the Chief Operating Officer in the rare instances when that is necessary.

Training: Training on operating and safety rules begins for new employees at the Railroad Education and Development Institute in Atlanta, which is called the REDI Center. That training continues throughout an employee's career and includes dozens of courses tailored to specific job responsibilities and delivered through advanced computer-based multimedia and classroom instruction. Training is also focused on needs identified by employee behavior.

Rules Compliance: Operating and safety rules build on knowledge and experiences, as well as federal regulations. Compliance with rules is a key component of accident and injury prevention.

Train Accident Prevention System (TAPS): The Train Accident Prevention System, or TAPS, is a structured, scientific approach to identify and analyze root causes of train accidents. In addition, TAPS provides cross-functional training in train accident investigation and prevention for all managers and includes both classroom and field exercises.

Personal Injury Analysis: Like train accidents, personal injuries are reviewed to determine root causes, identify leading indicators and develop corrective actions.

Leadership: Formal leadership training is provided regularly to supervisors and labor safety coordinators. The instruction includes how to approach and coach an individual who requires extra assistance in working safely. In this training, discussions

are held on how managers are accountable for safety performance as well as supervisory qualities that include integrity and trust.

Labor Safety Leadership: CSXT actively leverages the experience of union-represented operating employees to promote safety and prevent accidents. Each of the 10 operating divisions employs two Labor Safety Coordinators – one from the Brotherhood of Locomotive Engineers and Trainmen and another from the United Transportation Union. Their duties include training, coaching, resolving issues, and the development and implementation of safety programs and initiatives. These Safety Coordinators work full-time to make the company safer.

Operation RedBlock: Operation RedBlock is an important part of CSXT's safety program to prevent accidents and injuries caused by drug and alcohol use. It is a union-initiated, management-supported program to raise drug and alcohol awareness and to provide specific steps to confront such abuse. CSXT's RedBlock program is viewed as the most innovative peer prevention program in the industry. The RedBlock program continues to grow with 241 union-managed teams staffed by more than 3,000 trained volunteers.

Inspection, Monitoring, and Advanced Engineering Technology: CSXT has inspection programs to identify infrastructure problems before they become equipment failures or accidents. CSXT's rail inspection process utilizes sophisticated technology on special inspection vehicles to identify track geometry exceptions and internal defects

within the rail itself. Rail cars and locomotives are inspected regularly, consistent with federal and company standards. New technology also is being deployed across CSXT's system to increase the ability to detect potential train operational problems. This technology is predictive, much like the "check engine" light on an automobile.

Capital Investments and Infrastructure Improvements: CSXT enhances safety through significant investments in both maintenance and expansion of infrastructure. This year alone, CSX is spending approximately $1.7 billion in capital improvement and expansion of the rail network to meet future transportation needs. This amount is in addition to the normal maintenance expenditures of $1.45 billion.

INDIVIDUAL DEVELOPMENT AND PERSONAL ACCOUNTABILITY POLICY (IDPAP)

CSXT has a specific initiative for handling rules infractions called the Individual Development and Personal Accountability Policy (IDPAP). This policy builds on the belief that the vast majority of employees want to do the right thing and the fact that those employees do their jobs in a professional manner, day in and day out.

This initiative is designed to provide everyone an opportunity to improve and grow through a measured, open, and just process. The policy states clearly that managers must provide fair and consistent treatment to all employees, using alternatives to formal discipline wherever appropriate. The policy views infractions as minor, serious, or major and prescribes certain actions to address them. For all but the major offenses, the policy

provides for a progressive disciplinary approach and includes a non-punitive opportunity to correct isolated instances of unsafe behavior.

Minor offenses are defined as rules violations that do not result in derailments, or damage to equipment, or personal injury. Managers are encouraged to use informal, corrective instruction based upon individual circumstances. Repeated violations of the rules may require more focused intervention with each succeeding offense. For the third minor offense committed in a three-year period, an employee has the option to participate in an Incident Review Committee process. The Incident Review Committee is comprised of fellow craft employees selected by the local chairman. This Committee determines the root cause of the problem and prescribes corrective follow-up. The only record maintained is a note that the individual was referred to the Incident Review Committee. It takes 6 minor offenses over a three-year period to subject an employee to possible dismissal. An employee who works 6 months without a minor offense will have the last one removed from consideration.

Serious offenses include all train accidents resulting in a derailment, or damage to equipment, or personal injury. Examples of such violations are mounting or dismounting moving equipment or crossing over or riding the lead end of a rail car being shoved. For the first serious offense, an employee can choose to participate in a Time Out conducted by the division manager or designee to determine a root cause and corrective action. The only information in an employee's personnel file is a note that he or she was referred to Time Out. It requires 3 serious offenses over a three-year period to subject an employee to possible dismissal.

Major offenses are those that warrant removal from service pending a formal hearing and possible dismissal. These can include passing stop signals without authority, occupying track without authority, speeding or other blatant disregard for safety. If an incident is covered by FRA-certification regulations, then the appropriate federal provisions apply. A joint labor-management oversight committee reviews major discipline cases to ensure that this policy is administered consistently and fairly.

INJURY AND ACCIDENT REPORTING

CSXT is fully committed to the complete and accurate reporting of all workplace injuries and accidents. The company's policies and procedures speak to the proper reporting of on-duty injuries in a timely manner.

In the fourth quarter of 2006, CSXT again provided instruction on the proper handling of on-duty injuries as part of operating rules and compliance training for managers. In addition, the company provides Leadership training, discussed earlier, on an ongoing basis. Leadership training develops better manager communication skills and teaches managers to use these skills daily to lead, coach, and safely run operations, all on a foundation of integrity and ethical behavior.

This year, CSXT has continued to enhance the breadth and quality of the leadership program and management training on proper handling of on-duty injuries. The Vice President-Safety is delivering on-duty injury reporting training to all division managers, who will be expected to communicate that training to those managers who

report directly to them. This training includes CSXT's policy not to discuss FRA reportability criteria with an injured employee or with treating hospital personnel.

The company also maintains and disseminates a policy prohibiting intimidation or harassment calculated to prevent or discourage a person from receiving proper medical treatment or from reporting an accident or injury. If an employee, manager, or outside party perceives that any of these policies has been violated, he or she can report that violation in any number of ways, including CSX's Ethics Hotline, which can be accessed by calling toll free 1-800-737-1663. This Hotline has produced calls that relate to complaints of injury reporting intimidation or harassment as well as the failure to properly report an injury. CSX Internal Audit investigates these complaints. Where a complaint is substantiated, the company takes appropriate disciplinary action. Those actions have included dismissals, demotions, reductions in compensation, reprimand letters, and additional coaching and counseling.

In addition to CSXT's own internal methods of addressing improper injury reporting or allegations of intimidation and harassment, the FRA has recently conducted three related investigations. CSXT has cooperated fully with all these inquiries that concluded separately in August 2006, November 2006, and October 2007.

August 2006 Investigation

In August 2006, FRA found no instances of alleged intimidation or harassment on the company's Southern Region. FRA reviewed records pertaining to injuries reported by employees and the frequency of operational testing administered to those employees

prior to and following the injury reports. As the Committee knows, operational testing is a critical tool used to assess employee understanding of safety and operating rules. The basis for the FRA review was an allegation that CSXT supervisors were using frequent operational tests to punish employees for reporting injuries. The FRA concluded that the allegation could not be substantiated.

November 2006 Accident and Injury Reporting Audit

In November 2006, FRA conducted its periodic comprehensive audit of accident and injury reporting on CSXT. This comprehensive audit included a review of train accident and grade-crossing incident reporting, as well as injury reporting.

The report includes a number of recommendations for improved procedures. CSXT has taken actions to address all of FRA's recommendations for improvements to the procedure for reporting incidents. For example, earlier this year, CSXT adopted enhanced guidelines with timeframes for conducting injury reporting intimidation and harassment investigations and determining corrective action where appropriate.

The report found a number of cases in which CSXT had not properly reported an injury. CSXT has agreed with the audit in some of these cases. With respect to the cases on which CSXT did not agree, the company has explained its position to the FRA, which, in turn, agreed with CSXT on some of the cases and disagreed on others. CSXT is working with the agency to resolve conflicting views on the outstanding cases through the normal resolution procedures.

October 2007 Investigation

The company is currently reviewing FRA's draft Harassment and Intimidation Investigation report provided on October 18. CSXT has implemented recommended corrective measures. In addition, CSXT has taken important additional steps to improve the environment for safety including the management training described previously. CSXT has also implemented an employee wellness program that helps reinforce the company's concern for individual health and safety.

Those steps will continue to improve CSXT's culture and performance so that mistakes become even more isolated. CSXT owes that to the tens of thousands of employees and managers who do effective and ethical work in the area of safety every day, in every condition. CSXT will continue to improve so that those employee achievements are not marred by mistakes that do not reflect CSXT's culture. CSXT will continue to take every non-compliance act seriously because one instance of intimidation or harassment is too many.

CONCLUSION

The company hopes this information is helpful to this Committee. Under no circumstances will CSXT tolerate improper behavior by managers or employees. This includes violations of injury reporting standards and intimidation or harassment of employees who are injured. Such behavior is counter to the CSX Core Values and is in violation of company policy.

CSXT appreciates the insights of this Committee and those of FRA in this important matter. The company regrets every one of those cases in which it was clear that intimidation or harassment occurred with respect to injury reporting and pledges better performance. CSX's Core Value states it best: People Make the Difference, and the company's employees are a treasured resource.

CSXT would also invite the Committee to examine the overwhelming data related to significant and sustained improvements in safety, service to customers, and financial performance over the past few years. These results are evidence of the company's commitment to safe, reliable, and efficient rail transportation. CSXT is similarly committed to the fair and equitable treatment of its employees. Throughout this period of continuous improvement, the company has worked to improve relationships with employees while fostering a safer workplace. That work will continue.

Thank you.

Questions from Chairman James L. Oberstar

"THE IMPACT OF RAILROAD INJURY, ACCIDENT AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"

OCTOBER 25, 2007

1. Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?

   CSXT's railroad culture is built on safety being the number one priority. In order to maintain our continuous safety improvement and prevent injuries, each accident must be understood and the root causes identified and addressed. While root causes are not limited to human factor exceptions, the safety of railroad operations demands that employees be held accountable for rule compliance. The continuous improvement in safety on CSXT discussed in my written statement indicates that our efforts to improve safety are succeeding.

   The Federal Employers Liability Act (FELA), unfortunately encourages a focus on assignment of fault. The prospect of litigation creates a major impediment to the free flow of information from employees that is needed to determine the chain of events that preceded an accident and its root causes. Replacement of the FELA with a no-fault workers compensation type system would, in addition to providing a fairer and less adversarial compensation system, assist in identifying and addressing the causes of accidents.

2. We've reviewed your safety programs and ICP's, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?

   We do not believe there is widespread underreporting of injuries or widespread noncompliance with federal regulations. CSXT is committed to accurate reporting of injuries. We have strict reporting criteria and we agree with FRA Administrator Boardman, who testified that there is not significant underreporting.

3. In general, do you think your railroads have a problem with underreporting of injuries?

   See answer to Question 2.

4. Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidations exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?

We believe that the vast majority of on-duty injuries are properly reported, and that there is no widespread underreporting of injuries.

5. Even though you claim to discipline supervisors when caught putting pressure on employees not to report, don't you think there are pressures that cause this type of behavior to continue?

   One of CSX's core values is "Right Results; Right Way". We don't tolerate achieving safety or any other goals through improper methods. We have taken appropriate disciplinary action, which has included termination and demotion as well as reduction in compensation, for inappropriate handling of injury reporting or for violations of our Internal Control Plan.

6. Most of your operations are so widespread, how can you assure us that you are making every effort that you can to identify front-line supervisors who may be placing pressure on employees not to report injuries?

   Safeguards are in place through training which includes, but is not limited to, leadership and communication skills and training on appropriate procedures to follow when an employee reports an injury. Additional avenues such as division safety hotlines, the CSX ethics hotline, and union representatives provide the employee with the ability to raise concerns without going through their supervisors. CSXT's senior management also conducts face-to-face meetings on each division generally on a quarterly basis. CSXT's performance management system measures leadership effectiveness which includes achieving results the right way. All of these safeguards can never ensure that no individual will make a mistake, but when a manager is identified as utilizing improper leadership it is addressed up to and including dismissal from service.

7. Do you simply rely on complaints after the fact to identify these managers, who are bad actors, or do you make an attempt to investigate management practices on a more proactive basis?

   See answer to Question 6.

8. What policies do you have in place to provide disincentives to supervisors who engage in harassment and intimidation, and to catch this type of behavior?

   CSXT's Internal Control Plan includes the required policy statement prohibiting harassment or intimidation calculated to discourage or prevent reporting of an accident or proper medical treatment. Discipline assessed for violation of this policy provides a disincentive to supervisors to engage in such unacceptable behavior. CSXT's performance management system also provides incentives for behavior showing integrity and trust, and disincentives for improper leadership techniques that do not achieve results

in the right way. When poor judgment is identified, penalties are imposed which include bonus reductions and termination.

9. Couldn't you utilize employee surveys on a routine basis to identify managers that are of concern to employees?

   Employees who have a complaint about a manager's handling of an injury report have ample means and opportunities to make that complaint known, as described in answer to Question 6. We don't believe that employees are reluctant to make such complaints. In addition, CSXT regularly is in contact with our union representatives who are not reluctant to identify concerns they have with CSXT managers.

10. Have you recently fired or demoted front-line supervisors for failing to report accidents, or for harassing and intimidating employees to not seek the proper medical care? How did you uncover these cases? Was it through an audit or a complaint, or some other means?

    Yes. We take appropriate disciplinary action, which has included termination and demotion as well as reduction in compensation, for inappropriate handling of injury reporting or for violations of our Internal Control Plan. These cases are generally identified as a result of complaints, audits, or FRA reports.

11. Do you have an "availability policy" that requires that an employee be available to work for a specific number of days per year, which include days lost due to injury and sickness?

    CSXT does have an availability policy for train crew employees. Employees not meeting availability criteria over specified time periods are subject to review. Days where an employee is not available due to on-duty injury are not counted in this review. Any appropriate discipline is handled on a progressive basis, with the first two actions being warning letters.

12. Are you moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factors causes in accidents? Have you implemented such programs on at least a trial basis? If so, how?

    We are interested in reviewing the results of current C3RS tests on other railroads. CSXT is participating in the FRA – RSAC Human Factor Working group which is working towards measuring and testing various forms of this approach to increase effectiveness.

13. If you have implemented such programs, how have you seen that affecting employees on the ground?

    See answer to Question 12.

14. Where do you stand on the implementation of C3RS system-wide?

    See answer to Question 12.

15. The FRA has a standard 7-day reporting deadline for filing a report for a "reportable" injury. Do you have a different internal standard?

    FRA regulations require railroads to enter detailed information about each reportable and accountable injury into an internal record as early as practicable but no later than seven working days after learning of the injury. CSXT complies with that requirement.

16. Do you have a confidential "ethics hotlines" where an employee can call in and report anything that they are uncomfortable with?

    Yes, CSX Internal Audit maintains a confidential ethics hotline.

    a. How are hotlines cases pursued?

       CSX Internal Audit promptly investigates these complaints and determines whether there has been a violation of company injury reporting policies. If a violation is found, appropriate discipline is assessed.

    b. Can this system really be confidential?

       The hotline is answered by a third party, not by CSX employees. The identity of the complaining party can be kept confidential. Investigations are conducted in a confidential manner to the extent possible, consistent with the need to conduct interviews and obtain information regarding the subject of the complaint.

17. Do supervisors have any portion of their bonuses based on injury statistics in their management area? (If yes) What is the maximum amount that he/she could earn based on injury statistics alone?

    Yes, given the high priority our organization places on safety, a part of a supervisor's incentive compensation potential is based on this important measure of their leadership effectiveness. Many other criteria are also utilized in determining a manager's incentive compensation, including other measures of safety such as train accident statistics. Incentive compensation will be reduced to the extent the supervisor scores poorly in the categories of integrity and trust and does not achieve results in the right way.

18. It's pretty clear that you have good corporate policies on harassment and intimidation and also safety. However, there seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring? And, what are you doing to make sure that your corporate policies are being implemented correctly at the "local" level?

    We don't believe there is a "disconnect" as postulated in this question. With a large company there will be exceptions, but experience and facts demonstrate that these instances are few. When a complaint is received, senior management gets directly involved to emphasize the importance of these policies. CSXT's mandatory ethics training for all managers continues on a quarterly basis. Leadership training and compliance training are an integral part of the ongoing training programs provided to all managers.

19. Are you motivated by the Harriman Award to drive down your injury statistics? Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics? Do you think that any of the metrics of the award should be changed to incentivize reporting?

    Our company's goal is to be "the safest, most progressive North American railroad, relentless in the pursuit of customer and employee excellence." This goal was established without regard to the Harriman Award. We are motivated by this goal to achieve continuous improvement in our safety performance and to eliminate injuries and accidents which is our most important initiative. The Harriman Award, like other safety awards in other industries, is an acknowledgement of the effectiveness of a company's safety program. We believe that such awards are beneficial and appropriate and help the industry to achieve positive safety results, though it is more important to have a safe railroad for operational reasons than to win a competition. We see no reason to modify the Harriman award criteria.

20. Do you all have audit processes that links medical claims with injury reports? What do you do if someone puts in a claim but there is no injury report on file for them?

    Yes. The general claims database and accident reporting databases are reconciled on a routine basis. Exceptions are reviewed and reportability is determined by the company's reporting officer.

21. Do you have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?

Yes. We prohibit managers from accompanying injured workers into the treatment room unless voluntarily invited by the injured employee, and we prohibit managers from trying to influence medical treatment provided of an injured employee.

22. Do you believe these types of point systems create "unintended consequences"?

    CSXT does not utilize a "points system".

23. Human factors research has shown that rarely is an accident ever due to a single individual or causal factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?

    Some accidents occur as a result of a single individual or causal factor. However, most accidents are the result of a series of events. Typically, breaking the chain at any point will avoid the accident. New procedures may be appropriate in some cases to assist in preventing future accidents. At the same time, individuals must be held accountable for rules compliance in order to avoid accidents. As I have indicated above, the most effective government policy that would assist with understanding of injury causation is the replacement of the FELA with a no-fault workers compensation type system. This change would, in addition to providing a fairer and less adversarial compensation system, assist in better identifying and addressing the underlying causes of accidents so that future incidents can be avoided.

24. Do you have "Light-Duty"-type programs where instead of marking off an employee for being injured, they come to work and basically do nothing but sit in a room all day? Do you consider this practice to be harassment?

    CSXT does not have such a "light-duty" program.

25. Do you honestly think that <u>no</u> intimidation exists?

    We believe that intimidation or harassment in violation of the ICP regulations is infrequent and isolated. Likewise, we are committed to ensuring that appropriate discipline is assessed for proven violations.

26. How do you explain all the cases that FRA finds for underreporting?

    See answer to Question 2.

27. Mr. Brown, the Committee has a copy of a document, entitled "CSX Safety Action Plan" for the Southern Region. That Plan instructs supervisors to identify and target their 5 most "at risk" employees for additional monitoring. Doesn't that represent a form of intimidation? Doesn't it send a bit of a chilling message to employees?

As I explained at the hearing, this Plan was only in effect for a brief period on a portion of our railroad and was discontinued in 2006. Although well-intentioned as an effort to identify issues, we found that the Plan, like the FELA system, had unintended consequences.

Question from Congressman Henry E. Brown, Jr.

1. Mr. Brown, can you please go into depth about the safety investments that CSX has made in recent years, and the company's plans for future investment in the safety arena during the years ahead?

   The vast majority of CSXT's capital and operating expenditures represent an investment in the safety of our operations. On the capital side, I indicated in my written testimony that in 2007 we are spending approximately $1.7 billion in capital improvements and expansion of our rail network which will help meet future transportation needs while also enhancing the safety of our future operations. In addition, we are spending approximately $1.45 billion this year on maintenance of infrastructure and equipment, which protects the safety of our current operations. Capital investment and maintenance expenditures are expected to be at approximately the same levels in 2008.

   Many of our capital investments represent upgrades in technology that improve the safety of our operations and lead to fewer injuries and accidents. Examples of such recent investments include remote control operation of locomotives, wayside detectors, our Next Generation Dispatching system, and cameras and event recorders on locomotives. In addition, we plan a significant increase in expenditures on state-of-the-art wayside detection devices as we accelerate their deployment over the next several years.

   In addition to these capital investments that enhance railroad safety, many of our operating expenditures are designed to reinforce safe operating practices and employee safety awareness. These items include, by way of example, our extensive training, leadership, and development emphasis both for new hires and existing employees (including our REDI Center in Atlanta), comprehensive safety job briefings at the start of every day and every job designed to ensure that each employee performs his duties safely, our overlapping safety committee process, inspection and maintenance of our track and equipment including operation of rail and track geometry test vehicles, brush cutting at grade crossings, health and wellness programs, and our intensive Train Accident Prevention System (TAPS) efforts to identify and analyze root causes of train accidents. This list could go on and on, since a safety focus permeates all of our daily operations. As one of our core values states, at CSXT "Safety is a Way of Life".

HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

TESTIMONY OF JAMES BRUNKENHOEFER NATIONAL LEGISLATIVE DIRECTOR, UNITED TRANSPORTATION UNION

OCTOBER 25, 2007

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Good Morning. My name is James Brunkenhoefer I serve as the National Legislative Director for the United Transportation Union (UTU) in Washington, D C We appreciate the Transportation and Infrastructure Committee scheduling this hearing on an important discussion of harassment and intimidation.

First, I want to thank the Committee for including whistleblower protection in the rail security legislation which passed Congress. Also, we appreciate the prompt medical treatment amendment contained in H.R. 2095, which passed the House last Thursday Both of these provisions will help prevent, though sadly not eliminate, the serious problem of harassment and intimidation in the rail industry.

What I am about to present to you is not rhetoric. In your consideration of the rail safety legislation, we provided the Committee with numerous examples of harassment and intimidation in the rail industry. Additionally, we are aware of an investigation being conducted by the FRA on one of the nation's largest railroads covering complaints by the UTU and the BLET I am confident the FRA will find what we have been alleging—unchecked harassment and intimidation, including violations of the accident reporting regulations for failure to report injuries, general disregard for the safety requirements, noncompliance of the railroad's own Internal Control Plan, officials repeatedly questioning the injured employee while being transported to a hospital, officials "suggesting" that if the injury is reported, it will be an adverse impact on his/her employment, subsequent to being treated the employee is frequently taken back to the railroad's offices for further interrogation, and subjecting an injured employee to excessive alcohol and drug testing even though there is no evidence of such use. We urge the FRA to further conduct similar investigations of the rest of the rail industry. The bottom line is that this practice has been rampant throughout the industry for many years, and the FRA has not had the necessary personal to measure the problem. The time to address the problem is long overdue. The time to curb this cancer is now. With thousands of new employees being hired because of retirements in the industry, there will never be a better time to instill a positive culture for the employees.

I am sure the railroad officials testifying here today will tell you how they are taking measures to reduce this problem. However, as soon as the dust settles on this hearing, I know that again it will be business as usual. We have endured the false promises by management for too many years.

With management trying to manipulate the injury and accident numbers along with intimidated employees, both customers and commerce are adversely affected, because no one can be confident of the true safety problems which exist. The public, investors and rail customers would be shocked to learn from rail employees that a culture of lying, denial, and fraud is not only accepted in the railroad industry, it is rewarded, well rewarded. It is a problem that has become as much a part of the industry as the rail itself. It has existed the several decades that I have been involved in the rail industry. When the methods being used against their own employees is accepted practice, and in some cases well rewarded, should the investment community believe that the line on honesty and integrity, much less compassion, is drawn there? Incredibly, one railroad had in its 2006 Safety Action Plan a provision that orders supervisors to identify "bad actors" due to injures at each on-duty location.

Let me briefly review with you a typical example of what we see as a major problem. A UTU member is injured and, under railroad rules, he/she is required to report that injury promptly. Although, under federal regulations, the railroad itself has 30 days to make a report to the FRA. If the UTU member does not promptly report, then the employee can almost be assured that there will be a formal railroad investigation, and he can expect to be disciplined, and in many cases fired. It does not matter that the injury may take hours or possibly days to manifest itself. Frequently when an employee contacts the responsible party appointed by the railroad, he/she is "unavailable" for a lengthy period of time, and the injured employee must make several attempts to report. The railroads demand reporting of the injury to management, and this exceeds the importance of getting the injured employee quick and proper medical treatment. It is curious that the railroads want to know about the injury, but they do not want the FRA to know about it.

In railroad culture; when an injured employee contacts is the appropriate person, that manager frequently initially urges that the employee delay filling out the carrier's required form. It is suggested that the employee delay reporting, since he "might feel better in the morning." The manager wants the employee to believe he is doing the employee a favor. The manager illegally tells the injured employee that he/she "knows what happens" when a formal report is filed. What this means is that the employee knows that a reportable injury will be a mark on his/her record and will have an adverse impact on the person's career. There will be a formal investigation or hearing and, that most of the time, the employee will be disciplined, with an overwhelming number being dismissed.

If the injury has not improved "overnight," and the employee calls again and asks for the manager to formally report what happened, the first manager is usually unavailable. If he is, the injured employee is lectured that he was <u>not</u> told to not report the injury. It is a no win situation for the injured person. If the first manager is unavailable, then the new manager will ask why the reporting was delayed, and if the UTU member then reports, he will be charged with a rules violation for late reporting of the injury, plus the some rules violation connected with the injury. The employee is offered various incentives if he doesn't report the injury. He is offered "safety days" or "leave days," or encouraged to use vacation days if he agrees not to make a report. In other words, the manager commits fraud by enticing the employee to withhold a report required by the FRA.

If the employee chooses to go ahead and report, then the manager attempts to use a form of extortion. The manager appears to be his friend and is just trying to help, saying things will be bad if the paper work is filled out and the process is started. The employee is told then others will get involved, meaning that if the employee wants to keep his job, which he needs to support his family, make payments on his house, have health care for his family and attain retirement credits, then he better not report. If the employee reports and requests to mark off, the employee frequently is instructed to mark off either "sick" or "suspended." This violates the FRA reporting regulation because the days off are improperly recorded, but the carriers don't care. Additionally, it is common that the injured employee who reported will be placed under much more scrutiny with repeated observations and more efficiency testing. We also have instances where injured employees were improperly subjected to Federal reasonable cause testing, even though reasonable cause did not actually exist. This is just additional forms of harassment. Obviously, each of these practices by the railroads deters one from reporting.

The Committee has reports of managers who tell those that have received an injury report to cancel 911 calls from the field until such time that the manager can "check it out" and the injured employee is left in the field in pain without prompt medical care Injured employees, who are in pain and need immediate medical attention, are held at the scene or at a company facility for questioning and interviews, sometimes for hours. Sometimes the injured employee is interviewed, not once but several times, before he is transported for medical attention. Your prompt medical treatment provision in H.R. 2095 will significantly help alleviate this problem. Still, if the injured employee's statement varies at any point during the process, then the employee can be charged with lying.

Frequently, while the employee is being transported to a medical facility, in many cases being steered to a medical facility or a doctor favored by the railroad, the questioning continues all the way to the door of the emergency room. Since the passage of the HIPPA, the number of instances of managers demanding to enter the treating room has decreased. But the employee is again questioned on the return trip. On some occasions the employee who has been medicated and/or have stitches, is not allowed to leave company property. There is more paper work and more questions, and in some cases, the poor victim is transported back to the scene of the accident, many hours after the accident, for a reenactment under the guise of the manager wanting to know exactly what happened to prevent it happening again in the future. This is just another opportunity to get the medicated employee, who is in pain, to make a mistake in explaining what happened so that he may be charged with lying. Sometimes the managers will tell the employee not to take prescription medicine and, instead, to take over the counter medicine instead so that the injury will not need to be reported. The result is that the victim experiences a delay in healing and/or additional pain in order that that the manager involved will not have a reportable injury on the territory and most time gets their safety bonus.

When an injured employee reports an injury, they can expect, while they are convalescing, the game to go on. The railroad will use the threat of being fired to force the employee to return again and again to the railroad's chosen doctors, no matter how much pain the individual is enduring. Sometimes a family member must miss work or school to go to a medical facility far from his home that was selected by the railroad. Many times the company's chosen doctor's opinion disagrees with the UTU member's treating physician. The member is encouraged or threatened to disregard his physician's opining and return to work or else. After returning to work, some injured employees are tested repeatedly for possible rules violations, so they can be fired without that action being attributed to the injury. To create fear in the workforce, many of the actions create an environment so that managers have numerous examples to point to at every location if the UTU member do not play and go along to get along.

The railroads also use bonuses for managers whose record falls below a certain target on the number of accidents reported in their assigned territory. Many times, these bonuses are in the multi-thousands of dollars. Instead of this being motivation to cut down on injuries, it is instead motivation to avoid reporting injuries. This allows those at the top of a corporation to claim that managers are being motivated to be safe This is a damn lie – and they know it. The manager, given the choice of being fired, demoted and/or losing his bonus, and maybe the bonuses of other managers, has motivation on the wrong side. How is this different from the bonuses paid to those who perpetrated Enron and reaped millions in bonuses? Yes, when there is a lay down case presented to upper management of a cover-up, the manager could be fired, demoted or transferred. UTU would also support the transfer of managers who engage in such lying, denial, fraud and reward schemes. I would suggest that they get transferred to such places as San Quentin, Sing-Sing or Leavenworth. Many current railroaders, and former railroaders, are still suffering with untreated injuries. If such action on the part of railroad management is not a crime, it needs to be.

No American should have his medical treatment delayed or denied. Railroad managers use the threat of taking away an employee's job for not doing what is required by federal law. How is this not extortion or fraud? I very much expect that the industry representatives will try to severely mislead this Committee. They will attempt to deny that the problems are as serious as the evidence that has been received by Committee staff shows, or just give them another break because they did not know it was this bad and they will fix it. If they do that, it will be a lie. They have told us the same thing at hundreds of meetings. I believe that it is time to learn from the railroads and threat them as they have treated others. Get tough, really really tough. This activity must be made criminal.

Why would corporations engage in such activity? The answer is simple. In order to save money, much of this problem revolves around the Harriman Award. An award that the industry gives to itself. It claims that it uses "FRA statistics". But where do these statistics come from? They come from the railroads. Garbage in and garbage out. Many years ago, labor chose not to be a part of this shame but yet it goes on. We have been told that the game goes on because the poor unknowing insurance companies use this award as part of the calculations on its premiums.

FRA Oversight

Regarding federal enforcement of this problem, the FRA needs to be much more active in this area. The FRA's investigation of the railroad, which I previously mentioned, was long overdue. I recognize that the FRA is understaffed and, most importantly, does not have enough tools to adequately handle the situation. The UTU appreciates your Committee in H.R. 2095 authorizing more safety inspectors for the FRA. Railroads do not do business behind a fence or a locked door. It operates in almost every community in our nation. As long as they are allowed to play the lie, deny fraud and reward game, the regulators will not get accurate data as to the true safety situation of this industry. This should be a concern of everyone. If the data on safety is not collected accurately because of the cover-up railroad culture, then it cannot be evaluated and precautions incorporated. To allow this endemic problem to go unchecked is a threat, not only to railroad workers, but the stockholders, bond holders, and most importantly to the public as a whole. If such conduct were to happen outside this industry, it would be criminal.

There are some that would like the Committee to believe that the problem is a law known as FELA. The railroads do not like this law and have convinced themselves that is ok to act the way outlined. In other words, they believe that if you don't like a law that applies to them, it is ok to torture your employees until they demand to repeal a law. This is as wrong as torturing someone until they convert because you don't like their religion. Then the torture will stop There is no justification for the railroad actions – none.

I also want to assure the Committee that this situation has absolutely nothing to do with contract negotiations. There is nothing that the railroads can offer at the table that can get this union to approve of this torture.

In conclusion, railroad culture needs a dramatic change when it comes to harassment and intimidation. We are hopeful that the Committee and Congress will do its part in addressing this issue and making such activity criminal.

Questions from Chairman James L. Oberstar

"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
October 25, 2007

1. Do you have any way of knowing how many injuries never actually get reported?

No.

2. Is it a common understanding among employees that reporting an injury is not a very "smart" thing to do? And, is this "common understanding" pretty much the same at all railroads?

Yes, there is a common understanding that it is not very smart to report an injury. I do not know of a single railroad that does not have this common understanding.

3. What do you believe is the best way to rectify the harassment and intimidation problem?

Personal and lengthy criminal penalties with a low threshold.

4. What do you think of points systems or rating systems that identify "risky" employees? Do they create a disincentive to report?

I think a point system is horrible. Rather than identifying a risky employee, it simply makes a victim out of an employee who may have been nothing more than being at the wrong place at the wrong time.

5. Obviously, management has a responsibility to identify unsafe behaviors and attempt to influence employees into working more safely. What would be a better way to do this than the current practice?

Rather than discipline, there should be much more training and support from the highest levels showing that safety really is important and there should be an immediate removal of any supervisor who does not make safety the ultimate importance.

6. Do some railroads handle their employees better than others?

This changes from leadership to leadership but currently the NS is the best in regards to safety culture.

7. **What do you think of the Confidential Close-Call Reporting System, which FRA is experimenting with at certain UP sites and other locales? Is this the right way to go?**

So far it appears to be very good but data is still being collected.

8. Are there other programs that you believe would create a better working environment?

Training and support from the highest management for the rank and file worker who tries to observe safety

9. In your opinion, is there an adversarial relationship between management and employees, which may cause some of these instances of harassment and intimidation to occur?

Yes, because the railroad puts productivity ahead of safety.

10. What is your members' view on the Hotlines that railroad have? Do they feel comfortable coming forward and calling them when they are dealing with unfair workplace injures?

You must be joking. The hotlines are seldom used and the membership does not believe that they produce a positive result. They do not believe that they maintain their anonymity and they do not receive reports back as to the results of their complaint.

11. Do you think that there is a general disincentive for employees to report injuries?

Absolutely, totally, completely and undoubtedly.

12. When you put the word to your members that this hearing was happening, were you surprised at all by the flood of reports that came in?

Considering that our members put their neck on the line, yes I was surprised and it leads me to believe that if these statements could have been made anonymously, there would have been even more reports.

13. Could you estimate for us, unofficially, the percentage of on-the-job injuries that go unreported?

No, but I believe that almost all major accidents such as amputations and deaths are reported and very few of the less serious accidents are reported because of fear.

14. Do you think that the Harriman Award is driving some of these behaviors? Do you think that the Award needs to be changed?

The Harriman Award was originally started with good intentions. It is based on statistics provided to a review committee made up of railroad managers. They review the statistics that each railroad reports to the Federal Railroad Administration. The railroad with the

lowest number of reports per man hour wins. Unfortunately the awards usually go to the railroad that has developed the best method in circumventing reports. In other words, it is an award for fraud - not an award for safety.

James Brunkenhoefer, National Legislative Director
United Transportation Union
304 Pennsylvania Avenue, SE
Washington, DC 20003
202-543-7714

To: U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

From: David F. Cook
2404 Merida Circle
The Villages, Fl. 32162
Ph. 352-751-3242 home/ 407-716-2652 cell
BLET member

Re: Testimony before this Committee on October 25, 2007 regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of American Railroads"

I would like to thank the members for this opportunity to state facts regarding the situation I faced before and after my injury while at work on CSX Railroad in January 2006.

The Seaboard Coast Line Railroad Company employed me in May 1970 when I was 18 years old as a Locomotive Fireman and I was promoted to Engineer position in January 1972. I remained there over 36 years through many mergers until September 2006 on the same property known as CSX. Over those years, I held several positions in union representation for the United Transportation Union thru 1992 and in 1993 I joined the BLE where I assisted members of both organizations with grievances and safety related issues until Sept. 2006.

During 2005 I handled along with the local union Officers a complaint about an unsafe work condition relating to daily, extended overtime, which resulted in employee fatigue. Our Railroad Division sent down an assessment team and made job changes in November 2005, which addressed the long working hours. I was the Senior Engineer in our near 100-man Central Florida terminal at Sanford-Orlando area and occupied one of the newly created 10-hour 5-day jobs. In latter December 2005, I was told by a CSX manager with 5 years experience whom I had helped train, that "if I couldn't work 12 hours EVERY DAY, that CSX would pull me out of service to find out why I couldn't work long days". I asked, "was this a threat", but received no response. I gave this Officer copies of the two working agreements in effect since 1975, of which he wasn't aware of, which showed this forced overtime was not a work requirement.

On Jan. 12, 2006, after working over 10 hours I told the Officer I was tired and felt unsafe since the Locomotive Engineer is the sole operator of the locomotives. He told me to leave and when I returned the next morning at the assigned work time I was ordered to his office and informed that I had FAILED three operational rule tests the workday before, allegedly occurring at the same time he ordered me to leave. I objected and was not aware of any personal test failures since 1993, which started a bad chain of events. I then filed a CSX Code of Ethics violation on 1/28/06 against this supervisor for falsifying my personal employment records, which was dismissed by CSX without any investigation of the facts.

On January 20, 2006 after working 10 hours 30 minutes while an assigned relief crew present and available to take over, the same CSX Officer deliberately held me on extended overtime. I sustained a back and neck injury during a coupling at Taft yard just 7 miles south of Orlando and tried to continue to work with the pain, but after 15 minutes later my back pain was too severe, and I had to report my only career injury after over 12,000 working days. I was taken to the local hospital, but after waiting for 9 hours in a wheelchair and receiving no medical help, I opted to go home after being on duty for more than 21 hours to take some Aleve and lie down. I was on my off days the next two days; then I was ordered by a CSX Officer to take 1/23/06 off and attend a Safety seminar at Taft. I did and told the Officer that I needed a medical check of my condition, which definitely showed an upper back injury and was prescribed three meds for pain and inflammation. This made my injury reportable to the Federal Railroad Administration (FRA). The doctor asked if I wanted to have some time off to give my injury some rest but I opted to try working. The doctor cautioned me against climbing on/off of locomotives, which is part of my work requirements.

Starting at 1110 hours on 1/24/06 my crew and I were attacked by test teams ordered to Taft by the same CSX Officer who took me to have a medical checkup/Safety seminar as a result my personal injury. CSX has claimed that they sent those test teams to determine if the employees were acting in a safe manner. These teams were ordered to administer increased operational rules tests far in excess of the normal 3-5 per employee per month. The FRA regulations require the Railroad Officers to administer normal tests for educational purposes not meant to be disciplinary to improve our rules compliance. However, this was not the purpose of the tests on me. In those three days I was administered 13 tests, yet only 11 were noted. Of these 11, there were two alleged Failures and none of my crewmembers were failed, although they would have failed some of the tests as well. On January 31, 2006, the same Officer who handled my injury, charged me with another minor test Failure by not fully stopping at the bottom locomotive step before dismounting. I had two compliances at the same test time, yet neither of the compliances was recorded at all. CSX was interested in building up a record of rule failures on me.

As a result of five incidents in our area from 12/26/05 thru my 1/20/06 injury involving some 5-8 employees CSX increased FRA operational tests were ordered by CSX Officers from 1/2 through 2/26/07 for a total of 56 days and 457 train and engine employee tests. There were 19 failures by 13 employees. I had seven and 12 others had singular failures. From 1/12/07 thru 2/16/07 (35 days) there 334 total tests with 328 compliances and I alone had ALL six failures. CSX administered these additional operational tests as a cover up of their goal to terminate me. I was the most senior Engineer and very active in handling union grievances/complaints affecting our work location. Terminating me would send a message to other CSX employees not to become injured or not to report injuries in the future.

I was ordered to four separate investigations based on alleged "operational tests" failures

which started with my injury and went thru 1/31/06. No other Failed employees were called to any investigations. In these investigations, the Railroad CSX Officers are the prosecutor, judge, and jury. In addition in the latter three investigations, my crewmembers were not charged but were called as Carrier character witnesses even though in several cases they would have to be guilty of rule violations during the same test times as me (assuming that there were actually violations). Witnesses called by my union representative were refused to be made available by CSX "as having no testimony pertinent to the investigation". I was administered 85 days of unpaid disciplinary suspensions starting 3/1/06. This was more discipline than our combined employee terminal had in over a year and none of these had sustained an injury at work. I was the only employee at this terminal to incur a work related injury from 1/06 until latter 8/06.

In an 18 page letter dated February 18, 2006, I wrote CSX President Michael Ward about these harassing situations and copied several CSX execs, the FRA, DOT, DOL, OSHA, EEOC, the US Dept. of Justice, and 3 local US Congresspersons. CSX replied in latter March '06 and stated that they would investigate each of my points including harassment, employment record falsification, etc. and advise me of their findings. I am still waiting on the first reply. My four discipline cases were appealed by the BLET and we are awaiting hearings on each. My regional union Officer and one of the Congresspersons staff advised me that these actions by CSX towards an injured and/or medically afflicted employee were unethical and unlawful. They suggested that I needed legal advice from a Labor attorney.

In early 7/06 I filed an extensive Federal lawsuit against CSX and CSX Transportation based on discrimination, harassment, and intimidation of me because I was injured while working for these companies. In early August '06 both the UTU and BLET Presidents wrote a joint letter to CSX President Ward about several incidents on their property whereby acts had occurred to injured employees where CSX used written terms of the "CSX Action Plan". This plan carefully directs CSX Officers at each terminal (10 or more on most Divisions) to name 5 BAD ACTORS in each location. Bigger terminals may have multiple lists based on their numbers of employees. In most cases, the employees included on these lists most likely are not notified of their presence on such lists; however Officers are to check on the whereabouts each day of such employees. They are to be targeted, stalked, and followed very closely to find ways to terminate such actors. In early '06 most employees on the Jacksonville Division, where I worked, were specifically warned in face-to-face rule meetings by CSX Officers that, "if you get hurt, we will fire you".

During my suspensions I was being checked regularly by a chiropractor, orthopedic doctors, attending physical therapy sessions, having two MRI's and a nerve test in an attempt to find my pain source. It was discovered that I had 4 bulging discs (2 in upper back/two in lower neck) causing my constant pain. After 9/7/06 I could not work any longer based on my inability to climb, sit extended times on the loco, or stand the whole body vibrations present while using locomotives to perform yard switching. I consulted my doctors and found that only time would tell if my conditions would improve so I filed

for full Railroad Retirement Disability which was granted 3/1/07. The doctors now say they are not optimistic that I will ever improve.

In September '06 I was served with a fifth investigation notice based on several more alleged rules violations using my crew members as witnesses. This was a FINAL step to send me to termination from my employment after I was injured. I was not able to return to neither work nor attend the investigation and after several attempts by CSX to force the hearing, it was decided that it was postponed until I was ever able to return to work. This disappointing treatment by my employer was certainly a mental strain as not only was I faced with my disability and pain, but CSX was now trying paint a picture of me from an excellent, long term employee (who trained many new hires with CSX) to an employee not worthy of any employment. I started in 9/06 with psychiatric counseling and treatments, which continue to date to be able to cope with such treatment.

CSX has been extremely interested in winning the annual Harriman National Safety award and seem to always be beat out by the Norfolk Southern for years. It is common knowledge by CSX employees that Tony Ingram was hired, as CSX EVP & Chief Operating Officer, from the NS a few years ago to show how their record always stayed out front. I believe that the CSX Action Plan and their clear actions against me after Mr. Ingram was hired by CSX, based on written Officer instructions and verbal threats, show that CSX will terminate any employee who reports an injury, using false failure FRA test records or any other harassing and/or discriminating tactics they can manipulate. I and the many other US Railroad workers hope that this hearing and future legislation based on the clear facts you are presented show that we are handled by bullies in our workplace as Officers in a transparent effort to intimidate employees from reporting injuries or face termination. The US workers deserve to be treated with dignity and respect in their workplace and this has not been happening. US Railroad companies are guilty as charged based on the clear facts. While the US Railroads should continue to educate employees to improve safety, intimidating employees through threats and false FRA test failures is an unacceptable means of creating misleading and faulty safety records.

Thank you,

David F. Cook
Long-term US Railroad Engineer

U.S. House of Representatives
Committee on Transportation and Infrastructure

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

Washington, DC 20515

November 7, 2007

John L. Mica
Ranking Republican Member

James W. Coon II, Repoblican Chief of Staff

Mr. David Cook
5430 N. Lake Burkett Lane
Winter Park, FL 32792

Dear Mr. Cook:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

Enclosures (2)

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. What do you think your employer's motivation was for treating you the way they did?
2. Have you ever received any apologies, at the very least, by any company officials for what you've experienced?
3. Did your coworkers encounter harassment and intimidation, which have caused them to not report an injury?
4. Do you believe that harassment and intimidation is widespread and part of normal railroad operations?
5. While you were on the job, did you notice that the safety policies of your employers were readily accessible? Were they posted in common areas, like break rooms?
6. What type of safety training did you receive during your employment? Did any of this training cover workplace harassment and intimidation? Did you ever see a company policy that explicitly stated the types of harassment that you all experienced is not tolerated?
7. Have you ever seen or heard of supervisors or managers being fired or demoted for harassing and intimidating employees?
8. Were you ever aware that your company had a hotline that you could call to report something, such as wrongdoing by a supervisor or an injury that you were afraid to report? What is your view of hotlines?

Questions from Congressman Henry E. Brown, Jr.

1. Mr. Cook, during your years as an engineer, how many times did you couple a locomotive in the same way it occurred on January 20th of last year?

2. Mr. Cook, how long has it been since you acted as a union officer? Has your union claimed that CSX took action against you because of your union-related activities?

November 11, 2007

Responses to Questions from Congressman Jim Oberstar and Congressman Henry E. Brown, Jr. in regards to the 10/25/07 hearing on "The impact of Railroad injury, accident, and discipline policies on the Safety of America's Railroads":

(I) Responses to questions from Mr. Oberstar:

1) I had never seen them act in any manner close to mine. I had seen them for over 30 years lightly discipline people who filed for an injury a few days after the fact when pain had manifested itself and caused that report. In other words whether you thought you were hurt seriously or not, they demanded immediate reports. In addition if you did report such, then you were charged with not taking action to insure you were hurt even though, in many cases, you had no way to prevent such. It was a "catch-all" way to assess discipline.

   In my case, a few local CSX Managers were upset about my union handling of the extended overtime issue in our area and the fact that their bosses chose to make positive job changes to reduce the OT, which I occupied one of new jobs. I had made a clear and distinct effort to show that these long hours were leading to employee fatigue, which was a fact. In my case I had went thru several physicals and was under doctors orders and iron supplements daily. This issue was leading to increased chances of accidents, injuries, fatalities, etc. These two Managers chose to make my job work longer while the relief job was present and available to take over past 10 hours as the jobs were changed and assigned to do. On 1/12/06 the junior Officer at Taft was ordered to add ANY rules failures to my record since I complained about the fatigue after working over 10 hours on 1/12. Three rules violations were noted in my record on 1/12 after I was told to go home if I was fatigued. The senior Officer told the junior that he should have instructed me to continue working and if I refused, charge me with insubordination and "pull me out of service" from any future work.

   On 1/20, while again being held longer past 10 hours, I was injured for my first career injury and CSX chose to make an example of me by the provisions of the "CSX Action plan" to warn others from reporting legitimate injuries. The Officer heading up these actions, which portrayed me as a BAD Actor or "at risk" employee, was the senior Manager opposing my handling of the fatigue issue. He gave orders to attack me with multiple CSX Manager test teams in a clear effort, when I attempted to return to work with an injured back and neck, to find in three days ANY so-called rules violations in an effort to set me up for increased discipline and lastly, permanent termination. This same Officer tried this in February to April 2005 to have me investigated and be fired because of my handling with senior CSX execs about a CSX Conductor at our terminal verbally and physically assaulting CSX employees from 2001 thru January 2005. It also included this local senior Manager falsifying FRA and/or CSX records in 2003 which we provided CSX employee records, the Conductors county arrest records

while on duty and under pay by CSX, official handling by the FRA, etc. In 2005, two senior CSX VP's and a General Manager were fired by CSX resulting from this case and this local senior Manager had it out for me. He was just waiting on another issue for me to be involved in, union related or otherwise, and when I became injured thru no-fault of my own occurring during extended OT hours, the CSX Action plan was his sword. On 10/25/07 Mr. David Brown of CSX testified in the US House hearing that this plan did exist, but not any more since CSX middle Managers carried the intent well beyond what it was intended to accomplish. I was an example of the wrong intents, but it DID happen!!

2) Not one apology has been extended. After I was forced by these actions to file the Federal labor lawsuit in 7/06 by these unlawful harassing, intimidating, and discriminating actions against me directly by CSX, they knew that I had the facts to prosecute them as a US civilian employer using their own written instructions how to handle injured employees. The unions got directly involved the next month. I would like to note that my lawsuit DID NOT add the FELA injury claims until 4/07.

3) My over 100 coworkers were not subjected to the amount of tests I was, and none had any multiple failures. I had seven of 19 total failures from 457 total area tests and 12 others had singular tests during the first two months of 2006 (just before and after my injury). In a 35 day period of these tests, I supposedly failed 6 and 328 others tested ALL passed. Sound strange!! I had four investigations in two weeks and received 85 days of unpaid suspensions from 3-6/06 as a result of these tests results and in September '06 was set for a 5th investigation. Termination was their next step and only one other person was hurt in 2006 after me. In 8/06 a very young Conductor seriously hurt his ankle and never returned to work after several surgeries, so CSX didn't get a chance to act any way to him. By then I had filed my labor lawsuit, the major Railroad Transportation unions had exposed the CSX Action plan, and they put it away as it was now a public embarrassment.

4) During the Action plan existence they was being used on CSX as the UTU and BLET exposed in their long term handling with CSX execs. And other US Railroads, including SCL-CSX, were using similar plans, points, etc., but employee intimidation has been present for decades by our Railroad companies to keep you scared to challenge any issues safety, injuries, or otherwise.

5) Yes, safety policies were posted in many common areas and CSX Managers had many briefings, films, and other instructions to prevent injuries and keep us all safe. Even from the time I hired in 1970, as evidenced by my rules books I still keep copies of, the first rule in these books was "Safety is of the 1st importance". Their methods of enforcing the importance I have earlier explained, but most employees (me included) did everything to be safe every second as this is a dangerous and unforgiving industry. This included practicing safe work methods, wearing the correct safety equipment, shoes, side shield glasses, earplugs, etc. Then in early 2006, after I was injured, CSX Managers told many employees in

face-to-face rule meetings "if you get hurt, we will target and test you until we get rid of you". The CSX Action plan had emerged and was in full practice.

6) I hope I explained the training in question 5 herein, but a few years ago CSX instituted "job briefings" required on any jobs where more than one employee is involved. This requires each and EVERY employee involved in a work move to be fully aware of any requirement to make this move. And if it changes before completion, then the movement is stopped until ALL involved are aware of this change and understand such. CSX encouraged questions until ALL understood BEFORE the work started. This slowed down the work, but made it much safer and that was the top importance ALWAYS.

   Yes, CSX posted their harassment policy in all work areas, break rooms, etc. and each year sent to each employees home a copy of the CSX Code of Ethics which further illustrated their commitment to these policies. On annual employee rules tests we took over the computer, there was always a section with explanations and about 10 different examples of sexual or racial harassment/discrimination we were tested on. If you picked the incorrect response, the program gave the right responses and explained its importance. There was never a specific example of what happened to me, except CSX employees would always be treated with dignity and respect. I and others had NEVER heard of our RR being so directly rotten to an employee, injured, medically afflicted, or otherwise.

   After my three false failure tests on 1/12/06, I filed a CSX Code of Ethics complaint in latter 1/06 as these violated the Code of Ethics, were not true, and was immediately dismissed by my Division senior Manager as he reported to CSX Human Resources and Executive Vice-President that I was not harassed. I received no knowledge of his response until last month in info from my lawsuit.

7) Yes, in past years and, as I stated earlier in answer 1 herein, my new senior Division Manager told me, my local union representative, and the Division Ass't. Superintendent, at Taft-Orlando, Fl. in early 4/05, that two senior CSX VP's and our former Division Mgr. were fired by CSX. They were attempting to terminate me about my handling from 2001 thru 1/05 about the uncivil, vicious, and unlawful repeated acts of a Conductor at our work location and the records falsification by one of my Managers. Other RR managers have been fired or demoted in the past for bad actions toward RR employees, which clearly violated CSX policies.

8) We have had a safety hotline for our separate divisions for years and I have called them several times to report unsafe issues. Usually within a few days or no more than 30 days, the corrective actions are taken based on their severity. Also you can report either verbally or in writing to your local RR Officers or union Officer, but the safety hotlines seemed to work very effectively.

I guess you could use that hotline for harassment, wrongdoing of supervisors/managers, etc., but I would contact them on the CSX Code of Ethics hotline. Injuries should be reported to your immediate local supervisor right away, such as I did. In my case though the CSX Code of Ethics complaint was trashed when other employees with MUCH less importance was handled properly and after I reported my injury, as required to do by CSX rules, it started an immediate retaliation, intimidation, targeting, stalking, harassment, and personal discrimination based solely on this injury report using the CSX Action plan.

(II) Responses to questions from Mr. Henry E. Brown, Jr.:

1) In over 12,300 days and 36 years well over 200,000 couplings based on a minimum of 20 per day. In yard, local, or road switcher work, we had over 100 couplings each day and most involved jolts and vibrations to the locomotive cab occupants, such as an Engineer as I was. I was coupling with two locomotives and the jolts are more distinct, such as the one when I was injured, because you are right at the point of impact and you feel them MUCH more, even at 1 mph or more. All switching movements with cars attached involve run in or out of slack in the cars based on their combined weights and the speed traveling and they could cushion some impact. Our rules don't allow for couplings over 4 mph and mine occurred at 2 mph according to the locomotive event recorder.

It has now been discovered that we were also receiving whole body vibrations transferred from the track structure, through the wheels and locomotive bodies, and loco seats which lodged in our backs and/or necks attempting to compensate for the jolts, etc. involved in most couplings every day. US Railroad companies are aware of these studies for nearly 10 years suggesting in order to protect us better from injuries that more high-back, ergonomic seats are to be used on our locomotives. The newly ordered locos do have these, but the older fleet locos, such as I was required to use for years coupling, are not ergonomically safe and unsafe to our bodies based on these jolting vibrations. I was not aware of this fact until the jolt on 1/20/06 on extended overtime shot an extremely sharp pain to my upper back and neck which I now feel ALL day everyday.

It should be noted that a pioneer in the field and studies of whole body vibration on US and European locomotive and/or subway operators is Dr. Eckardt Johanning in Albany, NY. I went to him on 8/20/07 to personally be evaluated as a result on my injuries and he will be at CSX Taft yard, Fl., where I was hurt, performing extensive whole body vibrations testing on locomotives on 11/15/07 to research my case.

2) I was last a UTU Officer at both the local and General Committee levels until 12/92 and have helped local employees since with issues they requested me to handle involving many unlawful, uncivil, or unsafe issues on CSX. My union supported me and represented me in all four of my investigations in early 2006 right after my injury. In addition, they appealed all my discipline cases for a hearing on each before a neutral party under the Railway Labor Act. The BLET

and UTU have each handled mine and other issues of harassment and discrimination using the written CSX Action plan whereby I was openly targeted, stalked, and intimidated to be terminated from employment only after I reported my only career the job injury on 1/20/06 and earlier union-related activities.

My union which includes the Teamsters has nationally handled my issue, others similar, and falsification of RR employee test records since 8/06 until the present and in mid '06 suggested that mine was so deliberate and intentional that I needed legal advise. One of the local Florida Congressperson's staff suggested the same. Since my filing with extensive facts in this Federal suit in 7/06 and the handling by the two unions of these issues, CSX according to VP David Brown's 10/25/07 hearing testimony, has stopped using the CSX Action plan. They were embarrassed by the unlawful and unethical methods their managers used in regards to this plan, not only in my case, and they should be.

I thank you for your time and please forward more questions so that you and this country will understand that we need laws to protect civilians from such bad and deliberate actions by US employers.

Sincerely,

David F. Cook
Disabled US Railroad Engineer

TESTIMONY OF CHARLES R. EHLENFELDT
1115 West Deschutes Avenue
Post Falls, ID 83854
208-777-2576
BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
OCTOBER 25, 2007

INTRODUCTION

Mr. Chairman, Members of the Transportation and Infrastructure Committee, thank you for allowing me to testify today and listening to my personal experience of harassment and intimidation by the BNSF. This harassment and intimidation began after I was injured. I was investigated by the railroad on two separate occasions. I was prohibited from marking off work based on my injury. Finally, I was terminated for doing something that numerous other employees, including officials, had done. In fact, another employee engaged in the same activity as I had and to my knowledge, she was not terminated. The only difference is that I had an FRA reportable injury.

I hope that my personal experience of harassment and intimidation by the BNSF will prompt action by Congress to prevent future workers from having to endure harassment and intimidation.

FRA REPORTABLE INCIDENT- INACCURATELY REPORTED

I was hired by the BNSF in July of 1997. I remember being extremely happy that day and I planned on working for the railroad for my entire life. Everything changed when I injured my back on August 1, 2002 while operating a poorly maintained switch. Since the accident, I have had two major back fusion surgeries. From the date of the incident, I have been harassed, intimidated, and treated unfairly by the railroad. I was called into the Supervisor's office almost immediately after the incident. Both the Superintendent and Trainmaster were in the office. I had no Union representation or even a neutral person with me at that time. The two officials closed the door and drilled me with questions.

Photographs of the switch, which were taken on the date of the accident, were only given to me this past week, FIVE years after they were taken, and show the poor conditions. [Ex. 1]. The photographs show that the ties are hanging off the ground. The ballast is supposed to come up to the ties. I also gave a statement to a BNSF claim agent. The railroad states that they have lost the statement I gave along with a statement a co-worker gave. In addition the switch was tested on the day of the accident and showed that it was hard to operate and not within acceptable limits. [Ex. 2]. Despite these facts, the BNSF reported the cause of my injury to the FRA as human factor; they blamed me for the injury. [Ex. 3]. In my opinion, the BNSF did not accurately report my incident to the FRA.

ATTENDANCE/AVAILABILITY POLICY USED AS FORM OF HARASSMENT

The BNSF used my injury to assess trumped up rule violations against me. When I could not work due to my injury and pain in my back I attempted to call work and tell them I could not work due to my back injury. They BNSF would not allow me to stay home from work for that reason. I had to lay-off sick, rather than lay-off due to my on the job injury. This counted against me in BNSF's "attendance policy". I was eventually called to attend an investigation where they alleged I violated the attendance policy. It did not matter to the BNSF that I was injured on the job and was laying off due to the injury. It did not matter to the BNSF that two supervisor's could not explain the attendance policy to me prior to the trumped up charges being assessed against me. I had an on the job injury and the BNSF was going to punish me for that.

This practice may also lead to the inaccurate reporting to the FRA about the number of days an employee misses due to an injury. Rather than allowing me to lay off due to my on the job injury, the BNSF forced me to lay off sick.

HEALTHCARE INSURANCE USED AS A METHOD OF HARASSMENT

The BNSF eventually terminated me because I had an FRA reportable injury. This in turn cancelled my healthcare insurance and I was forced to take COBRA coverage which was $560.00 per month just for myself. The BNSF conveniently pulled my healthcare insurance just prior to my second back surgery.

While I was in the hospital having my second major back fusion surgery, the BNSF towed my car. They did not call and inform me that it was in jeopardy of being towed. I found out five days later from a fellow employee that the BNSF towed my car. I had to go to the impound lot and pay about $600.00 to recover the vehicle.

PERMANENT DISMISSAL USED AS A METHOD OF HARASSMENT

The most egregious form of harassment and intimidation came when the BNSF terminated me. I believe they terminated me because of my at work injury on August 1, 2002. On January 6, 2006, while working on a train I heated a can of soup on the sidewall heater. I had to do this because there is no other way to heat food on the train. As an engineer we often work twelve hour days. When I opened the can of soup it splashed on my face and I sustained some second degree burns. I reported this incident to the BNSF as I am required to do.

I went to the emergency room for the burns. I initially turned down pain medication from the doctor because I was worried that the BNSF would fire me for having drugs in my system. This was based on the prior harassment of the BNSF. I eventually was given morphine. While at the emergency room and on morphine two BNSF officials questioned me about the incident and wanted me to sign, what I believe, was a release of liability form.

The BNSF then required me to attend an investigation concerning this incident. Prior to the investigation beginning, I gave the railroad a doctors note that I was unable to work for the BNSF due to my back injury. [Ex. 4]. In what is more than a coincidence, I was permanently terminated after the investigation.

In the investigation, Randy Cartwright, Roadforeman, a BNSF official, admitted that it was common practice to heat food on locomotive equipment, including sidewall heaters. [Ex. 5]. Mr. Cartwright had been with the railroad since 1969 and he himself had used locomotive equipment to heat food. [Ex. 5]. To my knowledge he was never investigated by the railroad. He also testified that he knew that other people had used the sidewall heater to heat food in the past. [Ex. 5]. Despite the railroads knowledge, for many years, of this common practice there was never a rule against this practice and employees were never told not to use the sidewall heater. [Ex. 5]. In his deposition, Mr. Cartwright could not explain, in his position as a railroad official, why I was fired and he was not when we both had engaged in the same common practice. [Ex. 6].

The BNSF did issue a specific rule after two incidents occurred in the same month, my incident being one of those. [Ex. 7]. This was the first rule telling employees not to engage in this common practice that the railroad knew about. As I just stated, another employee heated food on a sidewall heater the same month as I did. To my knowledge, this employee was offered a waiver, this option was not available to me. To my knowledge this employee was not terminated. The only difference is that I had a prior FRA reportable injury.

This FRA reportable incident automatically places me in a compromised state of employment. I am aware that the BNSF has a risk assessment program. Under this program, employees are given 40 points if they are involved in an FRA Reportable incident. [Ex. 8]. Employees are only given five points if they are involved in an incident that is NOT FRA reportable. [Ex. 8]. I was involved in an FRA reportable incident. A BNSF Trainmaster told me I was a red employee because of my back injury.

EFFECT OF THE HARASSMENT, INTIMIDATION, & UNFAIR TREATMENT OF THE BNSF

I believe the facts of my case show that the BNSF harassed and intimidated me because I was involved in an FRA reportable incident. At a time when I was physically hurting; I had two major back surgeries and was in significant pain; the BNSF made the conscious decision to kick me while I was down. They cut my healthcare insurance during the time I was scheduled to have my second major back surgery and while I was in the hospital they towed my car. They brought trumped up charges against me on two occasions and assessed discipline both times. The second trumped up charge resulted in permanent dismissal. I was dismissed for heating soup on a sidewall heater, a common practice that the railroad knew about. A practice which no rule prevented. A practice that company officials had done. A practice that another employee did the same month, again, to my knowledge that employee was not permanently dismissed. The only difference between my case and the numerous other employees that have done the same thing,

including company officials, is that I had an FRA reportable incident.

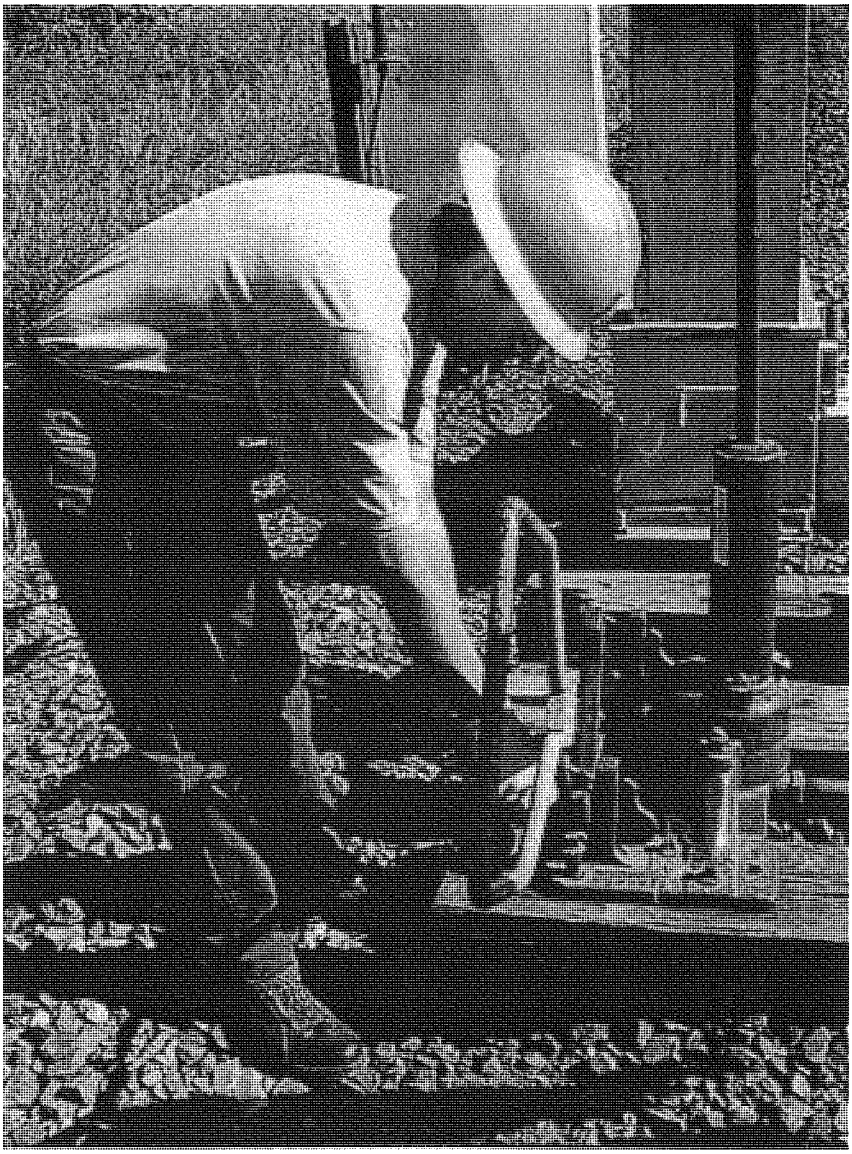
If I knew the level of harassment and intimidation that the BNSF would put me through when I had my FRA reportable injury in 2002, I would not have reported my injury. The level of harassment and intimidation that I have testified to today far outweighs any benefit from reporting my injury.

I have been told by fellow employees that the BNSF has used my personal case of harassment and intimidation as a method to deter the reporting of injuries. Fellow employees have told me that statements such as "look at Ehlenfeldt, if you turn in an injury you know you'll have a target on your back", "look at Ehlenfeldt as an example of someone who retains an attorney for a personal injury . . .see where he is working now", and "You had better think twice about turning in an injury unless you want to be fired like Ehlenfeldt" have been said by BNSF officials.

Mr. Chairman, and members of the Committee, thank you for listening to my story and taking on the issue of railroad harassment and intimidation. Individual employees, such as myself, are no match against the large railroad corporations, such as the BNSF. I believe we need congressional action to solve this serious injustice. Thank you.

Charles R. Ehlenfeldt

Switch pressure test at MP 1401.6
08/01/02.
Post injury: Ehlenfeldt
EXHIBIT
1



Switch Pressure Test Parameters

EXHIBIT
tabber
2

1. Ensure that a switch is calibrated for the green range of forces under the following circumstances:

    - When inspecting a switch during regular turnout inspections
    - When installing a new switch and again within 1 week after
    - **Yellow range:** Forces shown in the chart below. Schedule the switch for maintenance.
    - **Red range:** Forces above the yellow range (see the table below). The switch must be taken out of service per instructions in section 9.1.3A.

Yellow Range Force Measurements for Hand Operated Switches			
	Handle Position		
	Lift Up	Middle (Across)	Push Down
Torque Wrench Dial Reading (Ft-Lbs)	30-130	60-90	80-115

* Note: See Figure 9-5 for the correct handle position.

Three man inspection and pressure test report, well within parameters

L.S.-Sw#	Date	Yard	M.P.	Stand Type	Point Type	Stand Model	Switch Location-Main
036-234	8/1/02	Boyer	1401.26	High target	19'6" welded 132 lb.	Racor 36H tri-handle	thur on Main

Switch Location-Turnout	PreTest Main / Turnout	Test Main / Turnout	Frog	gc
in Boyer Yd Newport	20-60-60 / 20-55-70	20-60-60 / 20-55-70	rbm, good,tighten	54 1/2"

Work Done	Tested by	Weather	Note	Last tested
	DGF,CJF	WARM	3 MAN TEST. INJURY ON 8-1-02 AT 2AM.	6/5/01

FROM FORM FRA F 6180.55A

CASUALTY RECORD

RAILROAD:	BNSF Rwy Co. [BNSF]	**INCIDENT NUMBER:**	NW0802001
DATE:	08 /01 /2002	**TIME:**	2:10AM
STATE:	Idaho	**COUNTY:**	BONNER
TYPE PERSON:	Worker on duty - employee	**AGE:**	30
EMPLOYEE JOB:	Road freight conductors (local and way freight)		
INJURY:	Sprain/strain, lower back		
DAYS ABSENT:	86	**DAYS RESTRICTED:**	237

EMPLOYEES TESTED FOR ALCOHOL USE:	NONE REPORTED
NUMBER OF POSITIVE TESTS:	
EMPLOYEES TESTED FOR DRUG USE:	NONE REPORTED
NUMBER OF POSITIVE TESTS:	
EMPLOYEE TERMINATION/PERMANENT TRANSFER:	NO
EXPOSURE TO HAZARDOUS MATERIAL:	UNK/NA
FRA FORM 6180-54 FILED:	NO
FRA FORM 6180-57 FILED:	NO

CIRCUMSTANCES

PHYSICAL ACT:	Lining switches
EVENT:	Overexertion
RESULT:	Switch
CAUSE:	Human factor

LOCATION

SITE:	Yard
ON TRK EQP:	Did not involve ontrack/other equipment
WHERE:	On track

NARRATIVE

EXHIBIT
3

DR. RICHARD R. SAMUEL, M.D., A.B.F.P.
8660 N. HESS STREET, SUITE 1
HAYDEN, ID 83835
(208) 772-5204 LIC # M7185

NAME Charles Eichenfeldt AGE
ADDRESS DATE 2/21/06
Rx ILLEGAL IF NOT SAFETY BLUE BACKGROUND

Rx To whom it may concern – Mr. Eichenfeldt saw me today and was seen to work based on the fact that he was having pain. However, he complains of some significant back pain and [illegible] radiculopathy which work with aggravation at the point. He therefore can't return to his job description at least until his neurosurgery appointment March 2, 2006.

Refill # ____ PR ____
Brand Only ☐

Brand Medically Necessary must be handwritten by the practitioner for medicaid patients or product selection will be allowed

6AFP1140592

EXHIBIT
tabbies
4

Investigation Data Worksheet

Audio File: NWE-2226-EHLENFELDT_Tape1_86min.wav (38724)
Submitted by: WARD ANGELOS
Pages: 25 (excluding cover page)

Date Submitted: 23-Feb-06
Date Draft copy of Transcript is required: 02-Mar-06
Final Transcript Due Date: 07-Mar-06

BNSF FILE NUMBER: NWE-TYE-02222006-1010-1170976-EHLENFELDT

Cross Reference Number: 0
Cost Center: 61588
Division Code: NWE
Department Code: TYE

Conducting Officer: WARD ANGELOS
Email: WARD.ANGELOS@BNSF.COM Phone: 509-546-0107

INVESTIGATION INFORMATION
Location: SPOKANE, WA Date: 22-Feb-06 Time: 10:10
Date of Incident: 10-Jan-06 #Exhibits: 14 #Pages: 25

PURPOSE OF INVESTIGATION:
Injury on duty

Principal: CHARLES R EHLENFELDT EID: 1170976 Craft: ENGINEER

Representative: JAMES J LARKIN Title: LOCAL CHAIRMAN Org: UTU

Witness: RANDY D CARTWRIGHT Title: ROADFOREMAN
Witness: JEFF B WHITACRE Title: HAUSER OPERATIONS MANAGER
Witness: CLARK T SIMMONS Title: TERMINAL MANAGER

EXHIBIT
tabbies
5

1 WARD ANGELOS: If that' s indeed true is that the correct
2 use of a sidewall heater on a locomotive?
3 RANDY D CARTWRIGHT: No, it is not.
4 WARD ANGELOS: I believe you stated in earlier testimony
5 that you tried to call Mr. Ehlenfeldt twice on the day
6 following his injury, is that correct?
7 RANDY D CARTWRIGHT: That is correct.
8 WARD ANGELOS: And what number did you use to contact him?
9 RANDY D CARTWRIGHT: I' m not sure, I used the CC Employee
10 where they have their latest phone numbers listed.
11 WARD ANGELOS: So it was the number of record in CC
12 Employee?
13 RANDY D CARTWRIGHT: Correct.
14 WARD ANGELOS: Thank you Mr. Cartwright.
15 CHARLES R EHLENFELDT: ____
16 WARD ANGELOS: Mr. Ehlenfeldt, try not to whisper, it
17 confuses the transcriptionist.
18 CHARLES R EHLENFELDT: Alright.
19 WARD ANGELOS: Mr. Larkin, anything further?
20 JAMES J LARKIN: Sidewall heaters, engine reservoirs, have
21 you ever known anybody to heat food on those in the past?
22 RANDY D CARTWRIGHT: Yes.
23 JAMES J LARKIN: Has it been standard practice for years?
24 RANDY D CARTWRIGHT: I don' t know about standard practice,
25 but it' s been used a lot.
26 JAMES J LARKIN: Again how long have you been an Engineer

1 and Fireman?

2 RANDY D CARTWRIGHT: Since 1969.

3 JAMES J LARKIN: Was not probably one of the first things

4 you were shown how to heat up your can of soup on the

5 water reservoir in a GP7F9?

6 RANDY D CARTWRIGHT: Wouldn't say it' s the first thing I

7 ever learned but...

8 JAMES J LARKIN: Close?

9 RANDY D CARTWRIGHT: I was, I wouldn't say I was taught but

10 I knew how to do it.

11 JAMES J LARKIN: So this has been a common practice

12 throughout the years, heat food?

13 RANDY D CARTWRIGHT: Yes.

14 JAMES J LARKIN: Up until this time, when this safety alert

15 dated January 23rd, 2006 was put out and also the General

16 Notice 905, dated January 23rd, 2006, has anybody taken

17 exception to that, to your knowledge?

18 WARD ANGELOS: Can I ask that you enter those into

19 transcript Mr. Larkin?

20 JAMES J LARKIN: Yes.

21 WARD ANGELOS: We' ll enter Safety Alert...

22 JAMES J LARKIN: Excuse me.

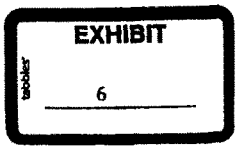
23 WARD ANGELOS: Yes, sir?

24 JAMES J LARKIN: Take this one, that' s one' s got email

25 addresses on it.

26 WARD ANGELOS: Okay.

1 IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT
2 OF THE STATE OF MONTANTA,
3 IN AND FOR THE COUNTY OF YELLOWSTONE
4
5 CHARLES R. EHLENFELDT,
6 Plaintiff,
7 vs. Case No. DV 05-0322
8 BNSF RAILWAY COMPANY,
9 a Delaware corporation,
10 Defendant.
11 _____
12
13 DEPOSITION OF RANDY CARTWRIGHT
14 Taken on behalf of the Plaintiff
15 March 14, 2007
16 - - -
17 BE IT REMEMBERED THAT, pursuant to the Washington Rules of
18 Civil Procedure, the deposition of RANDY CARTWRIGHT was
19 taken before KATHERINE S. VANGRINSVEN, a Certified
20 Shorthand Reporter, #3085, on March 14, 2007, commencing at
21 the hour of 2:18 p.m., the proceedings being reported at
22 3810 East Boone, Spokane, Washington.
23
24
25



1 Q As an official, will you look at the camera and
2 tell the jury why you, with a personal injury on a
3 railroad, and you've also acknowledged that you've done the
4 exact same thing, put a soup can on an apparatus in an
5 engine that it was not designed for, why you're still
6 working for the company and why Mr. Ehlenfeldt's fired.
7 MR. SIMPSON: Objection, foundation.
8 MR. JUNGBAUER: Just look at the camera and tell
9 them why.
10 MR. SIMPSON: I need that question again.
11 MR. JUNGBAUER: Yeah. Would you read that back
12 to him, please.
13 (Whereupon, the pending question was read back.)
14 BY MR. JUNGBAUER:
15 Q Yes. Now look at the -- tell the jury that,
16 please.
17 A I can't.
18 MR. JUNGBAUER: I have no further questions.
19 MR. SIMPSON: We'll reserve.
20 MR. JUNGBAUER: Okay.
21 THE VIDEOGRAPHER: Here marks the end of the
22 videotape deposition of Randy Cartwright. We are off the
23 record at 2:23.
24 (Whereupon, the deposition concluded at
25 2:23 p.m.)

1 CERTIFICATE
2 .
3 I, Katherine S. VanGrinsven, do hereby certify
4 that pursuant to the Rules of Civil Procedure, the
5 witness named herein appeared before me at the time
6 and place set forth in the caption herein; that at
7 the said time and place, I reported in stenotype all
8 testimony adduced and other oral proceedings had in
9 the foregoing matter; and that the foregoing transcript
10 pages constitute a full, true and correct record of such
11 testimony adduced and oral proceeding had and of the
12 whole thereof.
13 .
14 IN WITNESS HEREOF, I have hereunto set my
15 hand this 16th, March, 2006.
16 .
17 .
18 _____ _____
19 Signature Expiration Date
20 .
21 .
22 .
23 .
24 .
25 .

Safety Alert

January 23, 2006 **A-2006-03**

Burns from Hot Soup

Date and location of incident
January 2006, Northwest Division

Description of incident
In two separate incidents this month, BNSF employees sustained second-degree burns when cans of soup that had been heated on the sidewall heaters of their locomotives exploded as the employees opened or prepared to open the cans. The sudden and unexpected explosion of these soup cans caused the heated contents to be discharged onto exposed skin of their faces and hands. Heating items in such as manner should never be attempted because the content's temperature cannot be determined or controlled.

Preventive Measures
Employees should prepare soups and other hot liquids before going on duty and transfer them to a thermos in a controlled environment in their home or hotel kitchen. The liquids can then be transferred to the thermos top or other appropriate container for cooling and consumption when the movement of on-track equipment stops.

Do not use locomotive sidewall heaters or any other locomotive equipment to heat or prepare food. Locomotive sidewall heaters are not designed or intended to be used to heat or prepare food. Such use alters the intended function of these appliances and is not permitted.

Remember, all BNSF employees are empowered to work safely. If you think a condition is unsafe, protect it, report it, assist in correcting it, or use your expertise to provide a better and safer way.

REMEMBER - All BNSF employees are empowered to work safely. If you think a condition is unsafe, protect it, report it, assist in correcting it, or use your expertise to provide a better and safer way.

EXHIBIT
7

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Risk Identifiers Based On The Following Points

Incident(s) Date	POINTS					
	Reportable Injury (excludes 9A/B)	Non-Reportable Injury (excludes 9A/B)	Reportable Human Factor Accident (excludes H312)	Non-Reportable Human Factor Accident (excludes H312)	Ops Testing Failure (excludes 600 series)	Ops Testing Failure (600 series, including 699)
0 – 12 months	40	5	30	15	20	5
13 – 36 months	25	3	15	8	13	3
37 – 60 months	10	1	5	3	7	2
60 + months	0	0	0	0	0	0

Listed below are the thresholds for each work group.

	Red	Yellow	Green
MOE	25+	6-24	0-5
MOW	28+	10-27	0-9
OTHER	11+	1-10	0
TYE	47+	24-46	0-23

EXHIBIT

8

U.S. House of Representatives
Committee on Transportation and Infrastructure

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

Washington, DC 20515

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

November 7, 2007

Mr. Charles R. Ehlenfeldt
1115 West Deschutes Avenue
Post Falls, ID 83854

Dear Mr. Ehlenfeldt:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

Enclosure

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. What do you think your employer's motivation was for treating you the way they did?
2. Have you ever received any apologies, at the very least, by any company officials for what you've experienced?
3. Did your coworkers encounter harassment and intimidation, which have caused them to not report an injury?
4. Do you believe that harassment and intimidation is widespread and part of normal railroad operations?
5. While you were on the job, did you notice that the safety policies of your employers were readily accessible? Were they posted in common areas, like break rooms?
6. What type of safety training did you receive during your employment? Did any of this training cover workplace harassment and intimidation? Did you ever see a company policy that explicitly stated the types of harassment that you all experienced is not tolerated?
7. Have you ever seen or heard of supervisors or managers being fired or demoted for harassing and intimidating employees?
8. Were you ever aware that your company had a hotline that you could call to report something, such as wrongdoing by a supervisor or an injury that you were afraid to report? What is your view of hotlines?

1. **What do you think your employer's motivation was for treating you the way they did?**

   I think one reason they treated me like this was to make an example of me to deter fellow employees from reporting injuries. The superintendent in Spokane, WA, my home terminal, T. Clark Simmons, has personally used my injury as an example to deter the report of injuries in Spokane/Hauser terminal through harassment and intimidation of other railroad operating employees. I believe another reason is management personnel are paid bonuses on safety goals. When I was injured it impacted their bottom line at bonus time. I believe that local management was upset that I returned to work after my first back surgery. I don't think they expected me to return to work due to the severity of my injury. Railroads do not want to deal with seriously injured employees. They want them to go away. They would rather have the employee be forced from railroad work and have the tax payers of the United States pay to take care of the injured employee, rather than the railroad. This is the reason the railroads want to get rid of FELA; to have the United States government i.e. taxpayers, pay to take care of the injured employees even during a time that millions of dollars of bonuses are paid yearly to upper management and railroads are cashing in on record profits.

2. **Have you ever received any apologies, at the very least, by any company officials for what you've experienced?**

   No, not one apology of any sort or form.

3. **Did your coworkers encounter harassment and intimidation, which have caused them to not report an injury?**

   Yes, as I matter of fact they laugh at the thought that railroad management claims they have zero tolerance of harassment and intimidation.

4. **Do you believe that harassment and intimidation is widespread and part of normal railroad operations?**

   Yes. 110% absolutely yes. I can't stress this fact enough. YES.

5. **While you were on the job, did you notice that the safety policies of your employers were readily accessible? Were they posted in common areas, like break rooms?**

   The safety rules were usually accessible if the computers were functioning. We were required to have our own personal rule book. We were required to check for updates to the rules on every tour of duty via the computer. The railroad has amendments to the rule book in one form or another on an almost daily occurrence. They change rules so often that you can not keep up with the changes. In addition the railroad will retract and reinstate rules with the most subtle of

changes that most employees don't understand what the rule is by the time they read the change. The slight change of wording of a rule is almost exclusively to direct blame from the employer liability to employee liability. As for safety policies, I would say that I don't believe I can recall any posted policies.

6. **What type of safety training did you receive during your employment? Did any of this training cover workplace harassment and intimidation? Did you ever see a company policy that explicitly stated the types of harassment that you all experienced is not tolerated?**

   I went to conductor training school for three weeks and had on the job training for approximately five months when I hired out July 28, 1997. I attended engineer training for two weeks and on the job training for approximately five months followed by one more week of school to receive my engineer license. I also had to update my engineer's license by having a check ride and a review test annually. I received breathing apparatus class which teaches employees how to put on an oxygen mask for artificial breathing in case of a derailment or minor disaster that may occur in the few 10 mile long tunnels that we have on our trips. I also attended classes on proper railroad car/bad order/air brake and safety inspections due to the fact the railroad required trainmen to do airbrake and car safety inspections in our territory.

   To my knowledge the only harassment and intimidation training covered was sexual harassment.

   I never saw a company policy that explicitly stated the types of harassment and intimidation that I experienced were not tolerated.

7. **Have you ever seen or heard of supervisors or managers being fired or demoted for harassing and intimidating employees?**

   I have never heard of any supervisor or manager being fired or demoted for harassing or intimidating employees. I have seen harassing and intimidating managers/supervisors get PROMOTED. I know a lot of employees and have worked in almost every terminal in the northwest district and I have NEVER heard of a supervisor being fired for harassment or intimidation of ANY KIND.

8. **Were you aware that your company had a hotline that you could call to report something, such as wrongdoing by a supervisor or an injury that you were afraid to report? What is your view of hotlines?**

   Yes, I was aware the company had a hotline.

   My view on a company sponsored hotline is that I WOULD NOT TRUST a company sponsored hotline. The www.utu.org website reported on a story October 25, 2007, concerning the BNSF RR. The BNSF RR wants to sue an open

chat website or a "BLOG" site to find out who wrote in and made comments about the BNSF RR so they can pursue legal action against the authors of the comments. This is a perfect example of why an employee should not trust the railroad safety hotlines. I have also heard of railroad management retaliating against employees who HAVE used the hotline.

In my opinion, the FRA should have the hotline and it should have a check system to prevent fraud by the railroads.

Sincerely,

Charles Ehlenfeldt
1115 Deschutes Ave.
Post Falls, ID 83854
208.777.2576

Testimony
of
Robert M. Grimaila
Senior Assistant Vice President
Safety, Environment, and Security
Union Pacific Railroad
1400 Douglas Street
Omaha, Nebraska 68179

October 25, 2007

Before the
United States House of Representatives
Committee on Transportation and Infrastructure
Hearing on
"The Impact of Railroad, Injury, Accident, and Discipline Policies on the Safety of America's Railroads"

Chairman Oberstar, Ranking Member Mica, and Members of the Committee, my name is Bob Grimaila. I am the chief safety officer at Union Pacific Railroad, and I appreciate the opportunity to address the role of railroad policies in promoting safety for you today on behalf of Union Pacific Railroad.

At Union Pacific, safety is our first priority. This means ensuring that every one of our employees does their job in a safe manner and goes home safely every day. Our safety program is more than just rules compliance. It is a commitment to a vision and a process aimed at creating a total safety culture where managers and employees work together to enhance safety at all levels. We have instituted a number of innovative programs to cultivate this vision, which I will outline in my testimony.

Our goal is zero accidents. To enable us to get to our goal, we have systematic processes and explicit policies for managing safety programs and reporting. Unfortunately, accidents do sometimes occur. Our Internal Control Plan (ICP) and our safety policies specify how our managers are to handle personal injuries and the associated reporting. The ICP also spells out the complaint procedures available to all employees to report a potential violation of policy or an instance of suspected harassment

and intimidation. Reporting is done on a confidential basis and with the assurance of no retaliation. This policy and complaint process, which is posted on bulletin boards across our system for employees at their work locations, is attached to my testimony.

We are committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. In addition, Union Pacific will not tolerate harassment or intimidation of any person who seeks proper medical treatment or reports an accident, incident, injury, or illness. Disciplinary actions – up to and including termination of employment – will be taken against any employee, including supervisors, managers, or officers of the company, who commit a violation of this policy.

We do expect our managers to run a safe railroad, and those that prove better able to do so are going to have more successful careers at Union Pacific. However, the way that a goal is achieved is just as important to us as reaching the goal. Any manager who tries to make himself or herself look better by suppressing accident reports is going to have NO career at Union Pacific.

These are not just words, and we have proven this with our actions. At Union Pacific we back up this policy by taking strong action against those who violate the policy. Some may point to violations and disciplinary actions as an admission that some managers do not adhere to our policy, and they would be right. However, our processes do find them. We believe our actions in these cases show that we are serious about compliance, and that these cases of deviation are the exception, not the rule. Although these cases are unfortunate, our handling stands as evidence of our commitment to live up to our own expectations and that we will not tolerate unethical behavior. In fact, we have issued discipline to sixty-one managers for safety policy violations, including the dismissal of four high level operating managers in the last few years. As a critical part of our vision for safety, we are working hard to drive these to zero.

Today we are moving beyond the traditional command and control approach to safety. A basic safety program involves rules, rules training, testing and compliance enforcement -- a mixture of training and discipline systems. The next step involves safety committees with craft employees working together with their supervisors – the people closest to the work. We know from science and from benchmarking other industries that increasing the level of safety for our employees would be limited if we stopped at this point. As a result, we have taken a path forward for safety which I will briefly describe by summarizing three programs we have underway at Union Pacific.

Part 217 Testing – Field Training Exercises

We are required by FRA regulations to test employee competency in our operating rules. Under an older model, employees were given a certain number of points at the beginning of the year, and these points were deducted if an employee did not, for example, adequately complete rules testing or were observed to violate a safety rule. After a certain number of points were deducted, the employee was subject to training and/or discipline. Today, while points are still deducted for failure to pass a test on the operating rules, we have a much greater emphasis on coaching rather than discipline. In a process that was developed with labor, first and even second offenses are regularly handled with coaching and training, and employees now have the opportunity to earn points back by demonstrating competency in the application of the rules. So, while we still have a point system for rules compliance, it is dynamic and geared more toward coaching than punishment. I would like to be clear about our use of our tracking system. I want to emphasize that the point system is used for rules compliance evaluation only. We do not have a point system for accidents or injuries.

Total Safety Culture

In addition to gearing our testing programs to favor constructive coaching, we are also working to share the day-to-day responsibility for safety management with our employees. Total Safety Culture (TSC) is a peer-to-peer safety engagement process, and

its goal is to fundamentally change the safety culture at the railroad. TSC has employees watching out for each other in a manner that reinforces safe behavior – in a voluntary and non-punitive way. It is a formal observation and feedback process where an employee will observe and comment on another employee's work behavior. They look for, identify and correct unsafe behaviors rather than rules violations. TSC is employees looking out for and caring about the safety of other employees – without direct management involvement, but with full management support.

This is a voluntary program, and it requires a commitment on the employee's part as each employee must be trained in the program. The barriers to this program are sometimes difficult to overcome – for both the employee and the manager. It requires trust on both sides. Employees are concerned about whether or not the data is really confidential, and mangers find it difficult to change from the command and control process. However, we are committed to overcoming these barriers through education and example. We have implemented TSC in our mechanical shops and -- based on the success we have had with a Behavior Sciences pilot supported by the FRA – we are in the process of rolling TSC out with our train and engine employees. Where this peer-to-peer concept has been implemented, it has produced dramatic safety improvements as employees actively watch out for each other.

Confidential Close Call Reporting

Union Pacific's North Platte, Nebraska, service unit is currently engaged in one of the most progressive safety programs in the history of the rail industry. We have found that accidents are often preceded by a close call, and close calls are often not reported. Through a pilot program developed with our unions and the FRA, a confidential close call reporting system called C3RS has been established. Employees are free to report a close call without fear of discipline, and the data gathered is used to develop a safer operating environment. This means that safety information that otherwise would not be reported is collected, and it allows the team to identify and manage risk on a proactive basis. While this type of close call reporting program has become common in the airline

industry, it is revolutionary in the rail industry. Everyone focuses on safety, and it enhances partnerships, trust, and communications across all parts of the rail organization.

Mr. Chairman, our company is over 140 years old and as a result many customs have become firmly entrenched. For years, the culture has been one of command and control. We at UP are taking the steps necessary to shift that paradigm to one of collaboration, respect, and trust.

While we will always need to ensure our employees are competent in operations and the rules of railroading, we are working diligently to create a total safety culture with our employees. We will continue to drive mistakes and accidents out of the rail industry, but we will do so in partnership with our employees. We must all work together to improve the system so that together, we can create a new progressive and total safety culture across all the rail industry.

That concludes my statement, and I would be happy to answer any questions.

UNION PACIFIC RAILROAD COMPANY
ACCIDENT, INCIDENT, INJURY, ILLNESS REPORTING

Effective: January 01, 1997
Revised: September 1, 2007

POLICY STATEMENT

Union Pacific Railroad is committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. This includes compliance with Company, Federal Railroad Administration, and other regulatory agency reporting requirements. Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness. Persons who report alleged violations of this policy are also protected from harassment or intimidation. Disciplinary action, as provided in applicable collective bargaining agreements or in the Union Pacific Guidelines on Ethics and Business Conduct, will be taken against any employee, including supervisors, managers, or officers of the Company, who commit such harassment or intimidation.

COMPLAINT PROCEDURES

Following are the steps for addressing alleged violations of Union Pacific Railroad's harassment and intimidation policy related to reporting accidents, incidents, injuries and illnesses:

Step 1 Any alleged violation of the Accident, Incident, Injury, and Illness Reporting Policy must be reported to the Union Pacific Values Line at 1-800-998-2000. The complaint will be forwarded to the Company's General Director-Ethics and Compliance for follow-up and response.

Step 2 The General Director of Ethics and Compliance will forward the complaint to the highest-level safety officer for the functional area, i.e. Regional (Service Units), Engineering, Mechanical, etc.

Step 3 The safety officer will conduct an internal investigation which will include interviewing the complainant, interviewing the individual against whom the complaint was made, interviewing any witnesses to the alleged violation, and gathering all pertinent facts.

Step 4 The safety officer will forward the information gathered in step 3 to the appropriate department head for review.

Step 5 The department head will determine if the complaint has merit and, if so, what corrective actions are to be taken. Where corrective actions are warranted, the department head will initiate those actions. In all cases, the department head will notify the safety officer of the findings and of any actions taken.

Step 6 The safety officer will notify the General Director of Ethics and Compliance of the results, and the General Director of Ethics and Compliance will notify the complainant of the results of the investigation.

November 28, 2007

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Attention: [redacted]

Dear Chairman Oberstar:

This refers to your letter received November 15, 2007 with additional questions regarding Union Pacific's injury, accident, and discipline policies. Thank you for the opportunity to give more detail to issues that arose as a result of the rail industry hearing on October 25, 2007. Attached are the answers to those questions.

Chairman Oberstar, thank you again for the opportunity to participate in this hearing. If you would like additional information about Union Pacific policies and programs, please do not hesitate to ask. In addition, we would be happy to meet with you or your staff to review them in greater detail.

Sincerely,

RM Grimaila

Bob Grimaila
Sr. AVP Safety, Environment, Security

Questions from Chairman James L. Oberstar

"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. **Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?**

   The legal system is preoccupied with placing blame. UPRR's culture seeks collaboration and creation of safety awareness at all levels but FELA requires proof of fault. The UPRR Safety and Operating Departments have a history of developing safety processes that focus on preventing injuries. It is UPRR's goal to involve all employees in being aware of co-workers activities and reminding them of safe practices without discipline or injury.

   FELA's blame-based approach creates a situation where relative fault of the injured party and the company determines financial responsibility. The obvious problem with this blame-based approach is that if you fail to identify the root cause(s) of accidents, the probable consequence is that you are less likely to make the necessary corrections. FELA limits our success in the area of employee safety.

   In spite of the FELA barrier, we continue to learn from events and improve. During the past 20 years we have achieved sustained improvement in the number and the rate of employee injuries, rail equipment accidents, environmental incidents, and grade crossing accidents.

2. **We've reviewed your safety programs and ICPs, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?**

   The question makes broad assumptions that UPRR does not believe are accurate. UP identified reporting lapses several years ago but took aggressive action to correct them. We have also reviewed our internal injury reporting audit system, as well as the FRA reporting audits, and there is no evidence of widespread underreporting of injuries or non-compliance with regulations at Union Pacific. Every effort is made to comply with Federal regulations, including those governing the reporting of personal injuries. We have made a thorough review of our last FRA spreadsheet that covered accident reporting (2006) and do not find widespread underreporting. In fact we found less than ten involving failure to report and most of these exceptions were due to the extent of medical treatment not being correctly communicated by medical providers to the reporting group.

3. **In general, do you think your railroads have a problem with underreporting of injuries?**

   Not at UPRR. As noted above, UPRR maintains rigorous reporting and auditing processes. The processes include follow up procedures that allow for updates as each individual case status changes. With heavy attrition of managers who are reaching retirement age, new managers are being trained in the complexities of Federal Regulations to keep reporting accurate.

   We have established audit processes that require an injury to be reported before any monetary assistance can be given to an employee and before a medical provider can be paid. This provides an

after-the-fact confirmation that the event was reported accurately. We believe the internal controls we have in place promote accurate reporting and minimize, if not eliminate underreporting.

Both employees and managers can be disciplined for underreporting. We have terminated the employment of senior level managers for reporting violations. As noted in comment #2 above, we have a very low frequency rate of exceptions for underreporting.

4. **Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidation exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?**

We have a responsibility to provide a safe workplace. To do so we must investigate injuries to correct unsafe conditions and/or unsafe behavior. It would be irresponsible not to give sufficient attention to injuries so that we can improve the workplace and practices. In addition, unions have elaborate systems (including designated outside legal counsel that specialize in FELA lawsuits) that encourages all employees to report injuries. Between railroad requirements to report and union and FELA lawyer encouragement to report, UPRR does not believe the system scares employees from reporting.

It is likely that subtle pressures and influences exist in any large organization. The important question is: is intimidation formally or informally condoned, or does management actively prohibit this behavior and are there significant consequences for non-compliance? We continually communicate with managers that intimidation is not tolerated, and we back this up with consequences up to and including termination of employment.

5. **Even though you claim to discipline supervisors when caught putting pressure on employees not to report, don't you think there are pressures that cause this type of behavior to continue?**

Disciplining supervisors for underreporting is reality at Union Pacific, not something we just claim to do. Supervisors have lost their jobs for this behavior. There are pressures on managers in every business and in government to perform their jobs well. A very small minority unfortunately think that manipulating numbers is a way to show job performance. UPRR's role is to train managers otherwise and take appropriate action when they err and chose the wrong course.

6. **Most of your operations are so widespread, how can you assure us that you are making every effort that you can to identify front-line supervisors who may be placing pressure on employees not to report injuries?**

We have good management training programs and good communication processes to ensure that managers understand our standards of conduct. Non-compliance is identified through internal audits, FRA audits, management oversight, confidential hotlines, and feedback from employees as well as union representatives. Union Pacific does not totally rely on the Operating Department for oversight. We maintain a compliance network and have active involvement of other Departments. The discipline we have taken with management at all levels shows that every effort is made to enforce the correct reporting of injuries.

7. **Do you simply rely on complaints after the fact to identify these managers, who are bad actors, or do you make an attempt to investigate management practices on a more proactive basis?**

   UPRR utilizes multiple methods to evaluate management practices. Proactive methods help ensure that managers are aware that their actions are being evaluated. We perform internal audits regularly to determine accuracy of reporting, and when we find exceptions, they are communicated back to local department heads and corrected. If there is evidence of a deliberate attempt to underreport or to prevent employees from reporting an injury or from getting proper medical care, we take actions against offending managers.

8. **What policies do you have in place to provide disincentives to supervisors who engage in harassment and intimidation, and to catch this type of behavior?**

   Union Pacific has a zero tolerance policy for harassment and intimidation. At our railroad, it is simply unacceptable. Any employee who is caught engaging in this type of behavior is subject to pay reduction, demotion and/or loss of employment.

9. **Couldn't you utilize employee surveys on a routine basis to identify managers that are of concern to employees?**

   Any employee can utilize the ethics hotline at any time. Having a 24/7 opportunity to make a complaint allows employees to do so when an incident happens, on a confidential basis. Having to wait until a survey is sent out would dilute the opportunity to act quickly to correct behavior.

10. **Have you recently fired or demoted front-line supervisors for failing to report accidents, or for harassing and intimidating employees to not seek the proper medical care? How did you uncover these cases? Was it through an audit or a complaint, or some other means?**

    Yes. Earlier this year, one of our 21 Superintendents was found to have underreported accidents. As a result, he lost his job at Union Pacific. The underreporting was uncovered as a result of a formalized, routine audit we perform that cross matches accident/injury reports and claims for medical treatment.

    There have been other cases where reporting irregularities have been uncovered and disciplinary action was taken. In some cases, senior managers have been terminated and subordinate managers have been disciplined and, in some cases, terminated. In other cases, non-compliance was discovered through the ICP (Internal Control Plan) process, in others by an employee complaint, and in still others by supervising managers.

    During the last several years we have seen a marked decrease in the number of alleged cases of harassment and intimidation. We believe the decrease in complaints is due in large part to our efforts to educate and warn senior and front line managers about these matters and to explain the seriousness of reporting and compliance.

11. Do you have an "availability policy" that requires that an employee be available to work for a specific number of days per year, which include days lost due to injury or sickness?

UPRR does not have such a policy based on a specific number of days a year or on a percentage of days. We instead have an "attendance policy." The policy requires every employee to be a full-time employee. A full-time employee reports when scheduled to work or called to work, excluding vacations, illness and personal days. The policy provides opportunities for employees to explain absences (that result in less than full-time employment), such as injuries and documented illness.

12. Are you moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factor causes in accidents? Have you implemented such programs on at least a trial basis? If so, how?

Union Pacific is the first railroad to implement a C3RS program, on a trial basis. The pilot is located at our North Platte, Nebraska service unit. This program is a collaborative effort among management, unions, and the FRA, with the goal of reducing human factor rail equipment incidents. We believe that this program will be very helpful in addressing the root causes of accidents, before they become accidents. The pilot began on February 1, 2007, and, while in only its beginning phases, the program is already working very well and is producing the desired results.

13. If you have implemented such programs, how have you seen that affecting employees on the ground?

The most immediate effect is that employees are reporting close calls – events that would otherwise have never been collected for review and analysis. Because the pilot is in its early stages, the overall and long-term effects are not known at this time. The continued use of the reporting system is a good indication that the pilot is being accepted by the employees.

14. Where do you stand on the implementation of C3RS system-wide?

At this time UP is reviewing the results of the current pilot and will determine if the process should be implemented at other locations and in the same format or in a different format. We have ongoing discussions with the FRA about the expansion and sustainability of this process.

15. The FRA has a standard 7-day reporting deadline for filing a report for a "reportable" injury. Do you have a different internal standard?

FRA rules require that injuries (both reportable and non-reportable) be entered into carrier records within 7 working days after we learn of them, and that reportable injuries be reported to FRA within 30 days after the end of the month in which they occur.

Our standard for reporting is more stringent. Our operating rules require all personal injury cases to be reported immediately, whether the injury is "reportable" or not. By responding immediately, we can ensure that the employee gets immediate medical care; we can gather more accurate and timely information about the incident; and we can immediately investigate the scene of the accident/injury before the scene changes. We can then correct any potential safety hazards that may remain, subject only to legal requirements to preserve evidence (another effect of FELA).

We also measure and publish late reporting information (according to FRA's definition) by work unit to promote continuous improvement in compliance with the regulations.

16. Do you all have a confidential "ethics hotlines" where an employee can call in and report anything that they are uncomfortable with?

Union Pacific has a toll-free number called the Values Line that is staffed by an outside company. If the caller wishes to remain anonymous, he or she is assigned a number code and instructed to call back to check on the status of the complaint using the assigned number code.

a. **How are hotline cases pursued?**

For calls alleging harassment or intimidation to discourage or prevent accident reporting or receipt of proper medical treatment, the General Director of Ethics and Compliance, who is an attorney, reviews the complaint. He also oversees investigation and reviews corrective actions. He completes the process by contacting the caller through the Value Line process described above. For complaints that would affect a manager's employment, a senior executive team authorizes and monitors the investigation.

b. **Can this system really be confidential?**

Yes, it is. The continued use of the hotline by employees shows that it is confidential. We have never received a complaint to the contrary.

17. Do supervisors have any portion of their bonuses based on injury statistics in their management area? (If yes) What is the maximum amount that he/ she could earn based on injury statistics alone?

Supervisors are evaluated on several key performance metrics, including safety. At the frontline supervisor level, we focus primarily on prevention activities such as audits and inspections, training, and procedure compliance. We use injury statistics more extensively for the highest-level managers. There is no bonus schedule for injury statistics.

18. It's pretty clear that you have good corporate policies on harassment and intimidation and also safety. However, it seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring? And, what are you doing to make sure that your corporate policies are being implemented correctly at the "local" level?

The question mistakenly assumes there is a "disconnect." While in a very small number of cases there have been managers who have not followed the policies, it is incorrect to assume that there is a "disconnect" with front line managers. We do not believe this is widespread, and we have evidence that our compliance is continually improving. We have previously described how we communicate our policy with all levels of supervision, how we audit for compliance, and the consequences for noncompliance. We also explained that FRA has not found significant reporting failures at UPRR in recent years.

19. Are you motivated by the Harriman Award to drive down your injury statistics? Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics? Do you think that any of the metrics of the award should be changed to incentivize reporting?

UPRR is motivated by having an injury-free workforce. UPRR measures much more than reportable injuries in its efforts to eliminate injuries. Our goal is for all our employees to go home safely at the end of their shift. Manipulating data to win an award would be counter productive to our goal of a safe place for our employees to work. While winning the Harriman Award is an honor, it does not drive our accident prevention processes. Having safe productive employees, a competitive and viable company, and achieving continuous improvement in our processes is much more important to us and to the health of our company.

20. Do you all have audit processes that links medical claims with injury reports? What do you do if someone puts in a claim but there is no injury report on file for them?

Yes. Our controls are set up so that the Claims Department cannot pay medical bills for an injured employee unless an injury report has been completed by the employee and this report has been entered into the safety reporting data base. Other compensation, such as pay for lost time, etc., also cannot be made without a completed injury report in the safety reporting system. When a deviation is discovered, it is thoroughly investigated and corrective action is taken.

21. Do you have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?

Yes. First of all, our ICP (Internal Control Plan) specifically prohibits this behavior. Here is an excerpt from our adopted policy statement: "Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness. Persons who report alleged violations of this policy are also protected from harassment or intimidation."

Secondly, our Executive Vice President-Operations has published policy statements and reminders to field managers on multiple occasions that remind managers of the policy statement noted above, and specify what is prohibited by our policy, including: (1) Not being present in the examination or treatment room unless requested by the employee, and (2) Refraining from trying to influence the medical care providers from providing whatever treatment they deem necessary.

22. Do you believe these types of point systems create "unintended consequences"?

UPRR does not have a point system that is based on or that includes injuries. We believe that our EQMS system, which is based on observed compliance with rules and procedures, provides our employees with clearly delineated performance expectations, measures, and feedback. Substandard performance that could lead to an incident or accident is quickly identified and remedial actions are implemented.

23. Human factors research has shown that rarely is an accident ever due to a single individual or causal factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?

UPRR agrees that some research agrees with your statement. However, there are a variety of accident causation models ranging from Heinrich's Domino Theory to the more complex risk-tree analyses, such Johnson's Management Oversight and Risk Tree (MORT) and the Industrial Safety Management Accident Causation model (ISMAC).

Accident causation analysis is a complex and ever-changing area, and various industries, including transportation, medical, chemical, and nuclear energy, utilize models that fit their needs. We do not see a benefit to attempting to regulate accident causation models for the railroad industry.

24. Do you have "Light Duty" – type programs where instead of marking off an employee for being injured, they come to work and basically do nothing but sit in a room all day? Do you consider this practice to be harassment?

We have programs that offer opportunities for employees to, for example, become trainers, receive additional training, and work on safety committees and safety projects when appropriate. We offer this regardless if the condition is on-duty or off-duty related. Our Return to Work Program (RTW) is led and staffed by vocational rehabilitation professionals. One facet of this program is the Temporary Productive Work (TPW) program. Briefly, the TPW requires the following:

(a) A work plan of productive/meaningful activities that are within temporary medical restrictions.
(b) Job tasks and activities for the TPW Plan are discussed and mutually agreed upon by the RTW Manager, the supervisor and the employee.
(c) TPW is offered to all TE&Y employees losing time as a result of on-duty or off-duty injury or illness. One-third of the participants had on duty injuries/illness and two-thirds had off duty injuries/illness.
(d) TPW is voluntary for employees.
(e) TPW is for employees with an anticipated RTW date to regular duties within 60 days.

25. **Do you honestly think that no intimidation exists**?

No, we have not made that assertion. Managers have all types of personalities, but we give them guidance and training on proper professional behavior. We also monitor performance throughout the year. UPRR's record of swiftly handling managers who do not improve in this area stands as evidence of our commitment to zero tolerance for intimidation.

26. How do you explain all the cases that FRA finds for underreporting?

We do not see a "widespread" issue with underreporting. My comment in response to Question 2 notes the small number of cases where exceptions have been taken. When a case is identified as not having been reported correctly steps are taken immediately to correct the situation.

27. Mr. Grimaila, Union Pacific has a program called the Employee Quality Management System – or EQMS – where he or she starts off with 1,000 points and then gets debits or credits to that based on observed performance and structured testing.

a. How often is an employee observed and tested where they are assessed credits and debits?

All TE&Y employees must be tested at least once every 120 days. Engineers must be stop tested (checking compliance with a red signal) at least once every 180 days. Those employees may be, and generally are, tested on a more frequent basis.

b. If an employee is injured, how does this affect their overall EQMS score?

There is no deduction to his or her EQMS score because an employee is injured. There is currently a 10-point credit to the EQMS score if the employee has not had an injury in the previous 12 months.

c. If an employee's score falls to 900, what happens to them? Do they get more testing and monitoring?

Over 90% of the employees have a score above 900 EQMS. Once an employee's EQMS score falls below 900, then that employee is no longer eligible for the "on the ground, informal coaching in lieu of discipline" provisions in FTX - Field Training Exercise. Once out of FTX, an employee is subject to the Discipline Policy (UPGRADE) for rule violations including formal, documented coaching. All system guidelines (see above 27. a.) still apply.

d. What is your "Preferred Attention List" Employees program and how is it determined if an employee becomes part of it? Are their set requirements that automatically place an employee in this program? Or, is it more up to the supervisor's discretion who becomes a PALs employee and what that means? Are you in the process of revising this program?

The purpose of the PAL Program is to identify employees whose work performance is at a substandard level and provide positive management intervention for remedial training and counseling. The goal of the program is to improve the employee's safety, job skills, attitude towards safety, and attendance.

The supervisor then works one on one with the employee to help improve the areas that need attention. We view it as similar to a school situation where a student needs extra help and the school provides it through additional tutoring and/or through more directed one on one help in the classroom. While we are not revising the program directly, the implementation of the Total Safety Culture and the Close Call Reporting programs may provide the additional help required to an individual and diminish the need for this program. We will be monitoring the impact of these other programs.

The criteria for an employee being placed in the PAL program include:

(a) Rule(s) violations
(b) Human Factor rail equipment incidents
(c) Discipline Level 4 or greater
(d) Excessive absenteeism
(e) FTX eligibility
(f) A Decertification event under 49 CFR Part 240
(g) Return to work in the last three years after a Level 5 violation.

STATEMENT OF

EDWARD R. HAMBERGER
PRESIDENT & CHIEF EXECUTIVE OFFICER
ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

OCTOBER 25, 2007

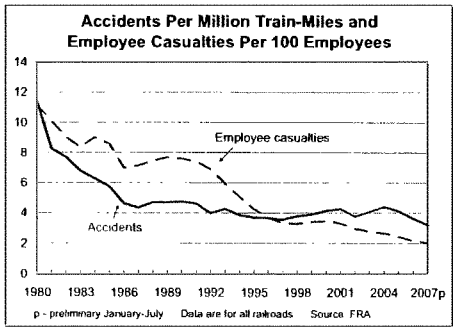
Association of American Railroads
50 F Street NW
Washington, DC 20001
202-639-2100

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to address the role of railroad policies in promoting safety. AAR members account for the vast majority of freight railroad mileage, employees, and traffic in Canada, Mexico, and the United States.

Overview of Rail Safety

For railroads, pursuing safe operations is not an option, it is an imperative. It makes business sense and it's the right thing to do. Through massive investments in safety-enhancing infrastructure, equipment, and technology; extensive employee training; cooperation with labor, suppliers, customers, communities, and the Federal Railroad Administration (FRA); cutting-edge research and development; and steadfast commitment to applicable laws and regulations (including those related to accident reporting), railroads are at the forefront of advancing safety.

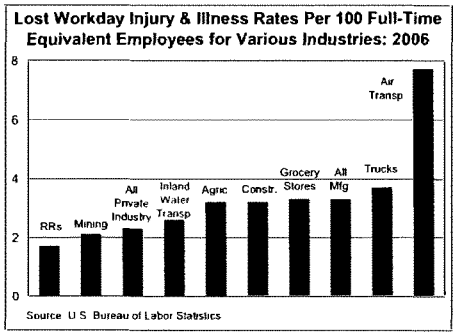
The overall U.S. rail industry safety record is excellent. As an FRA official noted in February 2007 testimony to Congress, "The railroads have an outstanding record in moving all goods safely." In fact, in aggregate 2006 was the safest year for railroads ever. According to FRA data, the rail employee casualty rate in 2006 was the lowest in history, having fallen 81 percent since 1980. Likewise, the grade crossing collision rate in 2006 was the lowest ever, having fallen 76 percent since 1980. And from 1980 to 2006, railroads reduced their overall train accident rate by 68 percent. The train accident rate in 2006 was just fractionally higher



than the record low. The freight itself is also "safer": loss and damage claims as a percentage or rail revenue on U.S. railroads fell from 1.08 percent in 1980 to just 0.22 percent in 2006.

And rail safety continues to improve. According to preliminary FRA data for the first seven months of 2007, the train accident rate, the grade crossing collision rate, and the employee injury rate are all at levels that, if they hold up for the rest of the year, will set new record lows.

According to U.S. Department of Labor data, railroads today have lower employee injury rates than other modes of transportation and most other major industry groups, including agriculture, construction, manufacturing, and private industry as a whole. Available data also indicate that U.S. railroads have employee injury rates well below those of most major foreign railroads.



Railroads are proud of their safety record, which results from railroads' recognition of their responsibilities regarding safety and the enormous resources they devote to its advancement. At the same time, railroads want rail safety to continue to improve. Railroads are always willing to work cooperatively with you, other policymakers, the FRA, rail employees, and others to find practical, effective ways to make this happen.

A commitment to safety that permeates the workplace is critical to promoting safety. Railroads have that commitment. But a healthy balance sheet is important to safety as well. A financially-viable railroad will be in a much better position to invest in

safety enhancements than a financially-weak carrier. The record investments that railroads have made in their infrastructure, equipment, and technology in recent years have made railroads much safer, and these investments were made possible by the moderate improvements in profitability that railroads have enjoyed.

Of course, no budget is unlimited, even for something as important as safety and even for railroads that have experienced financial improvement in recent years. Safety will not be advanced if resources are spent on programs that do little to improve safety or if unfunded mandates lock up resources that would have a more significant impact on safety if spent elsewhere. Unnecessary and unfunded mandates would also serve to increase the cost of rail service and drive more traffic to the highways, where the safety record is far less favorable than it is on the rails.

Intimidation and Harassment of Rail Employees

Some within the rail labor community apparently claim that railroads regularly intimidate and/or harass rail industry employees when the employees are notifying the FRA of an injury or illness, providing accident or incident information to a public official, cooperating with a safety investigation, reporting hours of duty, reporting a hazardous condition, or the like.

Likewise, it has been claimed that railroads regularly deny, delay, or interfere with the medical treatment given to employees.

These claims are false.

Let me be clear: railroads reject the use of harassment and intimidation against their employees, and denounce efforts to withhold or interfere with the provision of needed medical care to injured employees. Railroads value the health and safety of their

employees. Providing immediate medical care is the first priority. Any failure to do so violates internal policy, as well as FRA regulations, and should not happen.

Of course, no industry — especially one with some 185,000 employees — is completely free of workplace pressures and disagreements. Humans are human, and mistakes (by both rail management and rank-and-file employees) are sometimes made. But railroads believe that if actions occur that could be reasonably characterized as "intimidation," "harassment," or "interference" in the provision of proper medical care, they are extremely rare.

Moreover, reasonable actions taken by rail management in the course of a good-faith accident investigation have, at times, been labeled "intimidation" and "harassment" by elements within the rail labor community. Likewise, good-faith efforts regarding the provision of medical care might be labeled "interference" when such an appellation is not warranted. Railroads have an understandable interest in trying to determine, in a timely fashion, why an accident occurred so that the necessary steps to prevent a similar accident in the future can be taken. Railroads also have a keen interest in trying to understand the nature and extent of an employee's injuries in order to determine if and when the employee may be able to return to gainful employment.

In any case, rail employees already have a means — that they have not been shy about using — to pursue claims of harassment, intimidation, and interference under the Railway Labor Act (RLA). The RLA has a unique provision for statutory arbitration of employee claims and grievances before the National Railroad Adjustment Board, or Public Law Boards. Thus, any disciplinary action taken by management can be appealed to a neutral third party arbitrator who can alter or overrule management's actions.

In addition, FRA regulations already prohibit a railroad from taking action "calculated to discourage or prevent [an employee] from...reporting [an] accident, injury, or illness" or "calculated to discourage or prevent [an injured employee] from receiving proper medical treatment." Existing law also already prohibits railroads from discriminating against employees who refuse to work because of hazardous conditions or who complain about a matter relating to federal safety regulation. And railroads already have in place internal prohibitions (and avenues regarding redress) against intimidation and harassment.

Finally, H.R. 1 (the "Implementing Recommendations of the 9/11 Commission Act of 2007"), which was signed into law in August 2007, established a parallel process through which rail employees who believe they have been discharged, disciplined, or discriminated against because of their good-faith efforts related to safety (*e.g.*, cooperating with a safety investigation, refusing to violate safety regulations, notifying an employer of a work-related injury, etc.) may file a complaint with and seek relief from the U.S. Department of Labor.

In short, if cases of harassment, intimidation, or interference in the rail workplace were to occur, rail employees have several different avenues to seek redress.

The Federal Employers' Liability Act (FELA)

One factor that should not be overlooked when considering safety in the railroad industry is the adverse impact of the Federal Employers' Liability Act (FELA). Enacted in 1908, FELA serves as the railroad industry's workers' compensation system. In 2004, the most recent year for which data are available, total FELA payouts by railroads (including claims and lawsuits) totaled more than $750 million.

The vast majority of employees in the United States are covered by no-fault workers' compensation systems, under which workers are compensated for work-related injuries without regard to negligence. Not so for railroad employees. In order to receive compensation for workplace injuries under FELA, railroad employees must prove that their employers' negligence caused an injury. If the employee's negligence is found to have contributed to the injury, compensation is reduced accordingly.

Thus, when a rail employee is hurt on the job, he or she becomes the plaintiff in a potentially sky's-the-limit lawsuit against the railroad, with each side having a strong financial incentive to blame the other for the injury.

From a safety perspective, FELA's promotion of a culture of litigation in the railroad workplace is counterproductive. Injured employees know that in order to collect compensation they must show that the railroad was at fault. Railroads know that if they can prove the employee was at fault, liability can be reduced or even eliminated. Other employees know that their co-workers' right to compensation can hinge on their recollection of events surrounding an accident and testimony about those events. Thus, FELA breeds mistrust in the workplace as employers and employees are pitted against each other.

FELA also hampers railroads' ability to determine root causes. Investigating objectively the causes of workplace accidents and injuries that have occurred, and using this information to evaluate how best to avoid their recurrence, is an essential element of improving workplace safety. However, the need to affix blame for rail accidents provides parties with incentives to be less than candid during investigations. (Indeed information from trial attorneys aimed at rail employees counsel that being uncooperative with accident investigations is in the employee's best interest. For example, a FELA lawyer advises "[Y]ou should not make any statement, either orally or in writing, as to how the accident

occurred or concerning the nature of the injuries until such time as you have been fully advised by your attorney and/or union representative."[1]) This can lead to an obfuscation of the true causes of workplace accidents and lessen the likelihood that safety-related improvements will be made.

When an employee is hurt at work, the primary goals should be effective medical treatment; rehabilitation, if needed; and a return to work. However, FELA's reliance on litigation to determine the right to, and amount of, compensation creates disincentives for rehabilitation of injured workers and a return to the job. A prompt return to work can mean lower economic damages. It also probably means lower non-economic damages, which tend to be a multiple of the economic damages.

Moreover, a worker who has not returned to the job by the time of trial appears more sympathetic than a worker who is fully recovered and back at work. This creates a strong incentive to forego (or at least delay) rehabilitation, stay off the job, and build up damages in order to present the most favorable case before a jury. Employees' attorneys typically advise their clients along those lines. (For example, a FELA lawyer advises, "As a quick check-list, the six most important factors in establishing a claims value are: 1) The nature, extent and *duration* of the injury; ..."(emphasis added))[2]

Available data appear to confirm this point. The median number of days away from work by type of injury is typically far higher for the rail industry than it is for U.S. industry as a whole. For example, in 2005 the median number of days off from work because of a "sprain" was 8 for U.S. industry as a whole, but 72 for Class I railroads. For

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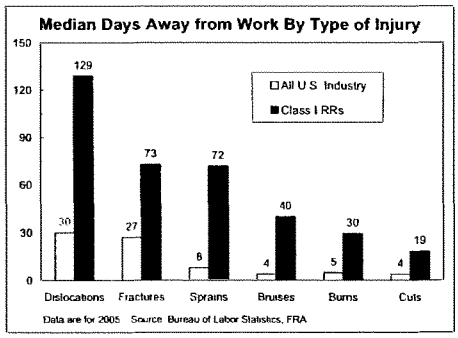
[1] From the web site of Paoli, Latino & Kutzman, P.C., a Montana law firm that handles FELA cases for railroad employees, at http://www.paoli-law.com/fela-railroad-claims.php.

[2] From "Answers to the 15 Most Commonly Asked Questions on Federal Employers' Liability Act (FELA) Affecting Railroad Workers," published by the Law Offices of John C. Dearie & Associates, at http://www.dearielaw.com/FELA.pdf

"bruises," the median number of days off from work was 4 for U.S. industry as a whole, but 40 for Class I railroads.



Just as rail labor and management have worked together to reform the railroad retirement system, AAR hopes that rail labor and management can work together to replace FELA with a more effective workers' compensation system that fairly compensates injured employees, enhances safety, and helps to remove a cause of adversarial relations. After all, if FELA is as beneficial to safety as some claim it is, why aren't all U.S. workers subject to a similar system?

Conclusion

Railroads agree that action designed to prevent an employee from reporting an injury, or to discharge, discipline, or in any way discriminate against an employee for notifying the proper authorities of an injury or illness or cooperating with an accident investigation, is unacceptable. So too is interfering with the provision of needed medical attention to an injured employee.

But these are not endemic problems for railroads. To the extent they occur at all, they are extremely rare and are contrary to FRA and internal railroad policies. Mechanisms are already in place to address these situations should they occur.

The rail industry applauds the dedication of this committee to advancing rail safety, and we are committed to working with you, others in Congress, the FRA, our customers, our employees, and others to ensure that rail safety continues to improve.

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

November 7, 2007

Mr. Ed Hamberger
President and Chief Executive Officer
American Association of Railroads
50 F Street, NW
Washington, DC 20001

Dear Mr. Hamberger:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

Enclosures (2)

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?

2. We've reviewed you're the safety programs and ICPs of Class I railroads, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?

3. In general, do you think that railroads have a problem with underreporting of injuries?

4. Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidation exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?

5. Is the industry moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factors causes in accidents? Have these programs been implemented on at least a trial basis? If so, how?

6. Where do you stand on the implementation of C3RS system-wide?

7. It's pretty clear that railroads have good corporate policies on harassment and intimidation and also safety. However, there seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring?

8. Is the industry motivated by the Harriman Award to drive down injury statistics? Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics? Do you think that any of the metrics of the award should be changed to incentivize reporting?

9. To your knowledge, do all railroads have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?

10. Do you believe that point systems create "unintended consequences"?

11. Human factors research has shown that rarely is an accident ever due to a single individual or causal factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?

12. Do you honestly think that <u>no</u> intimidation exists?

13. How do you explain all the cases that FRA finds for underreporting?

14. Mr. Hamberger, do you think that the safest railroads are also the most authoritarian in their management style?

15. Mr. Hamberger, do you think that the FRA is taking an approach that is progressive enough in encouraging non-punitive self disclosure?

Question from Congressman Henry E. Brown, Jr.

1. Mr. Hamberger, can you please describe the some of the investments in employee safety made by the U.S. rail industry over the past decade? What process does the industry take in identifying future investments?

Oberstar Questions

Question 1

A commitment to safety requires the railroads to both ensure the best systems are in place and to hold individuals accountable for their actions. As AAR's written testimony showed, the railroads' safety record over the last twenty-seven years, essentially showing continuous improvement, indicates that the railroads are doing an excellent job on all fronts.

There is no question that FELA places a priority on "assignment of blame." The job of plaintiffs' attorneys is to show a railroad is at fault. At the same time, in litigation a railroad might seek to show a railroad employee is at fault. To reduce this "preoccupation" with assignment of blame, Congress should replace FELA with a workers' compensation system that fairly compensates injured employees and facilitates discussions of ways of improving safety.

Question 2

AAR does not believe there is widespread or systematic underreporting of injuries, nor does AAR believe there is widespread noncompliance with regulations. At the October 25 hearing, FRA Administrator Boardman testified that FRA, too, does not believe there is significant underrerporting of injuries.

The railroads are committed to accurate reporting. AAR believes instances of injuries not being reported are anomalies, not a sign of a widespread problem. Furthermore, the railroads' record of compliance with regulations is excellent. Given the size of the railroads and that no industry is more regulated than the railroads, it is not surprising there have been instances of noncompliance with regulations. Even in those instances where FRA alleges non-compliance with accident/incident reporting regulations, the vast majority of cases do not conclude with a finding that a railroad failed to report an FRA reportable injury; rather, the cases more often involve administrative issues that in the end do not substantiate any claim of widespread injuries that go unreported. The railroads' safety record over the last twenty-seven years accurately demonstrates continuous improvement in safety attributable to the efforts of railroads and their employees, and those who try to denigrate these efforts affect a disservice to both the railroad industry and its dedicated employees.

Question 3

No. The railroads are committed to accurate reporting. While there have been isolated instances where an issue has arisen as to whether an injury occurred that should have been reported but was not, that clearly is the exception rather than the rule.

Question 4

If there is a significant problem with respect to the motivation of employees to accurately report injuries and accidents, it is due to the adversarial FELA system. FELA motivates employees to maximize their prospects for recoveries in litigation. FELA actually encourages the reporting of

exaggerated or false injuries since the employee stands to benefit from the subsequent resolution of claims or litigation. Additionally, FELA discourages employees from cooperating with investigations of accidents and injuries, often making it difficult for a railroad to determine what actually happened when an accident or an injury occurs.

Question 5

Human factors are a leading cause of railroad accidents and railroads are striving to reduce their occurrence. FRA has launched a confidential close call reporting system demonstration project. Information regarding the demonstration project is available at http://www.fra.dot.gov/us/content/1549. The railroads participating at this time are CP and UP.

Question 6

AAR awaits the results of the demonstration project.

Question 7

AAR does not agree that there is a "disconnect." In isolated instances the policies have not been correctly implemented, but in general supervisors adhere to those policies.

Question 8

The railroads are motivated by good business practices to place a substantial priority on safety and the elimination of accidents and injuries. There is no evidence that the Harriman Award creates pressure to underreport injuries. Nor, as stated previously, does AAR believe that underreporting is a problem. Consequently, there is no need to change the Harriman Award criteria to encourage reporting. AAR understands that awards such as the Harriman Award are common both in government and industry settings.

Question 9

To AAR's knowledge, all major railroads have such policies.

Question 10

On this question, AAR defers to the railroads with point systems.

Question 11

Procedures should be designed to minimize the possibility of an accident occurring. At times, as a result of an accident a railroad might conclude there are new procedures that can be adopted to reduce the chance of a future accident. However, individual actions also can contribute to an

accident and individuals must be held accountable. The railroads must address safety from a systems perspective, addressing all aspects of the railroad "system," including procedures and individual actions.

Question 12

Instances of intimidation are extremely rare and when they occur, they are addressed promptly by railroad management and FRA. There simply is no evidence of widespread violations of the ICP regulations.

Question 13

There have only been rare cases where an issue arose as to whether an injury occurred that should have been reported but was not. In any event, the railroads are striving to eliminate all violations of the reporting regulations, just as they strive to eliminate violations of other FRA requirements.

Question 14

AAR has no basis for evaluating the extent to which one railroad might have a more "authoritarian" style than another.

Question 15

AAR supports FRA's efforts to examine the effects of self-disclosure reporting systems. Regardless of whether it proves effective, the close call reporting system is an example of FRA's efforts in this area.

Brown Question

Employees benefit from safer operations generally. Investment in infrastructure, equipment, and technology leads to fewer accidents and a safer work environment. Annually, U.S. freight railroads typically spend $16 to $18 billion on capital investment and maintenance of infrastructure and equipment – equal, on average, to more than 40 cents out of every dollar of revenue. The capital intensity of freight railroading is at or near the top of all U.S. industries.

Remote control technology is an example of a technology implemented over the last decade that has led directly to fewer injuries. Another example of an innovation directly benefiting railroad employees is the design of locomotive cabs to protect employees in the event of a collision.

Before the

United States House of Representatives

Committee on Transportation and Infrastructure

Hearing on

The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America's Railroads

Mr. Gregory Haskin

Former Union Pacific Conductor

4312 Silverheel

Shawnee, Kansas 66226

(913) 488-3906

November 5, 2001 started out as a normal workday in the life of this average 28 year old Union Pacific Railroad Employee. Less than 2 hours later my life, as I knew it, would be changed forever.

I was born November 10, 1972 as a future third generation railroader. My grandfather was a conductor for the Union Pacific who had hired out in 1949 and worked until his death in 1975. My father was a signal maintainer for the Union Pacific who hired out in 1957 and retired in 2000 with 43 years of service.

As a young boy, I was the typical kid fascinated by trains, except for the fact I was privileged to get first hand looks. From the age of eight all the way through high school, my mother allowed me to go to work with my dad numerous times when he would get that call late at night, or during storms -- both rain and snow -- or on the weekends, when crossing gates failed, when a broken rail snapped on the coldest of nights, or when a switch would not line to allow a train into the pass. I would sleep lightly just to make sure I would hear the ring of the phone that I knew would bring me closer to the trains I loved. It was an easy sell for my mom as she felt comfort in the fact even though I might have been young, my dad would not be alone. I could not wait for my chance to do what I was born to do!

That opportunity finally came in late 1997 when my father called me with the news that he had pulled some strings and I was being hired into train service. I had been through college but I still knew what I wanted to do with my life.

I was the type of employee the railroad was looking for. I spent the first three years working every time the phone rang, which many times was 90 times in 90 days. As I am sure you are aware, these days would consist of 15-16 hour days with some 18-20 hours days on duty spread through. I was living a dream until that morning of November 5, 2001, when I found myself in a nightmare, that still to this day I can not seem to wake from.

The morning of November 5, 2001 I was struck in the head by a piece of steel on a rail car brought into Kansas City to install rail in a switching yard. The free swinging steel bar was used to caution people that they were working near live track. I would later find out it had been broken for more than three weeks prior to the accident, but the company needed the car to lay rail and could not spare the loss of taking the car out of service.

When I came to, I was laying face down on the rail car in my own blood, and was not sure exactly what happened. Minutes later, Union Pacific management was on scene and my lesson in harassment and intimidation was just beginning. For nearly two hours as my head continued to bleed, I laid in the bed of a Union Pacific maintenance truck as management tried to determine what to do with me. I was out of it enough that I did not realize the seriousness of the injury, until a fellow employee showed up on scene and told me it looked like I was shot in the head. No call to 911 was ever made. No one volunteered to rush me to an emergency room. No one with medical knowledge was ever brought to the scene. They just sat back, hoped and waited to see if my head quit bleeding.

Nearly two hours later after management huddled to determine their course of action,

management informed me they were taking me to get medical attention. One would think that I was taken to the nearest emergency room, but guess again. I was transported by a Director of Operations, 30 minutes to a business and industry clinic in Missouri, less than a quarter mile behind Union Pacific's Regional Headquarters. Again, this facility was in Missouri. I was injured in Kansas. We passed four major hospitals that were all closer than this facility. You might ask why, as I did myself.

I entered the clinic with the manager by my side. A nurse behind the desk rushed to me, keep in mind I had blood soaked clothes as well as a towel trying to control the bleeding. She informed the manager that they do not handle injuries like this. He quickly informed her that the Union Pacific's nurse had called ahead, and the doctor on call would handle it. To keep me from bleeding on the floor of the waiting room the nurse escorted me to an examination room. Within minutes a doctor was at my side. The director told the doctor we were here to see a different doctor. With a stunned look on his face he quickly turned and left the room. Approximately fifteen minutes later, according to facility records, the doctor that Union Pacific's nurse had talked to, entered the room. After a quick examination, he informed us I would need staples to close the wound. He told me to talk with the manager about what I wanted to do. The Director informed me that if I received staples my injury would tun1 into an FRA reportable accident and would follow me for the rest of my railroad career, and I would have no chance at promotion.

I was scared to death. I was doing the job I was born to do, and here I was about to lose it all. I chose not to have the staples, as the doctor informed me he could just bandage it. I informed him my head felt like it was ready to explode. He told me he could prescribe something, but it would be the same as taking four 200mg Tylenol that I probably had at home. The nurse informed the doctor that I had not had a Tetanus shot in over ten years. The doctor informed the Director and myself that they would love to give me a Tetnus, hut they were all out of it due to 911 1. You probably have not caught on to the Tylenol and Tetanus shot issues, as I did not either until much later. You see if he would have prescribed the 800mg Tylenol or given me a Tetanus shot it would have become an FRA Reportable Accident to the Union Pacific. I left with a bandage on my head and Tylenol for the pain waiting at home. I was taken back to my vehicle in Kansas and drove the thirty minutes to my home, of which still to this day I have little recollection of. Upon arriving home at about 5:00 p.m., nearly eight hours after the accident, I took my four 200mg Tylenol and went and laid down. I awoke 17 hours later, at 9:00 a.m. the next day to bloody sheets, nausea and a head pounding. As miserable as I was, I later found out I was lucky to have awaken at all. I took more Tylenol and vomited though out the day.

My mother, after failing to get a hold of me through out the day on Tuesday, November 6, 2001 (I was injured on Monday), called my sister -- a Neurological ICU nurse in Kansas City -- on Wednesday, November 7, 2001 to check on me. Upon hearing about my headaches and vomiting, she called a friend of hers who was a Neurological Surgeon at Saint Luke's Hospital in Kansas City, and after hearing of my symptoms, he told her to get me there immediately. I was rushed to Saint Luke's hospital where I was diagnosed with Post Concussive Syndrome and referred to a Neurologist. The emergency room doctor told me I was lucky to awake after that seventeen hour nap.

Upon the railroad hearing of my emergency room visit, they placed me in O.S., short for "Other Service", saying I was in training. I spent the next month at home in bed on narcotic pain medicines to try and control headaches, all the while still in O.S. The O.S. status kept the railroad from having to report my injury to the FRA as lost work days. I still had no lost time from work according to Union Pacific.

Even as I continued to take narcotic medicines as well as nerve medications, I wanted to get back to my life long dream, working for the railroad. The Railroad authorized me to come out of O.S. and return while on the medications. I continued to work with the railroad's approval for over two years while still undergoing treatment for the headaches. The railroad, in December of 2003, informed me I could no longer work while taking these medications, unless one of my treating physicians would put in writing I was safe to perform my duties. I was devastated to say the least. I went to all my doctors pleading for a written statement that I was safe to work. All the begging in the world could not get this done.

From my injury in 2001 until 2004 I underwent seventeen surgeries on my head and neck trying to alleviate the headaches and return to what I thought was the best job in the world. As a last ditch resort I underwent a surgical procedure where they inserted a probe in the back of my neck that was heated to 178 degrees for 60 seconds three times to burn the nerve endings as a hope they would no longer send pain signals to my brain. Unfortunately, it did not work. The most difficult thing about this surgery was the fact that no anesthesia could be given to me because the probe would shock each nerve, and the Surgeons needed to make sure they were not burning a nerve that went elsewhere to my body. You never will be able to imagine how excruciating a pain this was. The nurse had to place a towel in my mouth to keep me from biting through my lip and tongue. I have been asked to describe the pain of this surgery and the best analogy I can come up with is to place your hand on a stove top, on high, and leave it there until you can no longer feel your hand. I am sure my screams could be heard through out the hospital. The surgery left me with a constant pain in the left side of my head.

I still battle headaches every day. I have lost every ounce of pride I once had and I deal with impotency and depression that no 34 year old man should ever have to go through. Prior to my accident I lifted weights and ran three miles daily. I have gained over thirty five pounds and am lucky to run thirty feet without getting a headache. I am still not married and probably never will be. Depression floods my life and I constantly battle suicide demons.

I am no different than many of you as all I ever wanted was for my father to be proud of me. Every time prior to my accident, my Father and I always had railroad stories to talk about. Since my injury we struggle to carry a conversation. I know my Dad loves me and is proud, but I also know that he loses sleep over how the company that he dedicated forty three years of his life to treated his son as he lay there bleeding.

There will be more stories like mine as long as the railroads are allowed to harass and intimidate employees, as is current practice. The current reporting procedures give incentive to the railroads to keep an accident from becoming FRA reportable. I do not know if those

first 48 hours prior to me landing in the emergency room would have made a difference in my health today, but I do know if every injury, no matter what type of medical treatments are involved, had to be reported to the FRA, employees like me would be treated by emergency room doctors that were trained to treat injuries like mine. The doctor that treated me at the Business and Industry clinic was a retired Ophthalmologist. Yes that is right, a retired eye doctor. If your son had a severe head injury would you want him treated and diagnosed by an eye doctor?

To this day the Union Pacific's own documents show my accident never became an FRA reportable. I have not worked for the Union Pacific since December 1, 2003, but to this day the Union Pacific still shows I have never lost a day to my injury. The most ironic thing about my accident is that according to the Union Pacific's Records, I never even worked on November 5, 2001. If only it was that easy to erase my headaches.

ATRA American Tort Reform Association

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Testimony of Sherman Joyce

President,
The American Tort Reform Association (ATRA)

Before

The United States House of Representatives
Committee on Transportation and Infrastructure

"The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads"

Thursday, October 25, 2007

Good Morning Chairman Oberstar, Ranking Member Mica, and Members of the Committee.

My name is Sherman Joyce, President of the American Tort Reform Association (ATRA).

ATRA was co-founded in 1986 by the American Medical Association and the American Council of Engineering Companies. It is the only national organization exclusively dedicated to reforming the civil justice system.

Since that time, ATRA has been working to bring greater fairness, predictability and efficiency to America's civil justice system. These efforts have resulted in the enactment of state and federal laws that make the system fairer for both plaintiffs and defendants. ATRA's membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business, and professional associations. A representative list of members supporting ATRA is available on our Web site, www.atra.org.

ATRA's area of expertise is not running a railroad. Instead, our area of focus and experience is the manifold challenges that we see in restoring fairness and efficiency to the civil justice system. As such, our association supports the enactment of state and federal liability reform legislation, and speaks out frequently in the media on matters pertaining to the excesses of the civil justice system.

With that perspective, in 1996 ATRA participated as *amicus curiae* in *Metro-North Commuter Railroad Company v. Buckley,* a Supreme Court case concerning the creation of new causes of action under the Federal Employers' Liability Act (FELA). In its decision, which tracked arguments made in ATRA's brief, the Court declined to establish broad causes of action for emotional distress and medical monitoring under FELA.

ATRA believes that in the context of any Congressional focus on improving railroad employee safety, FELA merits careful examination, since the law's adversarial construct influences the behavior of all relevant parties.

My testimony today continues ATRA's commentary on FELA matters relevant to our civil justice system. It has two purposes: 1) to highlight how some of the over-arching challenges with our legal system have manifested within the construct of FELA, to the detriment of both plaintiffs and defendants; and 2) based on our experiences reforming the civil justice system, to provide this committee with some general recommendations on how FELA might be improved as well.

A Snapshot of FELA History

FELA is about to celebrate its centennial. While it has been modified several times, the FELA law with us today was enacted by Congress in 1908, in response to

conditions on railroads that were "far more dangerous and far more deadly then [they are] today."[1]

At its core, FELA is a federal law that creates an adversarial process – through litigation – to provide compensation for on-the-job injuries incurred by railroad workers. "Under the FELA, lawsuits are pursued to establish that on-the-job injury was the result of employers' negligence rather than the workers' negligence."[2]

At the time FELA was enacted, it was considered to be progressive legislation. Prior to the law's enactment in 1908, a worker faced more substantial burdens in receiving compensation for a work-related injury. According to a leading casebook on tort law, prior to 1908…

> *"...proving the employer's negligence meant that stumbling blocks were placed on recovery of damages by injured workers. Long, drawn-out litigation created severe financial burdens upon workers. Even though courts cannot be said to have been uniformly hostile to workers' claims, the realities of wealth and ineffectual representation institutions dictated relatively few instances of compensation."*[3]

For railroad workers, FELA changed this construct, and "restructured the tort system, making it easier for workers to recover damages," by limiting the railroads' affirmative defenses.[4]

FELA's status at the vanguard of fair workplace injury compensation was, however, short-lived. In 1910, New York became the first state to enact a workman's compensation law. The following year, Wisconsin's law became the first to withstand constitutional challenge. [5]

Workmen's compensation laws were soon adopted across the United States, where they replaced the adversarial litigation process – a process that (for reasons already referenced) disadvantaged employees – with a no-fault system that provided employees with prompt, predictable compensation for their workplace-related injuries.

State-based workers' compensation systems are by no means problem free or litigation free.[6] They are subject to fraud, and they generate litigation, primarily

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[1] Clayton Boyce, "Time to Go, FELA," *Traffic World*, September 22, 2003. *See also*, United States General Accounting Office, *"Federal Employers' Liability Act Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated,"* Report to the Chairwoman, Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives, GAO/RCED-96-199, Page 2. (Hereafter cited as "GAO")
[2] Boyce, "Time to Go FELA."
[3] Victor E. Schwartz, Kathryn Kelly, David F. Partlett, *Prosser, Wade and Schwartz's Torts Cases and Materials*, 11th ed. (New York: Foundation Press, 2005), 1192.
[4] ibid., 1192.
[5] ibid., 1192.
[6] GAO, 16.

concerning whether an alleged injury was incurred within the scope of employment. However, the no-fault model for compensating injured workers has been found so effective that Congress has extended it to cover millions of federal employees through The Federal Employees Compensation Act.[7]

The benefit of the workers' compensation system is the establishment of a no-fault system that provides prompt payment without the need to square-off against one's employer to receive compensation. Instead…

> *...benefits depend on one simple test: Was there a workplace connected injury? Negligence, and for the most part, fault, are not at issue, and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee: the same award issues.*[8]

ATRA believes that as Congress explores ways to better-manage the process by which railroads, and railroad employees handle accidents and injuries, FELA's ample shortcomings should be weighed against the benefits and shortcomings of other mechanisms to compensate employees for work-related injuries.

FELA Suffers from Many of the Infirmities of More Generalized Tort Litigation

While it allows for settlements, at its core, FELA creates an adversarial relationship between an employee that has suffered an injury, and her employer. In order to recover damages, she must initiate legal proceedings against her employer. Then, as one article noted, "In an employment case, the employee and his lawyer have an incentive to keep the employee off the job and appearing to be disabled for as long as possible."[9]

FELA's mechanism for compensation – tort litigation – has several problematic hallmarks that work against the goal of compensating employees fairly, fully, and predictably for their work-related injuries.

First, the initiation of legal proceedings and subsequent fact finding through the discovery process can create delays (generated by both sides) that forestall prompt payment to injured parties and delay their return to work.

Second, tort litigation is inherently uncertain. While the risks and uncertainties associated with litigation can promote settlement, they can also create disparate outcomes for parties that have suffered similar injuries under similar circumstances. While there are

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[7] ibid., 15.
[8] ibid, 1194. (Citing A. Larson, *The Law of Workman's Compensation*, 1-2, 5 (1991))
[9] Boyce, "Time to Go FELA."

variances in awards from state to state under workers' compensation systems, workers within the same state are paid against a well-known and well-established schedule, rather than against what a jury might award.

Third, the adversarial tort process places the burden of high transaction costs on both parties. According to recent data, the tort system returns less than 22 cents of each dollar spent to the injured party.[10] Untethered from FELA litigation, at least some of those resources could easily be reallocated toward still-greater investments in safety, in addition to workplace training, or additional compensation for employees.

Finally, many injured parties that cannot afford the up-front costs of legal representation, elect to compensate counsel through a contingency-fee arrangement in which plaintiff's counsel takes a percentage of any settlement or award (typically one-fourth to one-third *after* expenses are deducted).

While these arrangements can be advantageous for employees, such fee arrangements create incentives for plaintiffs' counsel to maximize damages. In addition, these arrangements often create two unappealing policy alternatives in the context of workplace injuries – either: 1) the plaintiff is made less than whole, after counsel has deducted his fee; or 2) the defendant has paid a premium at settlement or judgment to both make the plaintiff whole, and to compensate counsel.

Fraud and Abuse in FELA Litigation Parallels Trends Throughout the Civil Justice System

In the last several years, there have been significant instances of unlawful fraud and abuse permeating our civil justice system. Regrettably, FELA litigation has not been immune from these unseemly trends.

Many on this Committee are probably already familiar with the guilty pleas entered by current and former members of the law firm Milberg Weiss law firm over improper payments to a handful of plaintiffs in shareholder class action lawsuits, and specious silicosis litigation discovered by Judge Janis Graham Jack of the United States District Court in Corpus Christi, Texas.[11] Both of these incidents share a common element – the willingness of plaintiffs' counsel to place their own financial interests ahead of the interests of their clients.' These lawsuits were driven by and for the benefit of lawyers, rather than seeking to compensate truly injured claimants.

From the mid-1990s until 2004, a similar scheme permeated FELA litigation. In 2004, four officials of the Ohio-based United Transportation Union (UTU), which represents some but not all railroad employees, pled guilty to racketeering for accepting payments of as much as $30,000 each from personal injury lawyers in exchange for steering business to these lawyers, who were then placed on a union-recommended list of

[10] Tillinghast-Towers Perrin, *U.S Tort Costs: 2004 Update,* (New York, 2005).
[11] Julie Creswell, "Testing for Silicosis Comes Under Scrutiny in Congress," *New York Times*, March 8, 2006.

plaintiffs' counsel. In exchange for their immunity from prosecution, 37 personal injury lawyers gave information about 159 incidents of improper payments to union leaders.[12]

To its credit, the UTU has taken positive steps to ensure this type of conduct cannot happen again. The UTU has adopted a new code of ethics that prohibits lawyers from influencing union politics, and that prohibits union officials from soliciting gifts or money from lawyers.[13]

At the same time the UTU was resolving its issues, an entirely new set of FELA-related litigation abuses were being unearthed in West Virginia.

There, plaintiff Rodney Chambers and his counsel are alleged to have committed fraud against the freight railroad CSX when they submitted a medical report in FELA litigation that was certified by a "Dr. Oscar Frye," who has never been located, and whose address in Huntington, West Virginia is fictitious.[14]

In a separate but related legal proceeding, CSX has brought suit against Robert Gilkison and his employer – the law firm of Pierce, Raymond & Coulter (which at one time also represented Rodney Chambers at the time of the "Dr. Frye" episode) for "engaging in fraudulent schemes relating to screening mechanisms used by the law firm to find asbestos plaintiffs."[15] Interestingly, Dr. Ray Harron, who also came under national criticism for certifying silicosis claims that found their way to Judge Jack's Texas courtroom, is named as a co-conspirator in the suit because of his work on asbestos cases for the Pierce firm.

Solutions

My purpose in raising these issues is to suggest that there is evidence before this committee from divergent perspectives – labor, management, government and third parties like ATRA – that FELA, the current injury compensation mechanism for railroad employees, fosters behavior that is adversarial in nature, and works against the goal of compensating railroad employees quickly, fairly, and completely for work-related injuries. Further, in considering the perspectives of all involved, ATRA urges Members of the Committee to take into account that the process for resolving workplace-related claims for rail workers is unique in our legal system. The fault-based system in FELA harkens back nearly a century as virtually all other such claims are resolved through a no-fault type process, which began in 1910 with the first workers' compensation program.

Today, existing federal laws – the Federal Employees Compensation Act (FECA) and the Longshore and Harbor Workers Compensation Act (LHWCA) – have been enacted by Congress to create no fault systems to compensate injured workers, which are

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[12] Alison Grant, "Lawyers, leaders, capitalize on railroad workers' injuries. Deals created a system of abuse, leading to probe, guilty pleas," *Cleveland Plain Dealer*, March 26, 2004.
[13] ibid.
[14] Juliet A. Terry, "CSX lawsuit could lead to sanctions," *State Journal*, September 8, 2006.
[15] ibid.

administered through the Department of Labor.[16] A similar federal law could be enacted and applied to railroad employees.

Another approach advocated in a column appearing in a leading industry trade publication, *Traffic World*, suggests that FELA should be abolished, and the system should devolve to state-based workers' compensation systems.[17]

Alternately, in the past, Congress has explored capping noneconomic damages available under FELA, and examined alternative dispute resolution procedures like arbitration.[18]

In light of what you have heard today, we would urge Congress to explore some of the proposals that have been considered in the past, as well as seek the input of the organizations before you today on what innovative approaches could be implemented to accomplish these objectives.

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[16] GAO, 15.
[17] Boyce, "Time to Go FELA."
[18] GAO, 31.

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

November 7, 2007

Mr. Sherman Joyce
President
American Tort Reform Association
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Dear Mr. Joyce:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

Enclosure

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. What, if any, legislative action do you think should be taken to change FELA?

ATRA American Tort Reform Association

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November 26, 2007

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
United States House of Representatives
Washington, DC 20515

RE: House Committee on Transportation and Infrastructure October 25, 2007 Hearing on "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads"

Dear Chairman Oberstar:

We thank you for your interest in considering alternatives to the current mechanism for compensating injured railroad employees.

This letter is a follow-up to your request that ATRA provide the Committee specific recommendations on how to improve the system for compensating injured railroad employees, in light of the shortcomings with Federal Employer Liability Act (FELA) that ATRA identified in its testimony before the Committee.

ATRA believes that FELA has several significant problems that make it a poor mechanism for compensating injured workers:

- FELA is adversarial. In contrast to employees in virtually all other settings, FELA requires that railroad employees establish negligence in order to recover damages from his or her employer;
- FELA has generated fraud and abuse both among both labor organizations and elements of the personal injury bar;
- FELA has built-in incentives to delay an employee's prompt return to work;
- FELA creates the real potential for disparate awards between and among employees who have suffered similar injuries; and
- Even if FELA claims do not proceed to litigation, the system carries significant transaction costs for both the employee and the employer.

For these reasons, ATRA believes that the Committee should consider legislation that would create an alternative to FELA through the enactment of federal legislation to create a no-fault system for injured railroad workers.

In drafting such legislation, we recommend that the Committee carefully consider two federal worker compensation systems already in place as models upon which to craft a system to address the railroad's circumstances – the Federal Employees' Compensation Act, (FECA) which provides injury compensation to the federal civilian workforce, and the Longshoreman and Harbor Workers' Compensation Act (LHWCA), which provides compensation to employees injured on or adjacent to the navigable waters of the United States

The Federal Employees' Compensation Act

FECA provides no-fault injury compensation to virtually all of the 2.7 million members of the Federal civilian workforce. According to the U.S. Department of Labor (DOL), in FY 2006, FECA "provided 264,000 workers and survivors approximately $2.4 billion in benefits for work-related injuries or illnesses."

When compared with FELA, FECA pays claims promptly According to the DOL, under FECA: most traumatic injury claims are paid within 45 days; occupational illness claims are paid within 90 days; more complex occupational illness claims are paid within six months; and very complex decisions are rendered within 10 months.

By comparison, according to a 1996 GAO report, direct settlement of FELA claims with Class One domestic railroads took, on average, 7 to 10 months. Even at the outer limits the small percentage of FECA claims that proceed to litigation – claims were still resolved faster (26 months) than comparable FELA litigation (36 to 46 months).

In addition to paying claims more quickly than FELA, evidence suggests that FECA resolves claims at substantially lower transaction costs than litigation.

As the DOL notes on its website, " ..because disputes in claims under the Federal Employees' Compensation Act are resolved administratively, the Federal government avoids time-consuming and expensive litigation . "

According to DOL, overhead (transaction costs) accounts for a mere four percent of the cost of FECA. By comparison, the tort system has extremely high transaction costs, returning *less* than 22 cents of each dollar spent to the injured party. In FELA litigation, where injured workers are often represented on a contingent fee basis, attorneys' fees alone are estimated by the GAO to consume from 25 to 33 percent of the injured worker's award.

Under FECA, by contrast, evidence developed by the GAO in 1998 suggests that individuals receiving long-term FECA benefits (which are exempt from federal and state taxes) received compensation equivalent to, on average, 95 percent of their take-home pay

The Longshoreman and Harbor Workers' Compensation Act

According to the DOL, the LHWCA provides no-fault injury compensation coverage for approximately 500,000 workers. In FY 2005, the LHWCA paid more than $747 million to more than 27,000 claimants.

The LHWCA is similar to FECA in many respects Like FECA, it is a no-fault system administered through the Department of Labor.

However, the LHWCA contains a unique alternative dispute resolution (ADR) provision designed to resolve disputed claims quickly and efficiently. The LWHCA provides for an informal mediation process that allows both the injured employee and his or her employer to informally resolve disputed claims through a government mediator.

According to the Department of Labor, the 2,500 disputed claims resolved at the mediation stage cost taxpayers about $300 each. The alternative, a hearing before an Administrative Law Judge, costs taxpayers more (about $3,000), costs the parties more in litigation costs, and takes longer, depriving the injured party of compensation at a time when he or she may have no income.

It should be pointed out that, with regard to both FECA and the LHWCA, injured employees are compensated according to predetermined schedules, depending on the particular injury and its severity. In contrast to FELA cases, there is no prospect for an "outsize" judgment. Similarly, there is little prospect that an injured person will get the "short end of the stick" as a jury might decide under FELA. Balancing the equities for employees, the certainty of recovery, and the speed with which awards are made under no-fault systems suggests that the trade-off – the possibility of an outsize judgment in exchange for certainty and speed of recovery – is a positive one for employees. The law in this country certainly reflects that, given the prevalence of such no-fault type systems such as workers' compensation.

Moving Forward

ATRA does not suggest that either FECA or LHWCA are perfect systems, nor are they litigation-free and may not necessarily be the exact no-fault system ultimately crafted for the railroads. However, we do believe for the reasons stated above, that there are significant public policy shortcomings that explain why FELA is the anomaly and why virtually every civilian federal employee, every state government employee, and every private sector employee (even in jobs classified as far more dangerous that working on a railroad) is compensated for his or her injury through a no-fault mechanism.

We applaud your interest in addressing this important subject. We further urge this Committee to accept the suggestion of the Association of American Railroads and convene an open dialogue at which the railroads and railroad employees could share their views with you, and each other. ATRA would be pleased to participate in such a process. We thank you for the opportunity to provide you with additional information, and we look forward to working with in the future as you address this important subject.

Sincerely,

Sherman Joyce
President

TESTIMONY OF WILLIAM G. JUNGBAUER
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BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
OCTOBER 25, 2007

INTRODUCTION

Mr. Chairman, Members of the Transportation and Infrastructure Committee, it is a great honor and pleasure to be here today. My name is Bill Jungbauer. I have been practicing law in the field of railroad law and FELA litigation for nearly 30 years. I am President of the law firm of Yaeger, Jungbauer and Barczak. Our firm has represented injured railroad workers and their families for over 75 years in virtually every state and with every major railroad in the country. I have been personally designated by the Brotherhood of Locomotive Engineers and Trainmen as a Designated Legal Counsel. Our firm has been designated by numerous other unions representing rail labor. My curriculum vitae is attached as Exhibit 1. I have personally been involved in many cases where rail carriers have harassed, intimidated, threatened, and/or disciplined injured railroad employees. I have personally deposed many rail carrier officials on the subject of rail carrier policies, procedures and methods of dealing with injured employees. I am aware of many cases that have also been handled by my law firm involving harassment of injured employees by rail carriers. I am further aware of cases handled by other lawyers and union officials of many unions involving the same issues. I am personally disgusted with the rail industry and the abominable manner in which they treat their injured employees.

SCOPE OF THE PROBLEM OF CARRIER HARASSMENT/INTIMIDATION OF INJURED RAILROAD WORKERS & UNDER-REPORTING OF FRA STATS

Railroad carrier harassment and intimidation of their injured employees for the purpose of under-reporting of accident/injury statistics is a national problem that includes Railroads of all sizes from all parts of the country.

The FRA has failed to prevent harassment and intimidation of injured workers. FRA claims it has "zero tolerance" for carrier under-reporting/harassment yet rail carriers continue to SCARE employees into not reporting or under-reporting or misreporting accidents or injuries. Rail carrier Internal Control Plans (ICP's) have not stopped harassment and intimidation of injured employees. ICP's provide false cover for offending railroads and FRA top officials who have neither the will nor the manpower to prevent railroads from abusing their injured employees. FRA and Rail carriers can point to some examples of action taken to prevent such tactics. If FRA's "zero tolerance" policy had worked over the past decade there should be zero incidents of

harassment of injured employees and/or under-reporting of accidents. Today's testimony will clearly show that the FRA's "zero tolerance" policies have failed.

Rail carrier programs and policies actually encourage harassment and intimidation of injured railroad employees. The General Accounting Office documented in 1989 the problem of railroad under-reporting of accident and injury statistics and data. FRA Internal Control Plan regulation 49 CFR 225.33 was supposed to correct the problem in 1996. All the new regulation accomplished was to cause rail carriers to find new ways to under-report accident and injury statistics.

Why would rail carriers under-report accident and injury statistics? Such statistics are supposed to be used by FRA and Congress to consider the need for new safety, hazard elimination and risk reduction programs and legislation. New safety, hazard elimination and risk reduction programs and legislation cost money and affect corporate profits. Railroads apparently decided that if they could harass and intimidate injured employees causing them to fail to report injuries -- accident and injury statistics reported to the FRA would drop. Accident and injury statistics reported to the FRA have dropped significantly in the past decade; harassment and intimidation of injured employees has sky rocketed during the same period.

In addition to the harassment/intimidation methods of reducing reportable injuries, some railroads can use one or more of the following methods to under-report statistics: (1) forcing employees to use family medical leave act time for lost work time; (2) forcing employees to take personal days or vacation days for lost work time; (3) enacting draconian "availability policies" that force injured employees who return to work to work on days when they should not due to pain just to keep their job; 4) computer programming of call records that will not allow an injured employee to mark off "old injury"; and 5) fire the injured employee and have no lost work days to report to the FRA. Finally, FRA statistics in the past decade show that a large percentage of injuries are due to "human factors", a code name for blaming the injured employee. Due to a glitch in the reporting rules, carriers do not need to notify injured employees if the carrier claims the accident was caused by the human factor of the injured person.

STATE LEGISLATION TO COMBAT HARASSMENT/INTIMIDATION PREEMPTED

The problem of rail carrier harassment and intimidation of injured employees is so great that several states including Minnesota and Illinois have passed legislation due to the abject failure of the FRA and rail carrier internal control plans to prevent harassment and intimidation of injured employees. Amazingly, rail carriers have filed lawsuits in Federal Court in an attempt to block or destroy such state statutes. In the state cases, rail carriers have claimed that the Federal Rail Safety Act preempts any state laws or action in the field of preventing railroad carrier harassment and intimidation of injured employees. Rail Carriers argue that it does not matter whether or not the FRA through existing laws and regulations actually succeeds in preventing harassment; it matters only that the federal laws and regulations cover the same subject matter. Illinois passed

legislation that would make the prevention of medical services by rail carriers to their injured employees a crime. Rail Carriers sued and successfully convinced a federal court to overturn the Illinois statute.

Minnesota passed legislation in 2005 that made it a crime under section (a) of its statute for a railroad to deny, delay or interfere with an injured employee seeking medical treatment or first aid and further under section (b) made carrier harassment, intimidation, threat or discipline of an injured employee a crime. Every large and small railroad affected by the legislation joined together to sue in federal court to overturn the Minnesota Statute. Section (b) was overturned by the federal judge. The rail carriers were not satisfied. They appealed to the Eighth Circuit Court of Appeals to attempt to overturn section (a) of the Minnesota Statute.

Many of the rail carriers that sued to prevent Minnesota from using a criminal statute to stop rail carriers from intentionally harassing, intimidating, threatening and/or disciplining their injured employees are present at this hearing and will testify that current legislation, FRA action and rail carrier Internal Control Plans are sufficient to protect their injured employees. The list of rail carriers who sued in Minnesota to stop criminal actions against them are:

Burlington Northern Santa Fe Railway Company
Union Pacific Railroad Company
Canadian Pacific/Soo Line Railway Company
National Railroad Passenger Corporation (AMTRAK)
Dakota, Minnesota & Eastern Railroad
Ottertail Valley Railroad

Even little railroads want to be free to harass and intimidate their injured employees.

The rail carriers who sued in federal court in Illinois to prevent the State of Illinois from using a criminal statute to protect its injured railroad citizens were:

Burlington Northern Santa Fe Railway Company
Union Pacific Railway Company
Canadian Pacific/Soo Line Railway Company
CSX Transportation, Inc.
National Passenger Railway Corporation (AMTRAK)
Norfolk Southern Railway Company
Kansas City Southern Railroad Company
Illinois Central Railroad Company
Toledo, Peoria and Western Railway

Every railroad testifying here today and others represented by the AAR has proven that they do not want states to prevent them from abusing their injured employees to allow carriers to under-report injury/accident statistics. They don't want Congress to prevent them from abusing their

own injured employees for such purposes. Under the current system they can abuse their injured employees with impunity and they like that very much.

If these railroads and others would simply stop harassing, intimidating, threatening and/or disciplining their own injured employees and/or preventing them from access to medical treatment they would have nothing to fear from the Minnesota Statute, the Illinois statute nor section 606 of the House Bill.

In the Minnesota U.S. District Court case, rail carriers and the Attorney General of Minnesota presented what the court deemed to be "dueling evidence regarding whether the ICP Regulation effectively prevents harassment and intimidation calculated to interfere with the medical care of injured employees and whether the FRA properly enforces the ICP Regulation" Page 14 Court Opinion. Affidavits from the litigation are attached hereto as Exhibit 2.

The court recognized that "the determination whether state law is preempted by Federal Law does not concern an examination of the compliance with or adequacy of the Federal Regulation" "Neither the United States Supreme Court nor the Eighth Circuit Court of Appeals requires a railroad to prove FRA compliance before allowing state law preemption." Both courts deem coverage rather than compliance to be preemption's touchstone. In laymen's terms, if the FRA and carrier ICP programs TALK A GOOD GAME but actually FAIL TO PROTECT injured rail employees from harassment, intimidation, threats and discipline, that's sufficient to prevent any state from doing so. In laymen's terms again, it'll take an "Act of Congress" to stop the abuse of injured railroad employees by their employers.

INTERNAL CAUSES OF RAIL CARRIER HARASSMENT AND INTIMIDATION

Management Compensation Programs tied to injury Statistics/Performance:

Upper management may claim that they have no knowledge of any policies or procedures that encourage under reporting of accidents or injuries and/or encourage harassment and intimidation of injured railroad workers. The root cause that makes middle management and first line supervisors consider under reporting and harassment/intimidation of injured employees is the compensation system for such company officers. Middle managers and first line supervisors know that part of their total compensation with the railroad depends on whether or not goals are met for injury reduction statistics. (Ex. 3, testimony of carrier officials on compensation) It does not matter whether or not an official does his/her best in injury preventions; if statistics do not meet company reduction goals. Monetary rewards/penalties cause a true conflict of interest for middle management personnel wishing on one hand to earn as much money as possible and yet wishing to please upper management by achieving a lower accident reporting rate. Injured employees can be coerced through the carrier's discipline process into not filing FRA reportable accidents due to direct or indirect threats of selective enforcement of carrier disciplinary rules and procedures. The only missing piece to the puzzle is how the harassment or intimidation is

actually accomplished. That is done through various programs that each railroad has that allow for selective enforcement of various penalties including ultimately dismissal of employees. A number of years ago I personally advised FRA Director, Jolene Molitorous of the problem with compensation of middle and lower railroad management being tied to accident statistics. FRA refused and/or was unable to investigate this problem.

EXTERNAL CAUSES OF THE PROBLEM

FRA will claim that its system of fines is a deterrent to carrier misdeeds. A dirty little secret that few people know is that FRA fines of rail carriers are often bundled together and settled for pennies on the dollar. Billion dollar corporations do not fear thousand dollar fines that get negotiated down to hundred dollar fines. FRA claims it will investigate cases where medical treatment is denied, but FRA attorneys have personally told me they will not or cannot investigate other types of harassment such as carrier discipline of injured employees as a harassment tool. Our office recently asked the FRA for a copy of a Class 1 carrier's Internal Control Policy. The FRA responded that it did not have a copy of the policy. How can FRA know that the ICP's of various carriers are effective or not if they don't even have a copy of such policy, much less investigate compliance of any such policy.

I am aware that time is precious in these hearings and that I must end my prepared remarks. I am prepared to offer examples of specific cases involving a number of rail carriers present today and some not present today to illustrate the scope and breadth of the problem.

PROPOSED ACTION

The House Bill contains a section that would make it clear to states, rail carriers, the FRA, and injured railroad employees that this Congress will not tolerate rail carrier harassment and intimidation of injured railroad workers. Unfortunately, the Senate version of the bill does not contain similar language. It is incomprehensible to believe that any Senator or Member of the House of any political party would be in favor of allowing rail carriers to harass or intimidate injured rail workers. However, unless the House and Senate Bill are reconciled to include language of the House Bill the intent of Congress will be interpreted by courts around the country to allow rail carrier harassment and intimidation of injured railroad workers.

Thank you for your time and for allowing me to be here today.

William G. Jungbauer

ADDITIONAL DOCUMENTS AND SPECIFIC EXAMPLES OF HARASSMENT

1. Justin Cloud, CSX employee. Transcript between Mr. Cloud and CSX Terminal Superintendent (Ex. 4).

2. Lucas Litowitz, fired BNSF employee. Order from Federal District Court, Western District of Washington granting Protective Order. (Ex. 5). Plaintiff Litowitz Motion in Support of Protective Order [Ex. 6]. Defendant BNSF's Memorandum Opposing Protective Order. [Ex. 7].

3. Letter from Mr. John McArthur, Vice General Chariman of the Brotherhood of Railroad Signalmen dated September 10, 2007 summarizing three examples of harassment in the cases of Mr Vasquez, Union Pacific, Mr. Chavez, Union Pacific, and Mr. Lacsina, Amtrak. Supporting documentation for each case of harassment is attached. [Ex. 8].

4. Letter from Kevin T. Christians, Local Chairman BLET Division 6 dated October 14, 2007. [Ex. 9].

5. BNSF Risk Assessment Program. [Ex. 10].

6. Union Pacific UPGRADE Policy. [Ex. 11].

7. Tanner v. Union Pacific. Mr. Tanner is a fired Union Pacific Employee. Attached is the deposition of Cameron Scott. [Ex. 12].

WILLIAM G. JUNGBAUER

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- Juris Doctor Degree, University of Minnesota Law School 1978
- President of Law Firm of Yaeger, Jungbauer, & Barczak
- Senior Trial Attorney, practicing with firm that has been in existence since 1929 practicing in the field of railroad litigation, personal injury and wrongful death litigation
- The law firm has handled cases in 48 out of 50 states across the country
- Board Certified Civil Trial Specialist by National Board of Trial Advocacy
- Past National Chairman and Board Member of Academy of Rail Labor Attorneys
- Past National Chairman of Association of Trial Lawyers of America; Railroad Law Section, now known as AAJ, American Association of Justice.
- Listed in Best Lawyers of America; Railroad Law Section
- Lectured at the Western Economic Association International on "Calculation of Wrongful Death Damages"
- Co-author of Train Accident Reconstruction and FELA and Railroad Litigation: Volume I, Volume II, Volume III, and Volume IV.
- Contributing author to Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption by Thomas Ireland and Thomas Depperschmidt
- Brotherhood of Locomotive Engineers and Trainmen (BLET) Designated Legal Counsel
- Past National Chairman of Brotherhood of Locomotive Engineers and Trainman (BLET) Designated Legal Counsel

- Bar Admissions:

  Supreme Court, State of Minnesota, September 29, 1978

  U.S. District Court, District of Minnesota, October 11, 1978

  U.S. District Court, Eastern District of Wisconsin, August 30, 1979

  U.S. Court of Appeals, Eighth Circuit, March 26, 1980

  U.S. Supreme Court, November 30, 1981

  U.S. Court of Appeals, Ninth Circuit, June 30, 1986

  Supreme Court, State of Wisconsin, April 24, 1989

  U.S. District Court, Central District of Illinois, March 20, 1990

  U.S. District Court, District of Montana, February 21, 1992

  Supreme Court, State of Montana, May 13, 1993

  U.S. District Court, District of Colorado, November 9, 1993

  Supreme Court, State of Colorado, December 29, 1993

  U.S. District Court, Northern District of Illinois, July 26, 1994

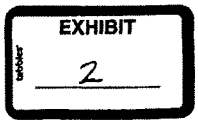
  U.S. District Court, Southern District of Illinois, August 20, 1999

  U.S. District Court, Southern District of Texas, October 4, 1999

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company, Plaintiffs, vs. Lori Swanson, in her official capacity as Attorney General of the State of Minnesota, Defendant.	Civil File No. 06-1013 MJD/SRN **AFFIDAVIT OF DENNIS DEAN**



AD

AFFIDAVIT OF DENNIS DEAN

State of Minnesota)
)
County of Dakota)

Dennis Dean being first duly sworn on oath, states as follows:

1. Your affiant's name is Dennis Dean. I reside at 25415 140th Street, Spirit Lake, IA 51360. I am 58 years old. I have been married to my wife, Anita, for 35 years.

2. I was hired by the Union Pacific Railroad on September 18, 2006.

3. Prior to going to work for the Union Pacific Railroad I served in the United States Navy and have previously worked as a cook, a sheet metal worker, a truck driver, and have worked various factory jobs including dye-cast metals, hydraulics, and inventory control. I have also worked for a hospital and for a cleaning business.

4. My wife and I were thrilled when I received the job offer from the Union Pacific because it would provide a good income and health insurance benefits for both of us. I looked at this job as being my best and final job before retirement, which I was planning on taking when I reached the age of 66.

5. I feel I was an exemplary employee for the Union Pacific. I passed all of my tests, was getting along well with my co-workers and supervisors and was enjoying the work.

6. On December 19, 2006, I was injured. On that date, we were working a train that originates out of Worthington and switches a number of elevators south of Worthington. I started my shift at 1630 on December 18, 2006, and completed my shift at 0430 on December 19, 2006. I had to stop at that point because I was "dead on the law", meaning the law does not permit me to work any longer than 12 hours per shift. At that point, I stayed in the locomotive by a siding and waited for a cab to pick us up. About one hour later an Armadillo cab arrived. As I got off the train, I crossed over the main-line tracks and started to descend a slope moving towards the Armadillo cab. This slope was about 10 to 12 feet in length and was very steep. As I was about 2 feet from the bottom of the ditch the ballast rocks rolled out from underneath me despite my best efforts to walk at an angle. I was carrying my grip and a lantern. I was attempting to shine the lantern ahead of me, as the lighting in the area was not very good. I fell down on my right hand and jammed my right hand, wrist, and arm. I felt immediate pain in my right hand and wrist.

7. I was told that the rules of Union Pacific Railroad were that, if an injury occurs, I must file a request with the MOP (Manager of Operating Practices) before I can seek medical attention. I attempted to reach the MOP, but he was unavailable, and accordingly I contacted another supervisor, the MTO (Manager of Train Operations) at approximately 0645 hours. I informed the MTO that I had been injured that day while at work. The MTO told me to wait at the terminal and that I must wait for him before I could get medical attention. The MTO arrived at the terminal at 0800 hours.

8. George Zettles (MTO), Eric Schundeman (MOP) and Dan Schedeman (a Mankato Roadmaster) all converged on me at about 0800 hours at the terminal. (The spelling of the supervisors' names is a guess.) I believe the three supervisors arrived specifically for the purpose of interrogating me. They made it clear that I had to complete the interrogation before I could get medical attention. They interrogated me for about 40 minutes. Eric then brought me to the Worthington hospital while the other two supervisors said they would go to the injury site.

9. I received an x-ray that revealed a broken ulna and was told by the physician that I had a bad break and that he was going to consult with a surgeon. The surgeon agreed that the break was bad but that surgery was not necessary. I was placed in a splint and was discharged at 1110 hours. Eric was with me the whole time.

10. At this point, I had been at work for 19 hours, had a broken arm, and was in a lot of pain. I very much wanted to go home to my family. Instead, Eric said we should go back to the depot to fill out reports and undergo more interrogation. I was in the probationary period of my employment and was hardly in a position to disagree.

11. Eric and I returned to the depot in Worthington at 1120 hours. I filled out a personal injury report form and then was questioned by five managers for yet another two hours from 1130 hours to 1330 hours. During this interrogation, I was required to take a toxicology test and a urinalysis test, which I believe were undertaken at approximately 1200 hours. While I was being questioned, my supervisors indicated that they did not believe my statement as to how I was hurt and asked whether there was an altercation or a fight between me and another crew member. Other than having a broken arm, they had no reason to believe that a fight or an altercation had occurred or that I was otherwise being untruthful as to how I was injured.

12. I finally departed for home at approximately 1330 hours.

D.D

13. Following my injury I performed light-duty work in Mankato, approximately 100 miles from my house. I drove almost four hours a day to light-duty and back with a broken arm.

14. On the final day of my probationary period, in fact 1.5 hours before my probationary status was set to expire, I was at my light-duty work station and was approached by management and told that I was terminated. I was not given a reason for my termination.

15. I am now unemployed.

FURTHER, affiant sayeth not.

Date: January 30, 2007

Dennis Dean

Subscribed and sworn to before me this 30th day of January, 2007

Notary Public

TONYA R. SALTER
Notary Public
Minnesota
My Commission Expires January 31, 2011

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF RITA M. DESMOND

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

RITA M. DESMOND, being duly sworn deposes and says:

1. I am a legal assistant with the Minnesota Attorney General's Office.

2. In connection with the above-captioned matter, I listened to and made duplicate copies of the official tapes of Senate and House proceedings listed below, as maintained by the Legislative Reference Library at the State Office Building in St. Paul, Minnesota.

3. Attached as Exhibit A is a transcript of a portion of the testimony before the House Public Safety Policy and Finance Committee Hearing on H.F. 1703, March 22, 2005.

4. Attached as Exhibit B is a transcript of a portion of the testimony before the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

5. Attached as Exhibit C is a transcript of a portion of the testimony before the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

6. Attached as Exhibit D is a transcript of a portion of the testimony before the House Public Safety Policy and Finance Committee Hearing on H.F. 1703, March 22, 2005.

FURTHER YOUR AFFIANT SAYETH NOT.

RITA M. DESMOND

Subscribed and sworn to before me on

this 31st day of January 2007.

NOTARY PUBLIC

AG: #1739382-v1

EXHIBIT A

From the House Public Safety Policy and Finance Committee, Hearing on H.F. 1703, March 22, 2005.

Phillip Qually:

"First I'd like to say that the nature of this problem is difficult. The railroads in this union have a productive working relationship in this State. There's many things that we work together on. But the nature of delaying and denying and interfering railroad workers' medical treatment is such that, well we've protested this, the injured people themselves have protested this, at the time of injury and the time of delay. We simply have to bring it to the State's attention. We believe it's within the State's interest to act to protect injured workers.

***

The first case was brought to my attention October 11, 2003 in Shakopee, Minnesota. The gentlemen cannot be here today because he's at work. He had a torn ligament at 2:30 in the morning. He called the manager immediately by telephone. The manager did not address nor call 911 emergency or make any arrangements for him to be taken to the hospital. The manager arrived at 3:15. Excuse me. He called the manager back at 3:15 and they were still not there. The manager arrived and then took the worker to the hospital at 4:15 until and we had a one hour and 45 minute delay on the front end from the time that the first call for emergency went in and when the carrier responded to it. At the hospital, the worker was given two levels of pain killers and told to ice the foot, keep it up, keep it compacted in a cast. Instead, the worker was taken back to the yard office and held for another hour and a half with a claim agent and three other train

masters circling and asking him questions. Again, the worker was not allowed to go home until approximately 8:00 a.m. And this is six hours, pardon me, 5-1/2 hours after the time of injury.

***

It's very unfortunate. Basically a worker broke an ankle on a train at 4:50 in the morning. The crew sought to get an ambulance and essentially a decision was made somewhere in the line that an ambulance was not called. We have records it was not called and finally a carrier manager took the injured worker then to the hospital.

At the hospital the injured worker was diagnosed with a broken ankle and then told to go directly to your own orthopedist. This cannot be set, you have to have this reset. Instead, the train master took her in the opposite direction from her home back to the injury site and photographed the area, then took her to her home."

***

AG: #1736778-v1

EXHIBIT B

From the Senate Crime Prevention and Public Safety Committee Hearing on S.F. 1606, March 22, 2005.

Senator Mee Moua:

> "This bill relates to railroads' crimes and addresses a disturbing pattern of conduct by railroad management personnel. Since the year 2003 and as recently as February 2005, the carriers have intentionally denied, delayed and interfered with first-aid medical treatment of injured railroad workers. And if passed into law, S.F. 1606 will make this conduct unlawful . . . ."

AG: #1731215-v1

EXHIBIT C

From the Senate Crime Prevention and Public Safety Committee, Hearing on S.F. 1606, March 22, 2005.

Mr. Clyde Larson:

> "Thank you Mr. Chairman. My name is Clyde Larson. I'm General Chairman of DMNI Railroad in Duluth, the United Transportation Union . . . ."
>
> * * *
>
> "[W]e see a trend where men and women are getting hurt out in the yard. They don't have their arms cut off, but they're brought into the yard office. They ask for medical treatment; they're held from anywhere from 45 minutes to an hour and fifteen before the carrier comes and will come with other managers. They will take them to the medical treatment facility; they've tried to get in and intervene in that treatment. Then when the doctors have said "go back and keep that leg up, keep it on ice, keep it compacted, they're taking the workers back to the yard office and holding them on duty against doctor's orders with a claim agent there, trying to get statements. We have three cases of this specifically. And these are ranging from periods of delay to an hour and half, before medical treatment and then after hour medical treatment . . . ."

EXHIBIT D

From the House Public Safety Policy and Finance Committee, Hearing on H.F. 1703, March 22, 2005.

Michael Nelson:

"I live in Circle Pines, Minnesota. I've got 30 years of service on the C&W and Union Pacific Railroad. February 8, 2004 I was injured in St. Paul and I called the manager right about, just before 10:00 p.m., when I injured myself, when I was injured, and I asked for help and I asked him if they could take me to the hospital right away, because I was in a lot of pain. I had apparently torn my achilles tendon and I was in quite a bit of pain. And he said that he'd get back to me. He had to make some phone calls first. Well then he hung up. Well, we waited and waited. And it's only about 15 minutes or less from where he had to come from. And, it had gone about half an hour, 35 minutes and nobody had showed up so we called again and he said, "well, I'm on my way now. I've still got to make some more phone calls. He finally showed up and finally we're on the way to the hospital. I finally got to the hospital probably about, oh, 11:20-11:25 at night.

***

And, I had been examined and everything there and I got back to the yard office. They took me back to where my vehicle was about 1:30 a.m., finally. And there was six people there waiting for me and my co-worker, they had already sent him home. And they wanted me, they were all asking me questions and more questions and I had a hard time focusing because they put me on some pain killers

and I was on crutches and the doctor had told me to go home and immediately put my leg on ice, my foot on ice and keep it elevated the rest of the night and stay off of it so I could go in the following day for some more tests. Well, they were just, each of the managers were circling me and asking me all types of questions and I said I wanted to go home and then they were wanting me to fill out all these different types of papers and I said well, I'd rather go home, I'm in a lot of pain, I don't know what's going on here right now. They said I could not leave the company property until I had signed these papers. So, he started reading them to me and I filled out some and then they finally said I could go home. And this was at about a quarter to three, ten minutes to three in the morning."

AG: #1737259-v1

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF PHILLIP QUALY

AFFIDAVIT OF PHILLIP QUALY

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Phillip Qualy, being first duly sworn upon oath, states as follows:

1. I am the State Legislative Director for the United Transportation Union.

2. In my capacity as Legislative Director, I participated in the enactment of the Minnesota Injured Railroad Workers Medical Treatment Act of 2005 ("Act").

3. The purpose of the Act was to reduce the incidence of "swarming" which would occur when a worker was injured and not permitted to seek medical treatment until an interrogation by management had been completed.

4. I am aware that management at most railroads will earn a bonus based on different performance factors.

5. One of the performance factors is the frequency and severity of injuries that occur by the railroad workers under their supervision.

6. It has become a standard in Minnesota for railroad management to interrogate injured workers before getting medical treatment because of the belief that an untreated worker is vulnerable and will be induced to answer leading questions in a manner favorable to the interrogator because they are in pain, they need immediate medical treatment, and they are not focused on the questions being asked.

7. A term utilized in the railroad industry to describe a pre-medical and post-medical interrogation is "swarming." "Swarming" can be described as several managers surrounding the injured worker, prior to the worker receiving medical treatment, and interrogating him or her about the injury until they get favorable answers or until the worker cannot provide more

information. Thereafter, a second "swarm" may occur after the worker gets treatment, with up to five managers conducting the interrogation. The "swarm" will be conducted at a time the injured worker is just discharged by medical attendant, is tired, is in pain, perhaps sedated or heavily medicated, and has been told by the physician to go home and rest. In many cases, the physician will tell the injured worker to put the legs up, to have bed rest, and to lower their stress level. Instead of following the medical instructions, the managers take the worker in for another "swarm." During the "swarm" the injured worker may be taken to the injury site and told to reenact what happened to cause the injury.

8. The purpose in enacting the Act was not to stop interrogations or to stop the ability of a railroad to determine the cause for an accident. The purpose is simply to make sure that a worker is able to get prompt medical attention.

9. Through the 2005 session there were several amendments that were proposed that were part of the debate concerning the issue of "swarming" and the need for prompt medical attention. At no time did representatives of the railroad industry state that prompt medical attention would be a problem for them as it relates to injured workers.

10. Indeed, on May 31, 2005 the lobbyists representing the railroad industry lobbyist sent to me a fax, a copy of which is attached as Exhibit A, that states that the railroad industry agrees to draft amendment language regarding criminal penalties for impeding an injured railroad worker. The memo is drafted by John Apitz, a lobbyist who represents the railroad industry. The memorandum states that the amendment language for the $1,000 penalty is "consistent with the agreement that the railroads reached with the UTU."

11. Attached as Exhibit 1 to Mr. Apitz's memo, which again is Exhibit A to my affidavit, is the draft of the stipulated amendment. Please note that the draft language amends Minn. Stat. § 609.849, a criminal statute, and further that it provides for a $1,000 fine.

Minnesota Chapter 609 is the criminal code for the State of Minnesota. The Act was placed in the criminal code because both the railroads and the union agreed that the issue concerning "swarming" finally be addressed as such.

12. The only change from the amendment attached to Apitz's exhibit and the final Act was the addition of the word misdemeanor. The purpose of adding the word misdemeanor was to make it clear that the Act is criminal in nature.

13. I interviewed Ms. Dyer about the La Crescent, Minnesota incident which is referred to in Mr. Canny's affidavit (Exhibit B). She told me that Mr. Knickel picked her up in the switch shed approximately 40 minutes after she called for help on her radio. Mr. Knickel then took Ms. Dyer to the hospital in La Crosse, Wisconsin. The emergency room physician told her that her ankle was severely fractured and that they could not set the fracture in the emergency room. They told her to go to an orthopedic surgeon to get the fracture set that morning.

14. Rather than taking Ms. Dyer to an orthopedic surgeon, Mr. Knickel took her back to the injury site, which is approximately three or four miles West of La Crosse, to interrogate her about the incident.

FURTHER YOUR AFFIANT SAYETH NOT.

Phillip Qualy

Subscribed and sworn to before me on

this 31st day of January, 2007.

NOTARY PUBLIC

AG: #1741065-v1

To: Doug Franzen
Fax # 612/340-7900

Fr: John Apitz 651/260-0885 (cell)

Attached is the draft amendment language regarding penalties for impeding injured railroad workers. It is consistent with the agreement that the railroads reached with the UTU.

If this works, hopefully you can talk Bakk to offer it.

Exhibit A

1 Senator ..... moves No. 1976, in conference
2 committee, as follows:
3 On RS
4 Page 80, after line 3, insert:
5 "Sec. 85. Laws 2005, chapter 136, article 17, section 50,
6 is amended to read:
7 Sec. 50. [609.849] [RAILROAD THAT OBSTRUCTS TREATMENT OF
8 AN INJURED WORKER.]
9 (a) It shall be unlawful for a railroad or person employed
10 by a railroad ~~negligently or~~ to intentionally to:
11 (1) deny, delay, or interfere with medical treatment or
12 first aid treatment to an employee of a railroad who has been
13 injured during employment; or
14 (2) discipline, harass, or intimidate an employee to
15 discourage the employee from receiving medical attention or
16 threaten to discipline an employee who has been injured during
17 employment for requesting medical treatment or first aid
18 treatment.
19 (b) Nothing in this section shall deny a railroad company
20 or railroad employee from making a reasonable inquiry of an
21 injured employee about the circumstance of an injury in order to
22 gather information necessary to identify a safety hazard.
23 (c) It is not a violation under this section for a railroad
24 company or railroad employee to enforce safety regulations.
25 (d) A railroad or a person convicted of a violation of
26 paragraph (a), clause (1) or (2), ~~is guilty of a gross~~
27 ~~misdemeanor and may be sentenced to imprisonment for not more~~
28 ~~than one year or to payment of a fine of~~ may be fined not more
29 than ~~$3,000, or both~~ $1,000.
30 [EFFECTIVE DATE.] This section is effective August 1, 2005,
31 and applies to crimes committed on or after that date."
32 Renumber the sections in sequence and correct the internal
33 references
34 Amend the title accordingly

State of Minnesota

Public Safety Criminal Omnibus Bill: H.F. 1 Article 17, Section 27.

H.F. 1, Art. 17. Sec. 27. [609.849] [RAILROAD THAT OBSTRUCTS TREATMENT OF AN INJURED WORKER.]

(a) It shall be unlawful for a railroad or person employed by a railroad to intentionally:

(1) deny, delay, or interfere with medical treatment or first aid treatment to an employee of a railroad who has been injured during employment; or

(2) discipline, harass, or intimidate an employee to discourage the employee from receiving medical attention or threaten to discipline an employee who has been injured during employment for requesting medical treatment or first aid treatment.

(b) Nothing in this section shall deny a railroad company or railroad employee from making a reasonable inquiry of an injured employee about the circumstance of an injury in order to gather information necessary to identify a safety hazard.

(c) It is not a violation under this section for a railroad company or railroad employee to enforce safety regulations.

(d) A railroad or person convicted of a violation of paragraph (a), clause (1) or (2), may be fined not more than $1,000, misdemeanor not subject to incarceration.

[Effective Date.] This section is effective August 1, 2005, and applies to crimes committed on or after that date.

Exhibit B

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BNSF Railway Company; Duluth Missabe and Iron Range Railway Company; National Railroad Passenger Corporation, d/b/a/ Amtrak; Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway; Otter Tail Valley Railroad Company, Inc.; and Union Pacific Railroad Company,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of the State of Minnesota,

Defendant.

Civil File No. 06-1013 MJD/SRN

AFFIDAVIT OF HUGH CANNY

AFFIDAVIT OF HUGH CANNY

STATE OF WISCONSIN)
) ss.
COUNTY OF COLUMBIA)

Hugh Canny, being first duly sworn upon oath, states as follows:

1. I am 48 years of age. I reside at 327 North First Street in Randolph, Wisconsin 53956. I have been employed in the railroad industry for 30 years. I currently am an engineer.

2. On February 4, 2005, I was an engineer on a train going from Saint Paul, Minnesota to Portage, Wisconsin. Susan Dyer was the conductor and I was the engineer on the two-person crew. There were at least 70 cars on the train. At the time, the temperature was around zero degrees.

3. Sometime at approximately 0400 on February 4, 2005 our train passed a "wild detector" near Red Wing, Minnesota. A "wild detector" is a sensor attached to the track which detects the "out of round" wheels on freight cars. The "wild detector" signaled to our train that several freight cars were "out of round." The protocol when a freight car with a "out of round" wheel is identified is to detach the freight car at the next freight yard. In this case, the next freight yard was located in La Crescent, Minnesota.

4. We drove the train to La Crescent, Minnesota and, because we were running up to 11 hours on our shift, and because we are not permitted to work more than a 12 hour shift, another crew had been called to relieve us at the La Crescent freight yard.

5. The La Crescent freight yard is very isolated. There was ice and snow surrounding the environment. It was in the middle of winter. It was in the dark of night. The

protocol for removing a freight car with a bad wheel is for the conductor to get off of the locomotive and go back to the damaged freight car. She then radios the engineer to move the train until the damaged freight car is near a switch stand. At that point, the conductor disengages the freight cars behind the damaged freight car, radios to the engineer to pull the forward cars forward, moves the switch, and then backs the damaged freight car off of the mainline onto the siding. Once the damaged freight car is disengaged, the engineer is told to move the train forward back onto the mainline. The switch is then reversed by the conductor, and the engineer then backs the train up and hooks the remaining freight cars together.

6. The work involved in changing a freight car is extensive. This is done in an isolated location in a very rugged environment.

7. While the conductor was trying to place the damaged freight cars on the siding, she radioed to me in the locomotive and told me that she had hurt her ankle. She said she would try to complete the change of the damaged freight cars. At the time, I was on the locomotive, which was approximately 70 cars ahead of the conductor, which is approximately one mile.

8. I then received a call from the conductor who stated that she could not complete the task and that she was injured. She indicated that she was on the ground.

9. I then called the dispatcher by both radio and cell phone. The dispatcher received my call and I told him that the conductor was injured, could not walk, and she needed medical attention.

10. The dispatcher then called me back and asked for a description of how an ambulance could get to the location where the conductor was located. I told the dispatcher to contact the rail yard switch crew in La Crosse, Wisconsin who would probably know the directions to get to the switch shed located in La Crescent, Minnesota. The purpose of his

telephone call was to get directions for the ambulance. He made that clear to the La Crosse switch crew. The radio dispatch was heard by me in my locomotive.

11. About 10 minutes later, the dispatcher called me and told me that the road manager, Jerry Knickel, was going to pick up the conductor.

12. Approximately 30 minutes later, a replacement crew from Saint Paul, which had headed to La Crescent to relieve us because we were nearing the end of our shift, arrived on the scene. Terry Burns, the replacement conductor, said that they immediately went to the shed and found the conductor, Ms. Dyer, huddled in the shed and appeared to be going into shock.

13. Mr. Burns advised me that, approximately 15 minutes after they arrived, Mr. Knickel arrived on the scene and picked up Ms. Dyer.

14. Upon information and belief the ambulance located in La Crescent could have arrived on the scene within five minutes. By not ordering an ambulance, Ms. Dyer sat in a zero degree switch shed for approximately 40 minutes.

FURTHER YOUR AFFIANT SAYETH NOT.

Hugh Canny

Subscribed and sworn to before me on
this 31 day of January, 2007.

NOTARY PUBLIC

AG: 01740908-v1

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ORIGINAL

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANTA
IN AND FOR THE COUNTY OF YELLOWSTONE

CHARLES R. EHLENFELDT,

Plaintiff,

vs. Case No. DV 05-0322

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant.

DEPOSITION OF JEFFREY WHITACRE
Taken on behalf of the Plaintiff
March 14, 2007

- - -

BE IT REMEMBERED THAT, pursuant to the Washington Rules of Civil Procedure, the deposition of JEFFREY WHITACRE was taken before KATHERINE S. VANGRINSVEN, a Certified Shorthand Reporter, #3085, on March 14, 2007, commencing at the hour of 1:17 p.m., the proceedings being reported at 3810 East Boone, Spokane, Washington.

EXHIBIT
3

1 that you've listed a personal injury?
2 A Yes, sir.
3 Q And if you get enough points, the next time you
4 have discipline of any kind, including a soup can incident,
5 you could be fired?
6 A Not exactly.
7 Q Well, then, why don't you explain how it works.
8 A You are, you are assessed points, but just
9 because you have points, doesn't mean if you have one, one
10 incident that you would be fired.
11 Q But if you have the switch incident, which again,
12 the court and jury haven't had a chance to rule on whose
13 fault it is, but your company's already ruled by the mere
14 fact that it happened that you've assessed points against
15 his record, haven't they?
16 MR. SIMPSON: Objection, foundation.
17 THE WITNESS: We assess points for the personal
18 injury, yes.
19 BY MR. JUNGBAUER:
20 Q Why is that fair when we don't know whose fault
21 it is until the jury rules?
22 A I couldn't answer that. I don't assess -- I
23 didn't come up with the system.
24 Q Okay. Could that be -- and, now, our previous
25 witness testified to us that managers on the Burlington

1 Northern Santa Fe, their bonuses can be affected or their
2 total compensation, by the number -- by the safety record
3 and number of personal injuries that are filed in their
4 territory, correct?
5 A That's a possibility, yes.
6 Q Doesn't that create a huge conflict of interest
7 for someone who's deciding what penalty to give to an
8 individual on a soup can incident if he already knows that,
9 "Hey, this guy's got a personal injury for the, for the
10 switch. That's going to hurt my bonus. And now we've got
11 the soup can thing. That's going to hurt my bonus. So
12 let's fire him to make an example out of him for everybody
13 else." Isn't there a conflict of interest like that?
14 A I don't believe I've ever viewed it that way.
15 Q Well, let's look at it that way right now, and
16 tell the jury whether or not you think there is a potential
17 for conflict of interest if the person whose bonus is at
18 risk, that's the managing person that's going to fire or
19 not fire somebody, if he can use discretion of whether to
20 fire or not fire somebody and his own personal bonus is
21 affected by what happens long-term. Isn't that a conflict
22 of interest?
23 MR. SIMPSON: Objection, argumentative.
24 THE WITNESS: I'm not sure because the safety
25 aspect is only a fraction of the bonus potential.

1 BY MR. JUNGBAUER:
2 Q But if it affects a hundred dollars, much less
3 thousands of dollars, wouldn't an official want to make an
4 example of somebody like Mr. Ehlenfeldt so other people
5 don't turn in accident reports? Isn't there a conflict of
6 interest there?
7 MR. SIMPSON: Same objection.
8 BY MR. JUNGBAUER:
9 Q There's at least the potential for conflict of
10 interest, isn't there?
11 A Possibly could be.
12 Q Okay. And that's what I'm --
13 MR. JUNGBAUER: Go ahead.
14 THE WITNESS: Thank you.
15 BY MR. JUNGBAUER:
16 Q Now, you worked as a, as a conductor trainman
17 also?
18 A Yes, sir.
19 Q As we look at this Exhibit No. 4 [sic], can you
20 tell me what types of switches there are specific
21 instructions on how to throw switches?
22 A You're asking for the different types?
23 Q Yes.
24 A How many different types?
25 Q Yes. And I think if you go through there and

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ORIGINAL

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANTA
IN AND FOR THE COUNTY OF YELLOWSTONE

CHARLES R. EHLENFELDT,

Plaintiff,

vs. Case No. DV 05-0322

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant.

DEPOSITION OF THOMAS CLARK SIMMONS
Taken on behalf of the Plaintiff
March 14, 2007

- - -

BE IT REMEMBERED THAT, pursuant to the Washington Rules of Civil Procedure, the deposition of THOMAS CLARK SIMMONS was taken before KATHERINE S. VANGRINSVEN, a Certified Shorthand Reporter, #3085, on March 14, 2007, commencing at the hour of 10:10 a.m., the proceedings being reported at 3810 East Boone, Spokane, Washington.

1 A On many -- in, in many cases, if the manager
2 knows what he's doing, he can, he can contact the data
3 inputters, the people that input the data -- the data
4 inputters, that's great grammar there -- but he can contact
5 them and say, "Hey, I think that this situation, the guy
6 shouldn't be assessed points."
7 Q So the manager kind of has a little input into
8 whether points are assessed or not?
9 A If he's familiar with the process, yes.
10 Q Okay. Isn't it true that managers have bonus
11 systems where if accidents occur on their territory, it can
12 affect the overall compensation for that territory?
13 MR. SIMPSON: Objection, lack of foundation.
14 THE WITNESS: Accidents or injuries?
15 BY MR. JUNGBAUER:
16 Q Accidents or injuries, you tell me.
17 A We are rated, we are rated on safety, yes, sir.
18 Q I know. But let's say that an engine comes from
19 a different territory and it malfunctions in your
20 territory, so you have a malfunctioning engine that causes
21 an accident in your territory. You get assessed for it,
22 don't you?
23 A If there's an injury involved with it and I get
24 the man hours for the employee, that, that could be the
25 case, yes, sir.

1 Q And that's totally unfair, isn't it, that
2 somebody else doesn't do the proper maintenance on an
3 engine in a different territory, and you as a manager, just
4 because the accident occurs in your territory, get
5 assessed, right?
6 A That's unfair?
7 Q Don't you think that's unfair?
8 A No, sir. I think that's a system, a process we
9 have in place, and that's what we have to live with. I,
10 I --
11 Q Don't you also think that it's a, that it puts
12 pressure on middle management people to try to say to
13 employees, "Don't report injuries because, otherwise, it
14 gets on my" -- "my family doesn't eat"?
15 A I -- I, personally, I can't speak for the rest of
16 BNSF Railway, but it is what it is. If the injury happens
17 on my territory, it's my injury, and I'm willing to accept
18 that.
19 Q But it can affect your compensation?
20 A In the long run, yes, sir, it can. It can affect
21 my, it can, it can affect my compensation, that is
22 correct.
23 Q Right. And other managers' compensation also?
24 A That is correct.
25 Q So why would a manager ever want to give a break

COPY

TRANSCRIPT OF RECORDED TELEPHONE CONVERSATIONS

BETWEEN

JUSTIN CLOUD, CONDUCTOR, CSX RAILROAD

AND

DEWAYNE BARTON, TERMINAL SUPERINTENDENT, CSX RAILROAD
AND
MAX COX, ENGINEER/CONDUCTOR MENTOR, CSX RAILROAD

* * * * * * * * * * * * *

The following pages contains a transcript of one (1) recorded message and six (6) recorded telephone conversations been Justin Cloud, Conductor, and Dewayne Barton, (Former) Terminal Superintendent, and Max Cox, Engineer/Conductor Mentor, all being employed by CSX Railroad.

EXHIBIT
4

Phone Message:

DEWAYNE: Hey, this is Dewayne. I think we had a misunderstanding this morning. When I was talking to you, the speech I have to give to anyone that gets hurt. If I didn't, you know, that's why I said I'd come over there and take you to the doctor. It didn't have anything to do with you. It's a speech that everybody that gets hurt gets that speech, buddy, so it didn't have nothing to do with you personally. That's why I said I'll be down there in five minutes if you needed me to because Max called me after I called him and said you wanted to see how you could do, you know. I'm willing to work with you. I'll do anything to keep you out of trouble. That's what I want you to know but I wanted you to be well, too, so I hope everything turns out alright and you know, I'll give you until Sunday, four or five days, so you can get rested up there. You can give me a call 304-1400. Thank you, buddy.

* * * * *

Phone Conversation #1

DEWAYNE: ... and we'll go from there. See what I'm saying?

JUSTIN: About the accident report or...

DEWAYNE: Yeah, I'd like you just to show up for work and when you're out here, we'll say something flew up and hit you in the head, and fill out the paperwork and we'll just take you to the doctor and they'll tell you the same thing, you know, fill out the paperwork.

JUSTIN: Alright. He's supposed to call me back in the morning or something about that test and have me come in.

DEWAYNE: Okay. But I mean, I'm sure it, it was precautionary if it was just a mild concussion. Did they tell you class 1?

JUSTIN: Class 2. I don't know what that means but...

DEWAYNE: Do what?

JUSTIN: I'm not really sure what a class 2 concussion means. That's just what he said.

DEWAYNE: Yeah, I think that, I think that means a mild concussion. But hopefully everything is going to be alright. I'm sure you got hit pretty hard. Hopefully we'll get through this and all, like I said, we'll help you through whatever you need. I told Max if it costs anymore than what your insurance paid, we'll get you a day here or there

to make up the difference on it, so.

JUSTIN: Alright.

DEWAYNE: You don't have to worry about that.

JUSTIN: He said they was going to try to run some more tests or something. He said I may have done, pulled something in my neck. I told him it was stiff, it wasn't hurting really that bad. He just wanted to run a bunch of stuff, make sure I didn't mess anything up. My doctor is real precautious like that.

DEWAYNE: Ah, you're young. I'm sure, as good a shape as you're in, it didn't, but that's good that he's taking precaution.

JUSTIN: Yeah.

DEWAYNE: Big and strong as you are, I doubt, you know, I think you'll be alright. I hope you'll be.

JUSTIN: You and me both.

DEWAYNE: But like I said, we'll get you through it, so. Alright?

JUSTIN: Alrighty, I appreciate it.

DEWAYNE: Alright, if you need anything, just, you've got my number there, just call me but just get some rest there and like I said, if it takes, you know, being off six or seven days, we'll help you out

there.

JUSTIN: Alright.

DEWAYNE: Alright, buddy.

JUSTIN: I'll talk to you later.

DEWAYNE: Alright. See you.

* * * * *

Phone Conversation #2:

DEWAYNE: Well, did you hear anything yet?

JUSTIN: No, they said it's going to be in the morning before I get my test results back.

DEWAYNE: In the morning? ... I had one of those one time and it just, it took them, they didn't tell me after it got finished.

JUSTIN: Yeah.

DEWAYNE: How you feel?

JUSTIN: Pretty shitty right now. He said I might feel this way for a few days. They said if the CAT, or the CAT scan come up negative, I'll probably feel this way for a few days and then hopefully it will all go away.

DEWAYNE: Yeah. Okay, alright. Huh, huh, huh. How in the world did you get hit anyway, do you know?

JUSTIN: I have no idea. I didn't even see it hit me.

DEWAYNE: That's a good thing it hit you in the head. I mean, rather than an eye or something like that.

JUSTIN: Everybody says that my head has always been pretty hard.

DEWAYNE: Well, I mean, I didn't want to say that but you know, if you're like your brother, it'd be a whole lot better to hit you in the head than it would be (laughs)

JUSTIN: Yeah.

DEWAYNE: Is your head hurting right now?

JUSTIN: Yeah, I got a terrible headache. They just told me to take some Ibuprofen and stuff, nothing to make me drowsy.

DEWAYNE: Yeah. Well, well, well. Alright then, you know, I hope everything, hope it all works out. Now, you, you're off, so...

JUSTIN: What'd you say?

DEWAYNE: I just, can you hear me?

JUSTIN: Yeah, I can hear you now.

DEWAYNE: I said, we've got you marked off and everything so just let me know whatever you need.

JUSTIN: Yeah, tomorrow is my off day I think.

DEWAYNE: Yeah, well, I've still got you, I guess what they'll do is just keep you marked off till, you

know, Sunday or Monday, whatever.

JUSTIN: Alright. I'll call you tomorrow after I get back from my test results.

DEWAYNE: Yeah. Okay, alrighty, I hope everything is okay. I had one of those one time.

JUSTIN: It's kind of weird, ain't it?

DEWAYNE: Well, I, it happened at a ballgame. That was on a Thursday night but then when I woke up, it was Saturday night, so I'd been out, I'd been out a long time.

JUSTIN: Yeah.

DEWAYNE: And it may have, it was a awful weird feeling.

End of Conversation

* * * * *

Phone Conversation #3:

JUSTIN: Hey, this is Justin.

DEWAYNE: This is Dewayne. I was calling to see if you, if you went back to the doctor today?

JUSTIN: Yeah.

DEWAYNE: What did that MRI show?

JUSTIN: He said the MRI pretty much was negative. He said he's going to send me to a optometrist, that my eyesight should be better by now. He took a x-ray

of my neck because I've got some stiffness back there, just check and make sure everything is alright. He hadn't got back to me on that yet.

DEWAYNE: Okay. So that CAT scan was negative then. Well, what do you want to do? Do you want to come in, turn this thing in and go from there on Friday, or do you want to give it a shot here for about a week?

JUSTIN: Well, he pretty much told me I was going to be off a while, going back and forth to the doctor, and getting tested and make sure everything goes away, so I guess that's the only thing I can do is turn it in.

DEWAYNE: Well, I mean, if that's the way you want to go, then just come on. I mean, I can get you while you're going back and forth to the doctor, until, you know, a week, till next, you not come back until next Friday or Saturday, or whatever, you know, if it's nine days or whatever, seven days. If not, I guess, you know, we'll turn it in and go from there. It's up to you.

JUSTIN: Well, the way he talked, he pretty much told me that's what I needed to do. And that I needed to see the optometrist anyway and I don't have any

vision insurance, so I'm going to have to see how that's going to work out.

DEWAYNE: Well, are you just going to come in Friday then and we're going to turn it in and then go from there then?

JUSTIN: Can I do it today or tomorrow or what?

DEWAYNE: It'll have to be on... We're going to have... What you're going to have to do, since you didn't want, you went that way with Max, we're just going to have to say it happened Friday.

JUSTIN: Well, I was kind of wondering about that. I was talking to Max about it and you know how they said they was going to, you said they was going to send me a charge letter and whatnot.

DEWAYNE: Oh, that goes with everybody, just like I said.

JUSTIN: Oh, I understand that but what happens when they do that and if they make a big deal out of it and they pull my medical background and... x-rays and doctors appointments before the injury is on file? I mean that's going to put me up the shit creek.

DEWAYNE: Oh, I was going to take you to a different doctor and let him look at you and refer you that a way.

JUSTIN: But I mean, even in an investigation, if they pull my medical background period, it's going to show

my CAT scan, my x-rays and all that and that's going to show an injury before it was reported and I'm trying to screw them over or something is what I'm, you know, I don't know what else...

DEWAYNE: When did it happen, Tuesday night?

JUSTIN: Yeah. Tuesday morning, one o'clock in the morning.

DEWAYNE: Okay.

JUSTIN: And I'm just afraid, you know, they're going to end up screwing me on it or something. I mean, you know what I mean?

DEWAYNE: ... I should have just, it .... we all probably get fired over this. You know what I'm saying? I just don't know what to do.

JUSTIN: Well, I'm just trying, you know, to keep them from coming back and saying, you know, you're lying and you're fired and I wouldn't never have a job trying to fake an injury if that's what everybody thought.

DEWAYNE: It's the same way by not turning one in, everybody's going to get fired, you know what I'm saying? I'm just trying to look out for you and Max and everybody involved best interest. You know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: I don't know anything, well, just go with it, and see how you are next Friday and see if everything is alright?

JUSTIN: Well, Dennis wants me to call him before I actually do anything, so I guess I could talk it over with him and see what his situation is on it.

DEWAYNE: Well, I mean, I don't want any of us to get in trouble. I mean, if you, if there's any possible way, I mean, we'll make up whatever the optotritian costs, you know, whatever, you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: But, the way we got to look at this is keep you out of trouble, Max, me, everybody, if we can get through this, then we'll go on from there and if anything else happens, we'll know better and just turn it in right there, you know what I'm saying?

JUSTIN: Yeah, I know what you're saying.

DEWAYNE: And I'll, we'll make up anything that you have to pay out of your pocket, loss of time or... you know what I mean?

JUSTIN: Yeah.

DEWAYNE: And you know, I just don't want any of us, we're

all going to get in trouble now, is what I'm saying.

JUSTIN: Well, that's the last thing I'm wanting to happen but if something ends up being wrong and it's next week, you know, and he's like you know you're going to be off work for a while, there's no getting out of it, that's just going to be that much worse is the only thing I'm thinking.

DEWAYNE: But now, I mean, what, what could be wrong, I mean?

JUSTIN: Well, he's wanting me to see the optometrist to check the back of my retinas because my vision should be cleared by now and it's not and he don't understand why it's not.

DEWAYNE: I don't think, if anything was wrong, it would showed up in that CAT scan, you know, so...

JUSTIN: Well, your CAT scan don't do your vision. It does your brain activity.

DEWAYNE: Right, that's what I'm saying. I mean...

JUSTIN: It don't have anything to do with my eyes, the CAT scan doesn't.

DEWAYNE: And the only other thing, if we turn this in, you know, you're going to go, the way this works....and I don't want that to happen to you,

you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: I don't know, buddy.

JUSTIN: Well, let me talk it over with Dennis. I have my eye, my eye doctor appointment tomorrow at three o'clock, so let me talk to Dennis, and I'll give you a call back.

DEWAYNE: Okay, buddy, well, just, like I say, keep it between us and I'm here to help you and we'll do whatever we have to do to get through it and keep everybody a job, okay?

JUSTIN: Alrighty.

DEWAYNE: Alright, buddy, I appreciate you.

JUSTIN: No problem.

DEWAYNE: Alright, see you.

End of Conversation

* * * * *

Phone Conversation #4:

JUSTIN: Hello.

DEWAYNE: Hey, this is Dewayne.

JUSTIN: Hey, how's it going?

DEWAYNE: I was calling you back there.

JUSTIN: Well, I talked to, do what?

DEWAYNE: Go ahead.

JUSTIN: I talked to Dennis and he said there's no way I can do that, it was illegal and I'll get fired.

DEWAYNE: Okay. What we're going to do is, go ahead, run this by him. He said that you had a recording of me talking to you, is that right?

JUSTIN: Do what now?

DEWAYNE: Max said that you had a recording of me talking to you.

JUSTIN: I said that I had them other guys listening when I talked to you down there that night.

DEWAYNE: Oh, I didn't say nothing, you know, out of the way to you. What we can do, we have two options. We can go ahead and try to fill out now but try to get us for late reporting or I can keep it from going through investigation. When you show up Friday, I'm going to tell them that somebody threw a rock and hit you in the head, you're going to mark off, we'll ... till Saturday, you mark off for a doctor's appointment Sunday, go Monday get the paperwork, we'll file the paperwork on Friday and you get the CJ 24 filled out and we'll go right from there and no investigation. We'll say somebody threw a rock at work and hit you in the

head .....

JUSTIN: Okay, now go over, I don't understand what you mean.

DEWAYNE: If you come in tomorrow night, ... Saturday, you come over, we fill out the paperwork, somebody threw a rock and hit you in the head. Okay?

JUSTIN: Okay.

DEWAYNE: That means we won't have to go to no investigation. It's passive. There won't be anything done about... You will mark, we'll get you safety...seminar on Saturday just like we're supposed to. Okay. And then you mark off Sunday to go to the doctor Monday. You go get that paperwork, that CJ 24 filled out, you'll put on there, see optometrist, okay?

JUSTIN: Okay.

DEWAYNE: After that, we'll go from, if he says you're able to come back to work on Tuesday, whatever, great, it's non reportable. If you don't, that's fine too. You won't be charged, we'll go from there.

JUSTIN: Okay, what if I can't come back to work for a while after I see the optometrist tomorrow?

DEWAYNE: Well, you can go back and see him again and then you just go the claim agent and say he can't, he

can't see me. It will be reportable but it won't be charged is what I'm telling you.

JUSTIN: So that's going to keep me from getting a charge letter?

DEWAYNE: That's right. We're going to say somebody threw it. We tried to find them but they ran off. I got to get me a... if that's the way you want to go, just let me know.

JUSTIN: Okay, I'll think about it.

DEWAYNE: I'll call you right back and this will keep us all out of trouble, okay?

JUSTIN: Alright.

DEWAYNE: I'll call you right back.

JUSTIN: Okay.

End of Conversation

* * * * *

Phone Conversation #5:

MAX: CSX.

JUSTIN: Hey Max?

MAX: Yeah.

JUSTIN: This is Justin.

MAX: Hey, big fellow.

JUSTIN: How's it going?

MAX: Well, I've heard that they's been, I've had 75 different calls from everybody. What's the final verdict?

JUSTIN: Well, the final verdict, I can't really tell you. I got two more doctors appointments for Monday and Tuesday.

MAX: Okay, then that's going to, I guess that's going to go reportable then?

JUSTIN: Yeah, it'll have to be. I got, I'm going to have to get glasses and all that stuff and I don't have vision insurance yet.

MAX: Well, now, is it because of this or is it because of something else, do you know, or did the doctor say?

JUSTIN: Okay, say that again, I don't, what?

MAX: I said is the reason you're going to have to have glasses, not because of this thing, is it?

JUSTIN: Yeah, it's because of this.

MAX: Oh, okay. Well, I didn't know that. They, everybody is telling me that can't happen, so I don't know. I thought that's where, I say everybody and now, I'm not, I'm a lying to you, Dennis told me that. (Laughs) He ain't a doctor so I don't know.

JUSTIN: Yeah, Dennis is a professional doctor.

MAX: Yeah, well, alright, well, so it, well, well, well. I was going to say I could get you in for Safety tomorrow. That wouldn't make you mark off and I may could convince them to call extra crew where you wouldn't have to do nothing Monday, Tuesday and Wednesday but if it's going to go reportable, then it'll go reportable. You know, I can't stop that, but...

JUSTIN: Yeah.

MAX: Well...

JUSTIN: I'm supposed to be on bedrest until Monday when I go to the doctor.

MAX: Yeah. Alright. Well, okay then I guess, well, I'll just call, I'll call them up and tell them just to, I guess if that's what you want now, let it go reportable and then we'll just, you know, whatever falls, falls, but like I say, the only, the best I could do is for you to come in... and I don't even know if Dewayne, it may be too far, you know, too much out of the way to even call extra crews and stuff like that, but I, I, you know, .. convince them to call extra crew just to have you just, just to sit around, do nothing or talk to

somebody, but if you feel like it's going to go reportable with your eyes and everything, then it'll, we might as well go ahead and turn the paperwork in.

JUSTIN: Yeah, it's going to have to go reportable. I mean, they ain't no really way around it.

MAX: Okay. Alright...

JUSTIN: That was Barton, he called me a minute ago, I was going to call him back.

MAX: Okay. Alrighty, well, let me know now. You know, I'll quit aggravating you and everything unless, just let me know what I can do for you and everything.

JUSTIN: Alright, I appreciate it.

MAX: You know, instead of me a calling you and they'll be doing a lot of stuff and he'll want you to come in and you'll have to come in and put a statement together, you know, what happened and, and all of that type of stuff, and then, of course, what he'll do is just as soon as I call him up or if you call him, as soon as I call him up, then he'll, he'll call the home office or he'll at least call the general manager and he'll tell him and then from there on, you know, it's, it's just

whatever.

JUSTIN: Yeah.

MAX: You know. My suggestion would be, of course, here I am attending to your business again, I'd let, I'd go through the dad gone claims person, claims agent, because that way you can get paid right on. You know, you get, you get your, you get money right, they'll pay you money right on and all that stuff. Of course, that's my suggestion. Man gets a lawyer, then he's going to get, they'll quit paying you automatically and then they'll, then he, the lawyer is going to get thirty percent of it, but if that's what you want to do, I'd do. From this point on, I'd do exactly what you felt was, was right. Don't you listen to me. Don't you listen to nobody else. You do what old, the big boy thinks, you know.

JUSTIN: Yeah.

MAX: And then just let the chips fall where they may and, and all of that.

JUSTIN: Alright.

MAX: But I, I sure hate it, I sure hate it for you.

JUSTIN: I do too.

MAX: Yeah, I really do because they ain't nothing I can

do about it, other than just like I said, but if you, if it's going to be glasses and all of that, then, you know, you, but anyway, I hate it for you, son, I really do.

JUSTIN: Well, I appreciate all your help.

MAX: Well, I just, well, whatever, now you call me up. I don't care if it's two o'clock in the morning and you get up and you ain't got nobody to talk to or you're worried or, or anything like that, you give me a call.

JUSTIN: Alright.

MAX: Alright. Don't, don't let, don't let anybody mess over you. You just do what you think is right.

JUSTIN: Alright, I appreciate it, Max.

MAX: Alrighty, see you, buddy.

JUSTIN: See you.

End of Conversation

* * * * *

Phone Conversation #6

DEWAYNE: Hello.

JUSTIN: Dewayne?

DEWAYNE: Yes.

JUSTIN: This is Justin Cloud.

DEWAYNE: Hey, buddy.

JUSTIN: How's it going?

DEWAYNE: I left you a message there.

JUSTIN: My cellphone...

DEWAYNE: I got all that paperwork turned in and everybody talked to and stuff, so.

JUSTIN: Okay, my phone didn't have no service, I couldn't.

DEWAYNE: Okay. No problem. I got all that turned in. Actually I put it in the computer last night, got all the rest of the paperwork filled out today, and I'm going to get the statements from the other crew so we can put it in that file here in the morning before they get off.

JUSTIN: Okay.

DEWAYNE: Moore and Cromer. And if you get out there Monday, if you can, we'll come by and fill out a, a written statement from you and get it in that file, and I'll just tell you what I put....you know.

JUSTIN: I couldn't hear you. You was breaking up.

DEWAYNE: Employee walking down the ... was struck by what appeared to be a rock in the head and apparently may have been thrown by a trespasser, is all I'll put, so.

JUSTIN: Alright.

DEWAYNE: So, how, how you feeling now? Any better?

JUSTIN: Not, not too good, really. I went to the eye doctor and I don't know if you heard that or not.

DEWAYNE: I knew you were going. I didn't know what, what developed, was said.

JUSTIN: They wrote me a prescription, said I was going to have to start wearing glasses.

DEWAYNE: Okay. What, for vision?

JUSTIN: Yeah. They said that fuzziness that I got from my eyesight...say that again?

DEWAYNE: Can you hear me?

JUSTIN: What'd you say?

DEWAYNE: You broke up then, what'd you say?

JUSTIN: He said that the blurriness that they thought was part of my concussion was something that has happened to my vision and he wrote me a prescription and he's going to run some tests Tuesday to see why my eyes are messed up like they are and check out my peripheral vision because he said that it's not good right now.

DEWAYNE: Okay, so he, he's saying it may have been due to getting hit in the head?

JUSTIN: Yeah, because my, all my records of eyesight was perfect until a couple of days ago. It was 20/20 vision.

DEWAYNE: Okay, alright, well, well I've already got you off injury in the computer there, so that's taken care of, too. And I, besides your statement and that stuff, it'll be done with. Just let us know how you're doing.

JUSTIN: Alright, well, I appreciate everything.

DEWAYNE: No problem, and like I said, if you took that the wrong way when I told you that before, you know, there's no, I hope there's no hard feelings and I didn't mean it that way, and that's why, or in the morning there, you know, just telling you the facts, so.

JUSTIN: Okay.

DEWAYNE: And like I said, there's nothing coming out of this. You don't have to expect nothing from our end of it as far as getting charged or anything like that. It, it's what they call a passive injury and told them it was probably a trespasser. We don't know, you know, why, it just come out of nowhere and hit you, so.

JUSTIN: Alright then.

DEWAYNE: Something you had no control over, so. And from here on out, the best thing, we'll get you set up there after Monday when we do your statement, let you talk to the claim agent so he can pick up any medical bills that insurance don't cover and your lost time and stuff.

JUSTIN: Alright.

DEWAYNE: And just between me and you, if you, if you'll work with him, he'll work with you, so.

JUSTIN: Okay.

DEWAYNE: You know, you know what I'm saying?

JUSTIN: Yeah.

DEWAYNE: If you just work with him and go one on one with him, you know, he'll be fair with you and do, do whatever needs to be done to get you back to work and make sure you get paid for it, so.

JUSTIN: Alright, then.

DEWAYNE: But just, just for, it's in the computer and you're covered from here till you retire now, so just let us know how you're doing.

JUSTIN: Alright.

DEWAYNE: That's the only thing we, we're concerned about now. So just keep us updated and come, come give me that written statement and tell me how you're

doing.

JUSTIN: Okay, I appreciate it.

DEWAYNE: Take care of yourself.

JUSTIN: Alright.

DEWAYNE: Alright. See you, buddy.

End of Conversation

* * * * *

I, Justin Cloud, being a party to the foregoing tape recorded messages, do hereby state that the transcript of the tape recording is true and accurate, to the best of my knowledge.

JUSTIN CLOUD

CERTIFICATE

I, Janice A. Tolliver, Certified Court Reporter and Notary Public in and for the Commonwealth of Kentucky at Large, do hereby certify that the foregoing pages are a true and accurate transcription, to the best of my ability, of tape recorded telephone conversations between Justin Cloud, Dewayne Barton and Max Cox, all being employees of CSX Railroad; that the tape recording was provided to me by

Justin Cloud for transcription and that the full identification of the parties involved in the tape recorded conversations were provided to me by Justin Cloud; that I have transcribed said tape recording on the computer to the best of my ability, with some places being inaudible; and further, I certify that I am not related to nor employed by any party or entity involved herein.

Given under my hand this 4th day of October, 2007.

My commission expires 7-27-2010.

JANICE A. TOLLIVER
NOTARY PUBLIC/SCAR
COMMONWEALTH OF KY. AT LARGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUCAS LITOWITZ, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.	No. C07-993MJP ORDER DENYING TEMPORARY RESTRAINING ORDER BUT GRANTING PROTECTIVE ORDER

This matter comes before the Court on Plaintiff Litowitz's motion for a temporary restraining order. (Dkt. No. 6.) Defendant BNSF Railway Company ("BNSF") opposes the motion. (Dkt. No. 9.) Having considered Plaintiff's motion, Defendant's response, Plaintiff's reply (Dkt. No. 12), and all documents submitted in support thereof, having heard oral argument on the matter, and consistent with the oral ruling entered on July 3, 2007, the Court DENIES Plaintiff's request for a temporary restraining order but GRANTS Plaintiff a protective order.

Background

This case arises from Plaintiff's alleged on-the-job injury in June 2006. On February 2, 2007, Plaintiff informed Defendant BNSF by letter that Plaintiff had retained counsel in connection with his June 2006 injuries. (Frisinger Decl., Ex. 1.) Plaintiff's counsel advised BNSF that BNSF should not directly contact Plaintiff or any of his treating physicians without prior authorization. (Id.) On May 2 and May 25, 2007, BNSF sent letters directly to Plaintiff, without copying counsel, requesting that

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Plaintiff provide BNSF with information regarding his medical condition. (Frisinger Decl., Exs. 2, 3.) BNSF also sent letters on May 8 and June 1, 2007 to Plaintiff's counsel, requesting information about Mr. Litowitz's medical status. (Id., Exs. 8, 9.) On June 15, 2007, Plaintiff's attorney responded to the letters that BNSF had sent to counsel. (Id., Ex. 4.) Plaintiff's attorney agreed to forward to BNSF Plaintiff's medical records from an upcoming doctor visit. (Id.)

On June 20, 2007, BNSF sent a letter to Mr. Litowitz, informing him of an investigation scheduled on July 5, 2007, at which his attendance was required. The letter stated that the investigation would serve the following purpose:

> [To] ascertain[] the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions issued by BNSF Director of Administration Ken Iverson on May 25, 2007 (letter attached) to either: Report for duty no later than June 6, 2007, or provide information on your physician's letterhead or prescription form to support your continued absence from duty.

(Frisinger Decl., Ex. 10.) The parties agree that BNSF will not allow Plaintiff to be represented by counsel at the July 5 investigation.

On June 26, 2007, Plaintiff filed a Federal Employers' Liability Act ("FELA") suit against BNSF. (Dkt. No. 1.) In his complaint, Plaintiff alleges that his injuries and the resulting damages came as a direct result of the negligence of BNSF and its agents. (Id.)

On June 29, 2007, Plaintiff filed a motion for a temporary restraining order ("TRO") requesting that the Court prevent Defendant from engaging in extra-judicial discovery that contravenes the Federal Rules of Civil Procedure and Plaintiff's rights under the FELA. Specifically, Plaintiff requests that the Court prohibit BNSF from "requiring Plaintiff to appear, testify, and submit to cross-examination at an internal railroad investigation, presently scheduled for July 5, 2007, or at any time thereafter pending further order of this Court, or otherwise conducting any form of examination or interrogation of Plaintiff outside the presence of his attorneys." (Dkt. No. 6-3, Proposed Temporary Restraining Order.) Defendant opposes the motion.

1 **Discussion**

2 **I. Jurisdiction**

3 As a preliminary matter, BNSF argues that the Court does not have jurisdiction over its
4 internal investigation, which is being conducted pursuant to a collective bargaining agreement. BNSF
5 cites numerous cases holding that Plaintiff's opposition to the investigation is the kind of "minor"
6 labor dispute under the Railway Labor Act ("RLA") over which federal and state courts have
7 extremely limited jurisdiction. BNSF also cites numerous cases for the proposition that courts cannot
8 enjoin company proceedings under collective bargaining agreements.

9 But BNSF does not challenge this Court's jurisdiction over Plaintiff's FELA claim. It is that
10 jurisdiction that gives the Court authority to control interactions between the parties that touch upon
11 the issues raised in Plaintiff's FELA suit. The Court's stewardship of Plaintiff's FELA claim includes
12 supervision of all pretrial discovery. See Vicary v. Consolidated Rail Corp., 942 F. Supp. 1146 (N.D.
13 Ohio 1996). Pretrial discovery in federal court is conducted pursuant to the Federal Rules of Civil
14 Procedure and in conformance with the Rules of Professional Conduct. The Court has authority to
15 make sure that all parties to this litigation comply with the applicable federal and ethical rules.

16 BNSF seeks to investigate why Plaintiff did not respond to ex parte requests for medical
17 information. That investigation necessarily relates to and involves issues underlying Plaintiff's FELA
18 claim, including his injuries and subsequent medical diagnosis and treatment. The Court has
19 jurisdiction to control discovery of these matters and therefore has jurisdiction to entertain Plaintiff's
20 motion for protection from BNSF's investigation.

21 **II. Protective Order**

22 Plaintiff has styled his motion as a motion for a temporary restraining order. But because
23 Plaintiff has actually presented a discovery dispute, and not a dispute about Plaintiff's alleged work
24 injury, the Court treats Plaintiff's motion as a motion for a protective order under Fed. R. Civ. P.
25 26(c). Under that rule, the Court may make any order "which justice requires to protect a party or

person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

BNSF seeks extra-judicial discovery, discovery that would be obtained outside the legal protections provided by the Federal Rules of Civil Procedure. Plaintiff, as a FELA litigant in this Court, is entitled to the protections of the federal rules.

For these reasons, the Court enters the following protective order:

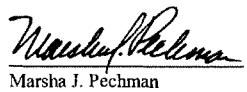
1. BNSF may not seek information from Plaintiff Litowitz regarding his FELA claim except through the procedures outlined in the Federal Rules of Civil Procedure.
2. BNSF may not contact Plaintiff except through counsel. BNSF may not conduct any form of examination or interrogation of Plaintiff outside the presence of his attorneys.
3. BNSF may conduct its scheduled investigation, but may not have access to Plaintiff in doing so. Thus, BNSF may not require Plaintiff to appear, testify, or submit to cross-examination at an internal railroad investigation, presently scheduled for July 5, 2007, or at any time thereafter, during the pendency of this litigation.

Conclusion

Plaintiff's motion for a temporary restraining order is DENIED. Plaintiff's request for a protective order is GRANTED.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: July 3rd, 2007.



Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LUCAS LITOWITZ, Plaintiff, v. BNSF RAILWAY COMPANY, a Delaware corporation Defendant.	Hon. James P. Donohue Case No. C07-993 **MOTION FOR TEMPORARY RESTRAINING ORDER** **NOTE ON MOTION CALENDAR: ___** **ORAL ARGUMENT REQUESTED**

COMES NOW, Plaintiff, Lucas Litowitz, by and through his attorneys, pursuant to Fed. R. Civ. P. 65, and hereby requests this Court for a Temporary Restraining Order so that the Court can properly hear and rule on a Motion for Protective Order pursuant to Fed. R. Civ. P. 26 (c), preventing Defendant BNSF Railway Company (BNSF) from engaging in extra-judicial discovery that contravenes the Federal Rules of Civil Procedure and Plaintiff's rights under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et. seq.* Defendant is requiring Plaintiff to appear, testify, and submit to cross-examination at an extra-judicial internal railroad investigation, without legal counsel present, regarding the subject matter of this FELA litigation. The investigation is scheduled for July 5, 2007. Plaintiff will suffer irreparable harm if a TRO and ultimately a Protective Order, is not issued by this Court. Plaintiff believes that the investigation is a guise to terminate Plaintiff in an attempt to eliminate Plaintiff's FELA claim for future wage loss, obtain extra-judicial information, and interfere with Plaintiff's FELA rights.

FACTS

Lucas Litowitz was injured on June 1, 2006 while working for the BNSF Railway Company (BNSF). Litowitz injured his back when he was adjusting a drawbar on one of Defendants railcars.

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Plaintiff retained the Yeager, Jungbauer, & Barczak law firm, which has associated with the undersigned attorneys to represent him in his FELA claim. Plaintiff sent a notice of representation letter to the Defendant on February 2, 2007 notifying Defendant that Mr. Litowitz had retained counsel for his on the job injury and that the BNSF was not to directly contact Mr. Litowitz. [Ex. 1 to Affidavit of Karl Frisinger, Notice of Representation Letter]. Plaintiff filed suit against Defendant BNSF on June 26, 2007.

Despite the notice of representation letter Defendant has been consistently contacting Mr. Litowitz without his attorneys' knowledge. Defendant has attempted to solicit medical information from Mr. Litowitz without notifying counsel or requesting it from counsel. On May 2, 2007, Joan Costa, a member of the BNSF Medical and Environmental Health Department (MEH) wrote plaintiff demanding that his doctor provide four specific types of medical information. [Ex. 2]. On May 25, 2007, Ken Iverson, Director of Administration for BNSF, sent a letter to Lucas Litowitz demanding the same four specific types of medical information. [Ex. 3]. In lieu of sending the information he was told to show up for work where he would have to undergo a medical review. This requests clearly violate the rules of civil procedure and Mr. Litowitz's right under the FELA.

Plaintiff did not initially comply with these requests. His understanding was that he was represented by counsel, that he should not directly contact the BNSF, and that the BNSF was not to contact him. When it became known to Counsel that BNSF had contacted Mr. Litowitz ex parte demanding medical information and was now threatening him with an investigation, medical records were promptly sent. [Ex. 4, Letter of June 15, 2007]. Mr. Litowitz, also saw his doctor on June 22, 2007 and a one page letter was written attempting to answer the BNSF's questions. [Ex. 5]. Despite the information being provided, the BNSF is still demanding an investigation.

Plaintiff has a good faith belief that the investigation is being done solely in an effort to terminate him for the purpose of eliminating future wage from his FELA claim and obtain information about the incident and about his medical condition as a result of the incident. Defendant has a "risk identifier" program that assess points to employees. [Ex. 6, Depo of Brian Reilly, 39:19-21]. Based on the number of points they are given either a green or red status. [Id. at 31:9-16].

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Relevant to this case, points are given for reportable and non-reportable injuries. Forty points are assessed to an employee if they have a reportable injury. [Id.]. A significantly less number of points are given for a non-reportable injury, approximately three. [Id. at 36:20-38:2]

There are several interesting and disturbing elements to the BNSF "risk identifier" program. First, the forty points are assessed regardless of fault. If an employee through no fault of his own is injured, forty points are assessed. If an employee intentionally injuries himself by jumping off a train for no reason, forty points are assessed. Second, there is a drastic difference between the number of points for a reportable and non-reportable injury. Reportable meaning that the Defendant has to report the incident to the government and manager / supervisor performance reviews are effected. Finally, if an employee is deemed a "red' employee, they can be fired for minor infractions whereas a "green" employee who committed the same minor infraction would not be fired.

In addition to the medical information Plaintiff has provided to Defendant, he has also filed a personal injury report, given a tape recorded statement to Terry Nies, trainmaster, and has already been investigated once concerning this incident on June 7, 2006. However, the BNSF is demanding that Plaintiff appear for questioning on matters concerning the incident and medical status.

Severe and irreparable harm will occur if Mr. Litowitz attends this investigation. He faces the risk of being terminated. He will be unrepresented by legal counsel. He will be examined and cross-examined about the accident and his medical status. All of these factors adversely affect Mr. Litowitz and his FELA claim.

ARGUMENT

Rule 65 (b) of the Fed. R. Civ. P. provides that a TRO may be granted:

> [W]ithout written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

The purpose of a temporary retraining order is to preserve the status quo until a hearing can be held

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to determine whether an injunction should be granted. Zabinski v. Bright Acres Associates, 346 S.C. 580, 601 (2001). In considering whether temporary injunctive relief is appropriate, the ninth circuit courts have applied the following test: "the moving party may meet its burden by demonstrating either (1) that serious questions are raised and the balance of hardships tips sharply in its favor or (2) a combination of probable success on the merits and the possibility of irreparable injury. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1201 (C.A. Cal. 1980). The decision to issue a preliminary injunction is left to the sound discretion of the district court. L. A. Unified Sch. Dist. v. U.S. Dist. Ct., 650 F.2d 1004, 1008 (C.A. 9 1981).

I. Serious questions are raised and the balance of hardships tips in plaintiff's favor by Defendant's extra-judicial investigation without legal counsel being present and the high probability that Plaintiff will be terminated

a. Serious questions are raised.

Defendant is attempting to obtain extra-judicial information, outside the Federal Rules of Civil Procedure, without the presence of legal counsel. Defendant will use this investigation, where railroad management plays judge, jury, and executioner, to fire Mr. Litowitz. The firing will based in large part on his reportable injury which this Court and the American legal system has not had the opportunity to consider and make an impartial decision based on the facts.

Central to the American system of justice is the right to have effective representation of counsel in civil actions. Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). This right is particularly sacrosanct in cases arising under the Federal Employer's Liability Act, 45 U.S.C. 51, et. seq. See, generally, Sheetmetal Workers Intern. Ass'n v. Burlington Northern R. Co., 736 F.2d 1250 (Neb. 1984). In effect, Defendant BNSF seeks to conduct extensive cross-examination of Plaintiff with regard to matters relevant to this litigation (i.e. his medical condition, his physical restrictions, and his corresponding ability, or inability to perform his job duties) without the benefit of counsel would be highly unfair, and would subvert fundamental principles underlying the Federal Employer's Liability Act.

The information Defendant is seeking and in fact has already obtained through Plaintiff's Counsel, subverts the Federal Rules of Civil Procedure. The information that Defendant seeks can

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be obtained through a properly noticed deposition, request for production of documents, and interrogatories. Plaintiff would then be permitted representation by legal counsel. The notion that parties will normally be represented by legal counsel is implicit in the discovery rules of this Court. See generally, Rules 26-37, Fed. R. Civ. P. This intent is clear from the letters that BNSF sent only to Mr. Litowitz while he was represented by counsel. The letters demanded specific types of medical information, violating Fed. R. Civ. P. 34 requiring proper notice to be given when requesting documents. The letters demanded that he show up to work and be subject to a medical examination, violating Fed. R. Civ. P. 35.

In a remarkably similar case, *Partida v. Union Pacific Railroad*, 221 F.R.D. 623 (C.D.Cal.,2004), an FELA plaintiff was required to perform exactly the actions requested of the Plaintiff herein. The court found that such requests invaded its province and control over the means and methods of discovery and could not be enforced. In particular, the *Partida* court found that the railroad's demands, under penalty of investigation and dismissal, were directly in conflict with his federally protected rights under the FELA, "Based on the authority above, it is clear that Plaintiff is asserting rights that are independent of the CBA, and thus, should not be preempted by the RLA." *Id. at* 629.

And so it is here–this Court should not permit Defendant to interfere with Plaitniff's FELA case under the guise of the collective bargaining agreement or its 'right' to manage its work force. The investigation should be stopped.

Another serious issue is that Plaintiff may be terminated at this investigation based on large part on his reportable injury suffered while working for the railroad. The investigation is held solely by railroad management who play judge, jury, and executioner. The railroad has already uniformly decided to assess forty points to Mr. Litowitz, regardless of fault, as a result of his reportable injury. Now they will seek to fire him for not providing medical information and use the points assessed against him for his reportable injury to do so. Firing Plaintiff will have a grave effect on Plaintiff's FELA claim. Defendant will attempt to eliminate Plaintiff's right to future wage loss because they terminated Plaintiff.

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Courts have recognized the harm that these internal railroad investigations have on an injured railroader's FELA claim, and have thus enjoined the railroads' attempts to circumvent the Rules of Civil Procedure. See, e.g., Gutierrez v. BNSF, No 93-2-07954-1, King County Superior Court (1993) (granting TRO to prevent BNSF investigation) (Ex. 7);

Serious questions are abound by the Defendant requiring Plaintiff to appear at an investigation without counsel, subject himself to extra-judicial questioning, and likely be terminated as a result of his injuries giving rise to his FELA action.

b. The balance of hardships tips sharply in Plaintiff's favor

If Defendant's investigation is allowed to proceed, Plaintiff will be subjected to extensive cross-examination outside the presence of his counsel and outside the rules of civil procedure, giving Defendant a decided and unfair advantage at trial. Moreover, because the railroad is the prosecutor, judge, and jury at this hearing, Plaintiff will almost certainly be fired, which will further jeopardize his FELA claim by threatening his right to future wage loss under the FELA.

In contrast, Defendant would suffer no prejudice if a TRO is granted. Plaintiff, through his Counsel, has already provided Defendant with the information it requested. The fact the Defendant insists on the investigation calls into question the true intent investigation.

II. Probable success on the merits and the possibility of irreparable injury

As discussed in the above section, Plaintiff will be irreparably injured if the investigation is allowed to proceed.

Turning to likelihood of success on the merits, courts in this circuit have stated that, "[w]here the balance of relative hardships "tips decidedly toward the plaintiff," however, "the plaintiff need not show as robust a likelihood of success on the merits. Republic of Philippines v. Marcos, 818 F.2d 1473, *1477 (9th cir. 1987). As discussed previously the relative hardship does tip decidedly in plaintiff's favor.

Plaintiff has a colorable FELA claim. The FELA is a broad remedial statute, and courts have adopted a "standard of liberal construction in order to accomplish [Congress'] objects." Urie v. Thompson, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030, 93 L.Ed. 1282 (1949). The Defendant had a

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duty to provide a reasonably safe place to work; the duty to provide reasonably safe tools and equipment; the duty to promulgate and enforce safety rules; and the duty to assign workers to jobs for which they are qualified and to avoid placing workers in jobs beyond their physical capacity. . . " Ackley v. Chicago and North Western Transp. Co., 820 F.2d 263, *266 (8th cir.1987) (citations omitted).

In this case, Plaintiff was injured when attempting to adjust a drawbar on one of Defendant's railcars. Plaintiff is claiming the Defendant failed to provide a safe place to work, failed to provide him with safe equipment and proper equipment to do the job. Discovery may lead to information that the equipment was not maintained properly and that Plaintiff was not provided with the proper aids to help him perform his job duties.

Based on the severe harm that will result and Mr. Litowitz's likelihood of success Plaintiff's motion for a TRO should be granted.

III. This Court has the power to grant a TRO and Protective Order

Defendant is likely to argue that this Court does not have the power to issue a Protective Order on this issue. This is simple not true. Courts routinely hold that this type of extra-judicial discovery that subverts the rules of civil procedure is not proper and not within the Railway Labor Act and grant Protective Orders. Vicary v. Consolidated Rail Corp., 942 F.Supp. 1146 (N.D. Ohio 1996). In Vicary, the Court granted a Protective Order prohibiting Defendant from requiring Plaintiff to submit medical information and records and submit to an exam. The Vicary Court held that it had the power to grant this relief despite Defendant's argument that the Court did not have the power to do so under the labor agreement. The Court disagreed stating:

> "I see no such handcuffing of my stewardship of the plaintiffs' FELA cases." That stewardship includes supervision over the course of pretrial discovery, which, in turn, means making sure that all parties comply with the rules that regulate such discovery.

Id. at 1149. See also, Gutierrez v. BNSF, No 93-2-07954-1, King County Superior Court (1993) (granting TRO to prevent BNSF investigation) (Ex. 7).

Given the irreparable injury Plaintiff will suffer and the broad purpose of the FELA the combination of these factors weigh in favor of granting a TRO.

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CONCLUSION

Plaintiff requests that this Court grant a TRO preventing the railroad from conducting an investigation on July 5, 2007, so that a proper Motion for Protective Order can be considered by this Court. The TRO, and ultimately the Protective Order, may be properly granted. There are serious questions that need to be addressed and Plaintiff will be severely harmed while Defendant will not be harmed at all. The combination of the irreparable harm Plaintiff will suffer and the probable success on the merits also weighs in favor of granting a TRO.

RESPECTFULLY SUBMITTED this 28th day of June, 2007

CROSTA & BATEMAN

Bradley K. Crosta, WSBA # 10571
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LUCAS LITOWITZ,	)	
	)	
Plaintiff,	)	Case No.
	)	
v.	)	**AFFIDAVIT OF KARL J. FRISINGER**
	)	
BNSF RAILWAY COMPANY,	)	
a Delaware corporation	)	
	)	
Defendant.	)	
	)	

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, Karl J. Frisinger, declare under the penalties of perjury, do hereby state that:

1. I am an attorney in the law offices of Yaeger, Jungbauer, & Barczak, Plc., counsel for Plaintiff Lucas Litowitz.

2. Attached hereto as Exhibit 1 is a true and correct photocopy of a letter dated February 2, 2007 informing BNSF of Lucas Litowitz's representation.

3. Attached hereto as Exhibit 2 is a true and correct photocopy of a letter dated May 2, 2007 from Joan Costa seeking medical information.

4. Attached hereto as Exhibit 3 is a true and correct photocopy of a letter dated May 25, 2007 from Ken Iverson requesting medical information.

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5. Attached hereto as Exhibit 4 is a true and correct photocopy of a letter dated June 15, 2007 giving defendant the requested medical information.

6. Attached hereto as Exhibit 5 is a true and correct photocopy of a letter dated June 22, 2007 from Plaintiff's doctor. This letter was faxed and mailed to Defendant on June 26, 2007.

7. Attached hereto as Exhibit 6 are true and correct photocopies of excerpts from the deposition of Brian Reilly, Terminal Trainmaster for BNSF.

8. Attached hereto as Exhibit 7 is a true and correct photocopy of the Order in Gutierrez v. BNSF, No 93-2-07954-1, King County Superior Court (1993) (granting TRO to prevent BNSF investigation

9. Attached hereto as Exhibit 8 is a true and correct photocopy of a letter dated May 8, 2007 from Dennis Wright, Claim Agent to BNSF to William G. Jungbauer. The letter is void of any repercussions to Mr. Litowitz if the information was not supplied by a certain date.

10. Attached hereto as Exhibit 9 is a true and correct photocopy of a letter dated June 1, 2007 from Dennis Wright, Claim Agent to BNSF to William G. Jungbauer requesting medical information on Lucas Litowitz. The letter is void of any repercussions to Mr. Litowitz if the information was not supplied by a certain date.

11. Attached hereto as Exhibit 10 is a true and correct photocopy of the letter of investigation sent to Mr. Litowitz.

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12. This case was put in suit on June 26, 2007. An appearance has not been entered by the BNSF. However, Tom Montgomery is an attorney for BNSF in Seattle who Counsel for Plaintiff is working with on another BNSF case venued in King County Superior Court. William G. Jungbauer contacted Mr. Montgomery by phone on June 27, 2006 and notified him of this issue and that we were preparing a Motion.

13. On June 27, 2006, I e-mailed and sent by U.S. Mail a copy of Plaintiff's Motion for TRO, this affidavit, and a copy of the complaint to Tom Montgomery. The email was sent to tom@montgomeryscarp.com. His mailing address is:

Tom Montgomery
Montgomery Scarp MacDougall, PLLC
1218 3rd Ave, Ste 2700
Seattle, WA 98101-3237

FURTHER YOUR AFFIANT SAYETH NOT.

Karl J. Frisinger

Subscribed and sworn to before me this

27th day of June, 2007.

Notary Public

JULIA BORAK
Notary Public
Minnesota
My Commission Expires January 31, 2010

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YAEGER
JUNGBAUER &
BARCZAK, PLC

FILE COPY

February 2, 2007

Dennis J. Cannon
Burlington Northern Santa Fe Railway Company
General Director
325 Cedar St, Ste 620
St. Paul, MN 55101-1012

William G. Jungbauer
ATTORNEY AT LAW
wjungbauer@yjblaw.com

Paralegal
Mary Jo Pickering
mpickering@yjblaw.com

Legal Assistant
Julie A. Senske
jsenske@yjblaw.com

Re: Lucas J. Litowitz v. BNSF

Dear Mr. Cannon:

Please forward this notice onto your claims representative in the Tacoma, Washington area.

Please be advised that our office has been retained by Lucas J. Litowitz of Tacoma, WA for injuries sustained on June 1, 2006, while employed for your company.

All medical authorizations previously executed by Mr. Litowitz are hereby revoked. Please advise all railroad personnel and contractors of my representation of Mr. Litowitz, no one is to have direct contact with him or any medical personnel involved in his treating without authorization from this office.

Please forward a copy of the following to my attention regarding this case and this injury:

1) the medical file;
2) any personal injury reports;
3) any statements given by my client;
4) any statements given by other employees of the railroad;
5) any photographs of the scene of the incident; and
6) any inspection reports.

I also ask that you preserve all inspection records, reports, photographs, or other documents regarding inspection of the accident site and/or equipment

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MINNEAPOLIS, MN 55414

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Toll Free:1-800-243-4253
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St. Louis.

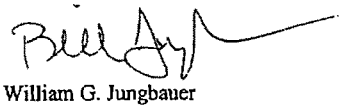
involved in the June 1, 2006 incident, including, but not limited to, retention of the actual equipment involved, particularly if said equipment was repaired or otherwise modified subsequent to this injury.

We will be pleased to discuss this case with you at a mutually convenient time.

Thanks for your kind consideration.

Sincerely,

YAEGER, JUNGBAUER & BARCZAK, PLC.



William G. Jungbauer

WGJ:jas

cc. Lucas J. Litowitz
6207 26th St NE
Tacoma, WA 98422-3310

JOAN L. COSTA MS, CRC
Field Manager
Medical and Environmental Health

BNSF Railway Company
2454 Occidental Ave South, Ste 1A
Seattle, Washington 98134

(206) 625-6170
(206) 625-6070 fax
joan.costa@bnsf.com

May 2, 2007

CERTIFIED MAIL – RETURN RECEIPT REQUESTED – 7006-0100-0003-1750-1308

Lucas Litowitz
6207 28th Street NE
Tacoma, Washington 98422

Dear Mr. Litowitz:

I understand you do not wish to participate in the Medical & Environmental Health (MEH) Department's medical care management program. You should have received a letter from Amanda Gambrell, Director Field & Clinical Services, MEH, describing this program. I encourage you to carefully read this letter that explains the beneficial effects of both you and your family.

In summary, our program is designed to assist you with finding quality medical care and treatment that will progress you to a timely and successful return to work. We have found and research supports, that a well-coordinated treatment plan that includes a plan for recovery of activity and function will diminish adverse affects of an injury. The best treatment plans are developed when everyone works as a team, which includes yourself, your physician, your supervisor and MEH. Quality rehabilitation incorporates medical treatment with home and workplace activities. Your company will provide you with workplace activities (restricted duty) that is coordinated by MEH, yourself, your supervisor and your physician.

While most employees return to their regular jobs after recovery, we also offer vocational rehabilitation assistance if it is determined that you may be unable to return to your regular assignment.

PLEASE CONTACT ME AT THE NUMBER LISTED ABOVE SO WE CAN DISCUSS HOW YOU CAN REMAIN ENROLLED IN THE PROGRAM.

If you decide not to remain in the program and do not contact me, please read the following so that you clearly understand your responsibilities:

The Medical and Environmental Health Department determines fitness for duty of BNSF employees by reviewing their medical information. This information may be required to document your absence from work. This information will allow us to inform appropriate personnel as to your expected return to work date for manpower planning purposes, safely integrate you back into the workplace at the optimal time consistent with national injury guidelines, and allow us to identify appropriate existing vocational/developmental opportunities to assist you in locating alternative work.

Therefore, in order for MEH to accurately advise management of your work status, we request that your treating physician send the following medical information:

1. Diagnosis of the medical condition/s for which you are currently being treated.
2. Treatment plan or treatment being received.
3. An approximate length of time that this treatment will continue.
4. Your current functional level – along with your current functional restrictions.

Please have your treating physician send this information by Thursday, May 17, 2007 to:

Joan Costa
2454 Occidental Ave South, Ste 1A
Seattle, Washington 98134
(206) 625-6070 fax

Also, if you elect not to participate in our program, you will need to process payment for your medical care through your health insurance provider.

Sincerely,

Joan Costa

Joan L. Costa MS, CRC
Field Manager, MEH

Cc: BNSF Corporate Medical File: 1675503
Doug Jones, General Manager
Ken Iverson, Director of Administration

Ken R. Iverson
Director of Administration
NorthWest Division

BNSF Railway
2454 Occidental Ave South
Suite 1-A
Seattle, WA 98134
(206) 625-6275

May 25, 2006

Certified Mail: 7006 2760 0000 7187 6230

L. J. Litowitz, Employee Number 1675503
6207 26th ST NE
Tacoma, WA 98422

Dear Mr. Litowitz;

On May 2, 2007 Ms. Joan Costa, BNSF Field Manager, Medical and Environmental Health Department, sent you a letter requesting information be provided by May 17, 2007 regarding your medical condition which included:

1. Diagnosis of the medical condition/s for which you are currently being treated.
2. Treatment plan or treatment being received
3. An approximate length of time that this treatment will continue.
4. Your current functional level – along with your current functional restrictions.

Records of the United States Postal Service indicate this letter was delivered to you on May 7, 2007. Our records show that as of the date of this letter you have not complied with Ms. Costa's request.

Therefore, you are instructed to report for duty or provide the above requested information to support your continued absence from work, no later than June 6, 2007 . When reporting for duty you may be required to undergo a Medical Review.

Failure to comply with these instructions may result in disciplinary action.

Ken R. Iverson

CC: Mr. Doug Jones
Mr. Daryl Ness
Mr. John Davidson
Mr. Mike Babik
Ms. Joan Costa
Mr. Dennis Wright

LAW OFFICES OF

YAEGER
JUNGBAUER &
BARCZAK, PLC

COPY

June 15, 2007

VIA FACSIMILE AND U.S. MAIL

Dennis Wright
BNSF Railway Company
2454 Occidental Avenue South
Suite #1A
Seattle, WA 98134

Re: Lucas J. Litowitz v. BNSF

Dear Mr. Wright

We are in receipt of your June 1 and May 8, 2007 letters. Enclosed in response are medical records pertaining to Mr. Litowitz's June 1, 2006 injury.

I appreciate you contacting our office to obtain the medical status of Mr. Litowitz. Please remember that all medical authorizations have been revoked by Mr. Litowitz and the BNSF is not to have direct contact with him or his medical providers. We will assist Mr. Litowitz in providing the BNSF with necessary information.

Mr. Litowitz would like to return to work, light duty for the BNSF if the opportunity is available If light duty is available, contact our office with the time, date, and location he is to report for light duty and we will forward this information to Mr. Litowitz.

Mr. Litowitz has a doctor's appointment next week. We will forward those records to you upon receipt.

We look forward to hearing from you regarding this matter. Please do not hesitate to call if you have any questions.

Sincerely,

YAEGER, JUNGBAUER & BARCZAK, PLC.

William G. Jungbauer

WGJ:jas

cc. Lucas J. Litowitz

William G. Jungbauer
ATTORNEY AT LAW
wjungbauer@yjblaw.com

Paralegal
Mary Jo Pickering
mpickering@yjblaw.com

Legal Assistant
Julie A. Senske
jsenske@yjblaw.com

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Toll Free:1-800-243-4253
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PLAINTIFF'S EXHIBIT
4

MultiCare

MultiCare Medical Group

Northshore

Diana M. King, M.D.

Khanh D. Nguyen, M.D.

Norman Seaholm, M.D.

Lucas J Litowitz
6207 26th St Ne
Tacoma, WA 98422

Patient is being followed for his ongoing work related injury involving his back.Patient still having severe ongoing daily pain, medically not fixed and stable.

Patient has follow-through With all recommendation,has undergone several epidural injections,and even undergone a discogram. Is being followed closely by his neurosurgeon, however medically patient still having moderate pain and discomfort.

At the present medical condition Patient may be able to work doing very light duty: which would entail no lifting greater than 25 pounds.

He may start right away if there is a job available with the description above.

Patient has been extremely compliant with all therapy recommendation Due to his work injury.

Time course expectation to improvement,presently unknown.Patient is still seeing his neurosurgeon specialist on regular basis.

Sincerely yours,

KHANH DINH NGUYEN, MD
6/22/07.

PLAINTIFF'S EXHIBIT
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTOPHER BELANGER,

Plaintiff,

vs. No. 06-2-36125-3 SEA

BNSF RAILWAY COMPANY
a Delaware Corporation,

Defendant.

THE DEPOSITION OF BRYAN C. REILLY
Taken on behalf of the Plaintiff
June 14th, 2007

BE IT REMEMBERED THAT, pursuant to the Washington Rules of Civil Procedure, the deposition of BRYAN C. REILLY was taken before Sheralyn R. McCormick, a Certified Shorthand Reporter, #3048, and a Notary Public for the State of Washington, on June 14, 2007, commencing at the hour of 1:02 p.m. the proceedings being reported at 3105 Pine Street, Everett, Washington.

PLAINTIFF'S EXHIBIT
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1 you as a manager?
2 A. Yes.
3 Q. Do other managers have access to that --
4 MR. MONTGOMERY: Foundation.
5 BY MR. JUNGBAUER:
6 Q. -- to your knowledge? You would assume people with
7 a higher pay grade like you would have access to --
8 A. I would assume, yes. That's correct.
9 Q. Okay. Are you aware of the company's labeling of
10 employees as red, green or yellow employees?
11 A. Not yellow, but red and green.
12 Q. Red and green, excuse me, yes.
13 A. Yes.
14 Q. How does that system work?
15 A. It's based on a points system that you receive from
16 derailments, injuries and opt test failures.
17 Q. And is that information also on the computer if we
18 wanted to look and see how that works?
19 MR. MONTGOMERY: Object to the form.
20 THE WITNESS: I don't know where on the
21 computer. I actually have received that in hard copy.
22 BY MR. JUNGBAUER:
23 Q. So there are hard copies?
24 A. From my supervisor, yes.
25 Q. Okay. The company has a list for all your

1 Q. What does that mean?
2 MR. MONTGOMERY: Foundation.
3 BY MR. JUNGBAUER:
4 Q. Go ahead.
5 A. There's I believe a dollar threshold that puts you
6 between -- excuse me, it's not a dollar threshold on
7 injuries, it's based on what type of treatment you
8 received, if it was a first aid incident versus an actual
9 one that you needed to receive medical care or time off
10 for would put you between the reportable and non
11 reportable.
12 Q. Right. And so once you've got reportable injuries,
13 a certain number of reportable injuries, are each
14 reportable injuries a certain number of points?
15 MR. MONTGOMERY: Foundation.
16 THE WITNESS: Say that one more time.
17 BY MR. JUNGBAUER:
18 Q. How did we get 40 points for Mr. Belanger?
19 MR. MONTGOMERY: Objection to foundation.
20 THE WITNESS: I don't know off the top of my
21 head how many points you receive for a reportable injury.
22 I think it is 40 and then it's -- I can't remember what's
23 the word. Over time that 40 points gets reduced based on
24 a time scale.
25 BY MR. JUNGBAUER:

1 Q. Sure. And it's less points for a non reportable
2 injury?
3 A. That is correct.
4 Q. So if an employee gets hurt, if they report it even
5 if it's not their fault, if they report an injury even if
6 it's not their fault, more points go against them on this
7 scale if it gets reported?
8 MR. MONTGOMERY: Foundation. Incomplete
9 hypothetical.
10 THE WITNESS: If they report it? It's
11 depending on the category, not if they report it or not.
12 BY MR. JUNGBAUER:
13 Q. Right. It's whether it's reported to the
14 government or not is what counts?
15 A. Yes, that's correct.
16 Q. All right. So let's say Mr. Belanger gets hurt and
17 if his injury has to be reported to the government, more
18 points are assessed against Mr. Belanger than if the
19 railroad doesn't have to report it to the government?
20 MR. MONTGOMERY: Object to the form.
21 BY MR. JUNGBAUER:
22 Q. Correct?
23 A. Yes, to my knowledge.
24 Q. Okay. Now, once you add up -- so we've got 40
25 points on Mr. Belanger for a reportable injury and three

1 points for non reportable injuries according to this form?
2 A. That's correct.
3 Q. And then there's 7 points for operational failures?
4 A. That's correct.
5 Q. And that adds up to 50?
6 A. That's correct.
7 Q. And that makes him a red employee?
8 MR. MONTGOMERY: Object to the form,
9 foundation and incomplete hypothetical.
10 THE WITNESS: That is correct on how it adds
11 up and makes him a red employee.
12 BY MR. JUNGBAUER:
13 Q. Now, a red employee is an employee that if they
14 make even a minor infraction of the rules, they can be
15 fired if they're a red employee?
16 A. I don't have any knowledge of that on that process.
17 Q. Who has knowledge of how the red employee or what
18 happens as far as termination of an employee if they're a
19 green or red employee?
20 A. It would be my supervisor.
21 Q. Okay. And there's a manual on that that tells him
22 how to do that, right?
23 A. I presume so.
24 MR. MONTGOMERY: Objection.
25 THE WITNESS: I presume so. I would assume.

1 BY MR. JUNGBAUER:
2 Q. And again you could ask that question on the
3 computer if you wanted to know?
4 MR. MONTGOMERY: Foundation, form.
5 THE WITNESS: Not to my knowledge on that, I
6 wouldn't presume.
7 BY MR. JUNGBAUER:
8 Q. Okay. Are employees who are red employees versus
9 green employees at higher risk of termination for the same
10 actions or inactions?
11 MR. MONTGOMERY: Object to the form,
12 foundation, incomplete hypothetical.
13 THE WITNESS: I don't know.
14 BY MR. JUNGBAUER:
15 Q. What does red employee mean?
16 A. It's safety, based on your safety records and based
17 on the points. It kind of gauges an employee on how
18 safely they work.
19 Q. What is the red and green employee status used for?
20 MR. MONTGOMERY: Objection, foundation.
21 THE WITNESS: As a risk identifier.
22 BY MR. JUNGBAUER:
23 Q. What does your company do with that?
24 MR. MONTGOMERY: Foundation.
25 THE WITNESS: I haven't gone through the

CERTIFICATE

I, Sheralyn R. McCormick, do hereby certify that pursuant to the Rules of Civil Procedure, the witness named herein appeared before me at the time and place set forth in the caption herein; that at the said time and place, I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 19th day of June , 2007.

Sheralyn R. McCormick May 9, 2009

Sheralyn R. McCormick Commission Expiration

CERTIFIED COPY

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93 MAR 31 PM 12:13

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SHELENE GUTIERREZ, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, Defendant.	NO. 93 2 07954 1 TEMPORARY RESTRAINING ORDER

The above-entitled matter came on before this Court on March 31, 1993, at 12 noon o'clock a.m./p.m. in Courtroom _____, in the Courthouse of the King County Superior Court, pursuant to Plaintiff's MOtion pursuant to CR 65 for a Temporary Restraining Order against the Defendant. Plaintiff was represented by her attorney, Mary Ruth Mann, 1300 Hoge Building, 705 Second Avenue, Seattle, Washington 98104, and William G. Jungbauer, 701-4th Avenue South, Suite 1400, Minneapolis, Minnesota 55415. Defendant was represented by its attorney, notice attempted

The Court, having heard the arguments of counsel, read the Complaint, Affidavits and documents filed by Plaintiff, and being duly advised of the files and records herein, hereby makes the following:

FINDINGS OF FACT

1. Defendant Burlington Northern Railroad Company has scheduled an "investigation" in connection with the

PLAINTIFF'S EXHIBIT 7

LAW OFFICES OF
MARY RUTH MANN
1300 HOGE BUILDING
705 SECOND AVENUE
SEATTLE, WASHINGTON 98104
(206) 623-2800

accident which is the subject matter of this litigation. Defendant has directed the Plaintiff to appear at this investigation and submit to questioning on cross-examination, upon threat of termination of employment.

2. Defendant has refused Plaintiff's request that she be represented by legal counsel at this investigation.

3. Any information regarding this accident possessed by Plaintiff could properly be obtained by Defendant at a deposition pursuant to this action, at which Plaintiff would be afforded right to representation by counsel.

The Court further makes the following:

CONCLUSIONS OF LAW

1. Any attempt by Defendant to subject Plaintiff to questioning or cross-examination regarding the subject mater of this litigation, while denying Plaintiff representation by legal counsel, would improperly prejudice Plaintiff's rights under the Federal Employers Liability Act, 45 U.S.C. Section 51, et seq., and would be violative of the fundamental rights possessed by Plaintiff under the law of the State of Washington.

2. Plaintiff would suffer immediate and irreparable harm if the status quo is not preserved for several days so that Plaintiff's motion for preliminary injunctive relief may properly be considered. In this regard, if a temporary restraining order is not issued, Plaintiff risks loss of her job by Defendant, or prejudice to her rights under the Federal Employers' Liability Act, neither of which could be

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fully rectified through an award of money damages at a later date.

3. In contrast to the harm faced by Plaintiff, Defendant will not suffer any appreciable harm if the status quo is preserved for several days.

4. Based upon the Affidavits, exhibits and legal memoranda submitted, Plaintiff is likely to ultimately prevail on the merits in this matter.

Accordingly, IT IS ORDERED:

1. Plaintiff's motion for a temporary restraining order, effective until 4/14/93 at 5 pm is hereby granted, and Defendant Burlington Northern Railroad Company, and each of its officers, agents, and employees, and all persons acting in concert within, are immediately restrained from:

A. Requiring Plaintiff to appear and testify or be questioned at an investigation, presently scheduled by Defendant to commence on March 31, 1993, at 1:30 p.m., outside the presence of her attorney.

B. Requiring Plaintiff to appear and testify at any investigation hearing regarding the accident in controversy, or regarding Plaintiff's work/safety habits, until and unless:

(i) Defendant agrees to permit full and complete representation of Plaintiff by legal counsel throughout the investigation hearing at a time and place convenient to all;

(ii) Defendant has provided to Plaintiff and all statements previously made by Plaintiff to Defendant regarding the accident of September 15, 1991, and has produced for duces tecum deposition by Plaintiff the following individuals: D.L. Maze, Burlington Northern Superintendent, Cascade Division; Amanda Gambrell, Burlington Northern Rehabilitation

LAW OFFICES OF
MARY RUTH MANN
1300 HOGE BUILDING
705 SECOND AVENUE
SEATTLE, WASHINGTON 98104
(206)623-2800

Services, Cascade Division; Dan Rourke, Burlington Norther, Director of Safety, Cascade Division; J.B. Dagnan, Executive Vice President Burlington Northern Railroad; Jack Chain, Vice President, Burlington Northern Railroad; and Dr. Thomas Mears, Vice President, Burlington Northern Railroad.

(2.) Any further findings of fact and conclusions of law set forth on the record during the hearing on Plaintiff's Motion are hereby incorporated as a part of this Order by reference thereto.

DATED this 31 day of March, 1993.

(3) Bond is set at $100.00 subject to review upon request of Δ's

(4) The defendants shall appear + show cause as to why this relief not be made permanent on Civil Motions calendar at 930 AM on 4/13/93.

YAEGER, JUNGBAUER, BARCZAK & ROE, LTD.

Mary Ruth Mann for
William G. Jungbauer
701 Fourth Avenue South
Suite 1400
Minneapolis, MN 55415
Attorneys for Plaintiff

Local Counsel:

LAW OFFICES OF MARY RUTH MANN

Mary Ruth Mann
Mary Ruth Mann, WSBA #9343
Attorney for Plaintiff

MAR 3 1 1993

Court Commissioner

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BNSF RAILWAY

Dennis W Wright
Senior Claims Representative

BNSF Railway Company

General Claims Department
2454 Occidental Avenue South
Suite #1A
Seattle, WA 98134
Telephone (206) 625-6446
FAX (206) 625-6447
Email: dennis.wright@BNSF.com

RECEIVED
KIESER JUNGBAUER
BARCZAK

May 8, 2007

William G. Jungbauer
745 Kasota Avenue
Minneapolis, MN 55414

Re: Lucas J. Litowitz

Dear Mr. Jungbauer:

We are requesting information on the medical status of your client Mr. Lucas J. Litowiz. Our last medical status for him to remain off of work expired on 02/01/07. Please provide this office with an updated status report from his doctor on Mr. Litowitz's current medical condition and limitations and or restricitions. I

Sincerely

Dennis W. Wright
Senior Claims Representative

PLAINTIFF'S EXHIBIT
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Dennis W. Wright
Senior Claims Representative

BNSF Railway Company

General Claims Department
2454 Occidental Avenue South
Suite #1A
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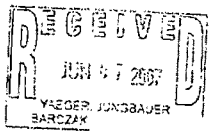
Email: dennis.wright@BNSF.com



June 1, 2007

William G. Jungbauer
745 Kasota Avenue
Minneapolis, MN 55414

Re: Lucas J. Litowitz (Second Notice) Medical Status Update

Dear Mr. Jungbauer:

We are requesting information on the medical status of your client Mr. Lucas J. Litowiz. Our last medical status for him to remain off of work expired on 02/01/07. I previously requested this update in a letter dated 05/08/07. I still have not received any information.

Please provide this office with an updated status report from his doctor on Mr. Litowitz's current medical condition and limitations and or restrictions. I have enclosed a medical status form that should be completed and faxed to Ms. Joan Costa as soon as possible. If you have any question, please contact me as soon as possible. Thank you for your assistance.

Sincerely

Dennis W. Wright
Senior Claims Representative

INSTRUCTIONS FOR COMPLETING MEDICAL STATUS FORM

This form must be filled out completely or it will impact the employee's work status.

SECTION I

BNSF Contact

1. Complete all items in Section I.
2. Give the Medical Status Form to employee before medical appointment.

SECTION II

Employee

1. Complete all items in Section II.
2. Sign and date the form in the space provided.
3. Please ensure that your health care provider completes Section III of the form.

SECTION III

Health Care Provider (please read)

1. Please complete all items in Section III, including ***Work Status Recommendation.***
2. When requesting restricted duty, a FULL DUTY release date must also be included. The full duty date may be an estimate and is subject to change.
3. Employees will only be considered for our restricted duty Transitional Work Program if they meet BNSF program criteria based on type of condition and length of restrictions.
4. If this is a heart related condition, please mark the appropriate functional classification and objective assessment (refer to chart below).
5. To maintain confidentiality, fax this form to **1-877-209-6216** (listed at the top and bottom of the form).
6. Long-term **Restricted Activity** recommendations will need additional detailed objective medical evidence to support the restrictions, such as a valid Functional Capacity Evaluation and the 2 most recent office notes.
7. A recommendation **Not to Perform any Activity** will be approved for a fixed length of time based on objective evidence provided, nationally recognized disability guidelines or the next follow-up date. Only rarely is this appropriate long-term. Use the Restricted Activity area when medically appropriate.
8. Thank you for your time and consideration.

American Heart Association Classifications

Functional Capacity	Objective Assessment
Class I – Patients with cardiac disease but without resulting limitation of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation, dyspnea, or anginal pain.	A. No objective evidence or cardiovascular disease.
Class II – Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain.	B. Objective evidence of minimal cardiovascular disease.
Class III – Patients with cardiac disease resulting in marked limitation of physical activity. They are comfortable at rest. Less than ordinary activity causes fatigue, palpitation, dyspnea, or anginal pain.	C. Objective evidence of moderately severe cardiovascular disease.
Class IV – Patients with cardiac disease resulting in inability to carry on any physical activity without discomfort. Symptoms of heart failure or the anginal syndrome may be present even at rest. If any physical activity is undertaken, discomfort is increased.	D. Objective evidence of severe cardiovascular disease.

MEDICAL STATUS FORM

Fax completed form to 1-877-209-6216

BNSF

SECTION I – BNSF CONTACT

BNSF Contact and Title: Joan Costa, Regional Manager, Medical Environmental Health Department

Telephone: 206-625-6170 Fax: 1-877-209-6216 Division: Northwest

SECTION II - EMPLOYEE (all items must be completed, please see instructions)

Name:	Employee ID or SSN:	Date of Birth:
Address:	Home Telephone:	Department:
	Job Title:	Last Day Worked:

List all medications that you are taking regularly (including over the counter medications):

Treating Physician's Name:

Address: _____ Telephone: _____

City, State, Zip: _____ Fax: _____

I hereby authorize my physician to release any information that is requested with respect to this medical condition to the BNSF Medical & Environmental Health Department and/or their designees

Employee's Signature: _____ *Date:* _____

SECTION III - HEALTH CARE PROVIDER (all items must be completed, please see instructions)

Diagnosis:	ICD Codes:
Current Objective Findings and Response to Treatment:	
Did patient require surgery? ☐ Yes ☐ NO	Type and date of surgery:
Medication(s) Prescribed – Dosage & Frequency:	Is the employee's agility and/or mental alertness impaired by a medical condition or medication(s)? ☐ Yes ☐ NO
	FOR HEART DISEASE ONLY (please see instructions) American Heart Association Functional Classification (circle): I II III IV American Heart Association Objective Assessment (circle): A B C D

Work Status Recommendation:

☐ **Full Duty** (*No Restrictions*) Effective date: _____

☐ **Restricted Activity** (*Complete below*) Effective date: _____

Planned Full Duty date: _____ *or* Next Follow-up date: _____

Circle applicable activity level
N = No activity
O = Occasional
F = Frequent

Walking on uneven surfaces:	N O F	Climbing (ladder, scaffold, etc):	N O F
Stooping, bending or twisting:	N O F	Working on unprotected heights:	N O F
Operating vehicles or machinery:	N O F	Lifting up to _____ lbs:	N O F
Other: _____			N O F
Other: _____			N O F

These restrictions are: ☐ Temporary ☐ Long-Term (*Please send 2 most recent office notes*)

☐ **Unable To Perform Any Activity** Effective date: _____ Next follow-up date: _____

Health Care Provider's Signature: _____ *Date:* _____

FAX COMPLETED FORM TO 1-877-209-6216

Michael J. Babik
Asst. Terminal Superintendent

BNSF Railway Company
2601 20th Avenue West
Seattle, Washington 98199-2907

(206) 272-3762
(206) 272-3775 Fax

June 20, 2007

File: IN-07-1198
CERTIFIED MAIL 7006 2150 0000 6941 2326

Empl Id 1675503
LUCAS J LITOWITZ
6207 26TH ST NE
TACOMA WA 98422

Investigation scheduled at the Terminal Superintendent's Office, Balmer Yard, 2601 20th Ave W, Seattle, Washington, at 1100 hours on Wednesday, June 20, 2007, was opened at 1108 hours on Wednesday, June 20, 2007, and recessed at the request of Local Chairman K.H. Allred account not prepared to proceed with investigation, and with the concurrence of all parties. **Therefore, attend investigation at the Terminal Superintendent's Office, Balmer Yard, 2601 20th Ave W, Seattle, Washington, at 1100 hours on Thursday, July 5, 2007**, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions issued by BNSF Director of Administration Ken Iverson on May 25, 2007 (letter attached) to either: Report for duty no later than June 6, 2007, or provide information on your physician's letterhead or prescription form to support your continued absence from duty.

In connection with these alleged violations, you are ineligible for Alternative Handling under Part I, Section III G of the Safety Summit Agreement.

Please arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

Request for postponement will not be considered less than 24 hours in advance of the investigation date and time.

Acknowledge receipt by affixing your signature in the space provided on copy of this letter.

Michael J. Babik

Michael J. Babik
Asst. Terminal Superintendent

cc: Crew Management
Ken Iverson -- Please arrange to attend as witness

Signature _____ Date _____

PLAINTIFF'S EXHIBIT
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LUCAS LITOWITZ, Plaintiff, vs. THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. C07-993 BNSF'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Plaintiff's request for injunctive relief in this FELA case is nothing more than an effort to interfere with the employer/employee relationship and is clearly improper. Under the RLA, the National Railroad Adjustment Board has exclusive jurisdiction over disputes such as this between railroads and unions. As such, courts have no jurisdiction to enjoin investigations or other disciplinary action taken by carriers against their employees.

Even if the Court did have jurisdiction over this matter, an order restraining BNSF's investigation would be inappropriate. The inquiry relates only to why plaintiff failed to provide information repeatedly and properly requested, or report for work, not into the

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EXHIBIT
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underlying events related to plaintiff's injury, thus plaintiff can make no showing of success on the merits or harm.

II. FACTS[1]

Mr. Litowitz claimed to be injured at work on June 1, 2006.

On February 2, 2007, Mr. Litowitz's counsel notified BNSF of his representation, and demanded that BNSF have no contact with his client. Frisinger Dec., Ex. 1. The demand had no force of law. *See* Section III(C), below.

On May 2, 2007, Joan Costa of BNSF wrote to Mr. Litowitz requesting that he provide BNSF with information relating to his medical and return-to-work status. Frisinger Dec., Ex. 2. BNSF needs the information to help employees manage their recovery and return to work. Iverson Dec. ¶4 (filed herewith). Mr. Litowitz did not respond.

On May 8, 2007, Dennis Wright of BNSF wrote *to Mr. Litowitz's attorney* requesting the same information. Frisinger Dec., Ex. 8. Mr. Lotowitz's attorney did not then respond.

On May 25, 2007, Ken R. Iverson of BNSF wrote to Mr. Litowitz, following up on Ms. Costa's letter of May 2, requesting the same information. Frisinger Dec., Ex. 3. Mr. Iverson directed Mr. Litowitz to either provide the information by June 6 or report for work. *Id.* Mr. Litowitz did not respond, or report for work.

On June 1, 2007, Dennis Wright of BNSF *again* wrote to Mr. Litowitz's attorney, following up on his own letter of May 8, requesting information relating to his medical and return-to-work status. Frisinger Dec., Ex. 9. Mr. Libowitz's attorney did not then respond.

On June 12, 2007, BNSF notified Mr. Litowitz that it would commence an investigation hearing on June 20 in connection with Mr. Litowitz's failure to comply with instructions to provide necessary information, or report to work. *See* Montgomery Dec., Ex.

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[1] There are conspicuous and noteworthy problems with the "Facts" section of plaintiff's brief. It contains a lot of arguments, not facts, such as plaintiff's assertion that the investigation is being done solely in an effort to terminate plaintiff to eliminate a damages claim. *See* Motion for TRO at 2:24-2:26. Also, many of the statements are uncited, meaning that they are unsupported in the record by any evidence whatsoever, and must be disregarded. By way of example only, plaintiff's statement that at the investigation hearing he "will be examined and cross-examined about the accident and his medical status" is not only wholly unsupported rhetoric, it is flat wrong, *see* Iverson Dec. ¶ 4, as is the statement that Mr. Iverson's letter "clearly violate[s] the rules of civil procedure and Mr. Litowitz's right under the FELA," Motion for TRO at 2:16.

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1. The investigation was undertaken pursuant to a collective bargaining agreement. Iverson Dec. ¶7.

On June 15, 2007 – nine days after Mr. Litowitz was required to provide the information or report for work – Mr. Litowitz's attorney finally responded to BNSF's inquiries, sending along *some* medical records and promising to "assist Mr. Litowitz in providing the BNSF with necessary information." Frisinger Dec., Ex. 4.

On June 20, 2007, BNSF convened its investigation to determine why Mr. Litowitz had refused to advise it of his medical and return-to-work status despite four requests over a four-plus week period. *See* Frisinger Dec., Ex. 10. The investigation is solely related to Mr. Litowitz's failure to respond to BNSF's repeated requests. Iverson Dec. ¶3. BNSF's purpose is not to question Mr. Litowitz about the accident and his medical status. *See* Iverson Dec. ¶4.

At Mr. Litowitz's representative's request, the investigation was recessed until July 5, 2007, at 11:00 a.m. *Id.*

On June 22, 2007, a doctor wrote a letter stating that plaintiff could return to light duty work, but did not opine when he could return to full duty. Frisinger Dec., Ex. 5. Plaintiff (finally) provided this letter to plaintiff.

On June 26, 2007, plaintiff filed this action, seeking damages under the Federal Employer's Liability Act.

Last Friday, June 29, plaintiff filed a motion for a temporary restraining order, asking this Court to stop the investigation into his repeated refusal to respond to requests for information, and BNSF's directive that he do so or report to work. Friday afternoon, BNSF was notified by the Court that any response to plaintiff's motion was due the following Monday at noon. This is that response.

III. DISCUSSION

Under the facts of this case and the applicable law, plaintiff's motion for extraordinary relief should be denied.

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A. Serious questions are not raised by plaintiff's motion.

1. BNSF's investigation does not relate to claims asserted in this lawsuit.

In support of his motion to restrain BNSF's investigation, plaintiff makes many incorrect and unfounded statements regarding the nature, scope, and motive behind BNSF's investigation of plaintiff's failure to respond to BNSF's requests for information. As a threshold matter, before addressing the legal analysis, these statements should be addressed.

Plaintiff claims that BNSF seeks to conduct "extensive cross-examination of Plaintiff with regard to matters relevant to this litigation (i.e. his medical condition, his physical restrictions, and his corresponding ability, or inability to perform his duties)." Motion for TRO at 4:22-4:24. This assertion is repeated over and over in plaintiff's brief; an apparent scare tactic. *See* also Motion for TRO at 2:25-2:26; 3:16-3:17; 3:19-3:20. It is categorically untrue. BNSF intends to inquire only into why plaintiff neglected to respond to BNSF's four requests for information and, ultimately, BNSF's demand that plaintiff either provide the information or return to work.

Plaintiff alleges that BNSF is conducting this investigation "solely in an effort to terminate him for purposes of eliminating future wage from his FELA claim." Motion for TRO at 2:24-2:26. This assertion is wholly without support. In an effort to bolster this unsubstantiated claim, plaintiff describes a "risk identifier" system whereby employees are given a "red" or "green" status related in part to their accident history. Plaintiff's status as an employee will not be affected by any such system. Iverson Dec. ¶6. Instead, it will be determined by whether Mr. Litowitz committed a "non-serious" or "serious" infraction by his failure to respond to BNSF's request for information, and whether he has committed or does commit rules violations in the past or future. Iverson Dec. ¶6.[2]

[2] To support its assertion that the "red" "green" will somehow affect Mr. Litowitz, plaintiff cites to a deposition transcript from the deposition of Brian Reilly, taken in an unrelated lawsuit. Mr. Reilly testified that he has no knowledge of how the system relates to the potential termination of an employee. Deposition of Brian Reilly at 38:16.

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BNSF's sole purpose in this investigation is to determine why plaintiff, with knowledge that company policy required certain information from him in order to maintain his medical leave status, failed to provide the information, and whether such a failure warrants disciplinary measures. As is clearly stated in the letter demanding plaintiff's presence at the investigation, the inquiry is limited to whether plaintiff knew that his employer required certain information of him, whether plaintiff failed to provide that information or report for duty, and whether company policy necessitates punishment for such a violation of protocol. BNSF does not intend to question Mr. Litowitz about the factual circumstances surrounding his injury, the extent of his injury, any allocation of fault for his injury, or any other topic properly the subject of this FELA litigation. The inquiry's only relationship to this litigation is that the injury that plaintiff alleges in this litigation led to the need for documentation of his medical leave status. No inquiry into the facts and circumstances of the injury, however, are necessary or contemplated.

2. This Court lacks jurisdiction over disputes governed by the Railway Labor Act such as those addressed in plaintiff's TRO motion.

At issue in this case is a labor dispute between a common carrier by rail and one of its employees which is governed by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et. seq.*, which "provides a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison, Topeka, and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562, 107 S. Ct. 1410, 1414 (1987). Such disputes fall into one of two categories: "major disputes" seeking to create new contractual rights, which are governed by 45 U.S.C. §§ 152 Seventh and 156; and "minor disputes" which involve the enforcement of existing contractual rights and are governed by 45 U.S.C. § 152 Sixth and 153 First (i). *Consolidated Rail Corp. v. Railway Labor Executives' Ass;n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 2480 (1989). In the case of a "major dispute" the RLA requires a "lengthy process of bargaining and mediation" during which the parties are required to maintain the status quo and federal district courts "have subject matter jurisdiction to enjoin a violation of the status quo pending completion of the

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required procedures." *Id.* "Minor disputes" are subject to a compulsory and binding arbitration process from the local level through the National Railroad Adjustment Board, with limited judicial review of the arbitral decision which has been characterized as "'among the narrowest known to the law.'" *Id.* at 303, 109 S.Ct. at 2480-81; *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 91, 99 S.Ct. 399, 401 (1978) (citation omitted); 45 U.S.C. § 153 First (i).

"Minor disputes" contemplate the existence of a collective bargaining agreement that has already been concluded and relate to either the proper meaning or application of the particular provisions of the agreement. If a dispute can be conclusively resolved by interpreting an existing agreement, it falls into the category of a "minor dispute." *Consolidated Rail Corp.*, *supra* at 305, 109 S. Ct. at 2482. ".Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement." As one court stated, "Congress specifically intended the RLA to keep railroad labor disputes out of the courts and instead requires the use of grievance procedures and arbitration." *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986) (*citing Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978)).

The leading case in this area is *Andrews v. Louisville and Nashville Railroad Co.*, 406 U.S. 320 (1972), in which a railroad employee claimed damages resulting from the refusal to reinstate his employment following his recovery from a personal injury. The Supreme Court held that the grievance and arbitration procedures provided by the RLA for resolution of "minor disputes" such as termination of an individual's employment are mandatory and constitute an employee's exclusive remedy against his employer. Dismissing the argument that the claim was one for "wrongful discharge" and therefore fell outside the scope of the RLA, the Court noted:

> [T]he very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is

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> conceded by all that the only source of the petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitled him to damages, is the collective-bargaining agreement between the employer and the union.

Id. at 323-24.

Since the decision in *Andrews*, courts have rejected efforts to circumvent it through innovative pleading. In *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), the plaintiff had been dismissed from employment as a train dispatcher after a railroad investigation determined that he was responsible for a collision. The employee brought an action in state court against the railroad and the employee who conducted the investigation, alleging that his dismissal amounted to an "intentional infliction of emotional distress" for which he sought damages. The case was removed to federal court and then dismissed upon a finding that it was in fact a "minor dispute" subject to the exclusive arbitral remedy provided by the RLA. On appeal, the court specifically rejected the plaintiff's contention that his claim was a common law tort action not subject to *Andrews*, stating:

> If the basic injury was his wrongful discharge, the complaint involves a minor dispute which must be arbitrated following the procedures of the RLA. All of the damages which he claims to have suffered flowed from his wrongful dismissal from his employment. The alleged evil motivation of the defendants would have caused him no legal injury if he had either not been discharged or if his discharge was not wrongful. The injuries for which he sought compensation included not only his emotional distress, but also his loss of income from his job from the time of his discharge until retirement age, together with loss of his retirement benefits. His emotional distress was an incident of the wrongful discharge, rather than a result of an alleged conspiracy. Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the RLA, the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

Id. at 1369.

Claims involving the railroad disciplinary investigation process itself have specifically

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been held to constitute "minor disputes" subject to compulsory and binding arbitration under the Railway Labor Act. In *Magnuson v. Burlington Northern, Inc., supra*, plaintiff claimed that in addition to the discharge itself, he was harmed by the actions of railroad's alleged abuse of the investigatory process and the alleged presentation of false and misleading evidence at the investigation which lead to his discharge. Noting that both the investigation requirement and the fair hearing right were "products of a collective bargaining agreement," the court in *Magnuson* held that the Adjustment Board and not the courts had exclusive jurisdiction over the dispute. 576 F.2d at 1369.

Similarly, in *National Railroad Passenger Corp. v. I.A.M.A.W.*, 915 F.2d 43 (1st Cir. 1990), the court held that it had no jurisdiction over challenges of disciplinary action taken against railroad employees as the result of a strike, stating:

> The trial court correctly held . . . that controversies involving disciplinary matters are "minor disputes" within the exclusive jurisdiction of the Adjustment Boards. [citations omitted] A dispute over the justification for and propriety of warnings and disciplinary investigations, as is present in the case herein, certainly falls within that class of controversies termed "minor disputes" under authoritative precedent.

Id. at 50. As noted in the Declaration of Ken Iverson, the investigation into Mr. Litowitz arises under the applicable collective bargaining agreement. A long line of decisions holds that the grievance and arbitration process under the RLA is mandatory, exclusive and comprehensive in the case of a so-called "minor dispute," the kind of disagreement involved here. These cases further hold that no court, state or federal, can interfere with this process, except for the limited appeal after the matter has gone all the way through the National Railway Adjustment Board. If there is a dispute regarding a disciplinary hearing under a collective bargaining agreement, these matters must be resolved under the RLA. This point has been made repeatedly by the United States Supreme Court as noted in *Elgin J. & E. Ry. v. Burley*, (1945) 325 U.S. 711, 723, as well as in *Gunther v. San Diego & A.E.R. Co.*, (1965) 382 U.S. 257, in which the United States Supreme Court stated, "This Court, time and again,

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has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board." *Id.* at 263.[3]

With regard to Plaintiff's request here for injunctive relief, neither state nor federal courts have jurisdiction to enjoin proceedings going forward pursuant to the terms of a railroad collective bargaining agreement. This recognition that courts cannot enjoin company proceedings under collectively bargained agreements is well set out in *Local 1477 UTU v. Baker*, 484 F.2d 228, 230-31 (6th Cir. 1973):

> If a dispute is minor and the parties are unable to resolve it through negotiation or prescribed grievance procedures, the National Railroad Adjustment Board then has primary and exclusive jurisdiction under Section 3 of the Railway Labor Act, 45 U.S.C. § 153, to interpret the agreement of the parties and make an appropriate award. [Citations omitted.] Thus generally stated, these concepts are settled law with which no party to this appeal takes issue.
>
> * * *
>
> It follows that in this case the District Court has exceeded its jurisdiction by undertaking to interpret a labor contract and related rules, the impact of which upon the matter in dispute is unclear, and then permanently enjoining the railroad from taking any disciplinary action inconsistent with the Court's interpretation of the controlling agreement.

In this regard, it should be emphasized that the RLA normally provides significant procedural safeguards during and after an investigation, a concern discussed in *Clark v. Seaboard Coastline R. Co.*, 332 F. Supp. 380, 381 (N.D. Ga. 1970). Mr. Litowitz will, if he wishes, be represented by his union representative at the investigation, have the right to examine witnesses, and the right to appeal an adverse finding. Iverson Dec., ¶7; *see also* 45 U.S.C. § 153 Subsection (g).

Based on the foregoing, it is clear this Court has no jurisdiction whatsoever to entertain the plaintiff's motion for relief. The matter in question is solely within the purview

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[3] A brief list of the many decisions supporting the foregoing assertions includes *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33 (1963); *State of California v. Taylor*, 353 U.S. 553 (1957); *Brotherhood of Railroad Trainmen v. Chicago Rock Island & Pacific R. Co.*, 353 U.S. 30 (1957), *reh'g den.*, 353 U.S. 948; *Radin v. U.S.*, 669 F.2d 681 (4th Cir. 1983); *Railway Labor Executives Assoc. v. Atchison, Topeka & Santa Fe Rwy. Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. den.*, 400 U.S. 1021; *Diamond v. Terminal Rwy. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970); *Spencer v. Missouri Pacific R. Co.*, 581 F. Supp. 1220 (D. Mo. 1984), *aff'd*, 473 F.2d 627; *Hennebury v. Transport Workers Union of America*, 485 F. Supp. 1319 (D. Mass. 1980); *Read v. Baker*, 430 F. Supp. 472 (D. Del. 1977); *Merinuk v. Baker*, 366 F. Supp. 735 (E.D. Pa. 1973); *Johnston v. Interstate R. Co.*, 345 F. Supp. 1082 (D. Va. 1972); *Elgin, Joliet & Eastern Rwy. Co. v. United Transportation Union*, 342 F. Supp. 793 (N.D. Ill. 1972); and *Baltimore & Annapolis R. Co. v. National Mediation Board*, 321 F. Supp. 51 (D. Md. 1970).

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of the RLA, the statutory scheme created by the United States Congress to resolve labor disputes in the railroad industry.

In situations involving contact for the purpose of learning employment status, such as here, numerous courts have found that the RLA trumps any FELA litigation. In *DeFelice*, 124 F.R.D. 603, 603 (W.D. Pa. 1989), for example, ConRail submitted a medical form to its employee to certify that the employee remained properly on disabled status, long after the instigation of litigation. The court concluded that because the form did not request findings from a physical examination, results of tests, or any medical conclusion other than a diagnosis, the form was not a discovery tool for litigation, but instead fell under the purview of the collective bargaining agreement between the railroad and its employees. *Id.* at 605. The court thus denied a protective order preventing plaintiff from providing the requested information because such an order fell under the purview of the RLA. *Id.* at 604 (*citing Lewy v. S. Pac. Trans. Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986)).

Similarly, in *State ex rel. Union Pac. R.R. Co. v. Dierker*, 961 S.W.2d 816, 817 (Mo. 1998), plaintiff Harper was brought before a disciplinary board for failing to comply with railroad requests documenting his medical condition. The Missouri Supreme Court ruled that the RLA's adjustment board possessed exclusive jurisdiction over such matters, and it was thus precluded from granting a protective order similar to the order requested herein. *Id.* at 824. *See also, e.g., Heller v. Consolidated Rail Corp.*, 1995 U.S. Dist. LEXIS 11615 (E.D. Pa. 1995) (refused to grant protective order because of RLA preclusion); *Chapman v. S. Buffalo Ry. Co.*, 43 F. Supp. 2d 312 (W.D. NY 1999) (same).

Here, BNSF requests information regarding employee status pursuant to its company policy, the collective bargaining agreement, and the RLA. Courts have found that such requests for information related to employment requirements, and investigations related to the failure to follow such requests, fall under the RLA's jurisdiction over "minor disputes" related to employment relations and the collective bargaining agreement between the parties. As

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such, this dispute is properly decided only within the arbitration mechanisms of the RLA, and this court lacks the jurisdiction to enjoin such proceedings.[4]

B. Even if this court finds that it has jurisdiction, a TRO is not proper.

Even if the Court finds that it has jurisdiction over the matter, a temporary restraining order would be improper because plaintiff does not face "serious hardship" if the motion for a temporary restraining order is denied. As stated previously, plaintiff faces no examination directly into matters involved in his FELA litigation, but only into his failure to provide requested information or report for duty. The investigation will have no effect on plaintiff's FELA claims. Plaintiff's histrionic assertions that BNSF will play "judge, jury, and executioner" are unfair and unfounded. BNSF is following applicable procedures prescribed by company regulations, the collective bargaining agreement between the parties, and the RLA relating to an employee's failure to provide requested information to his employer.

Plaintiff also states that the failure to provide counsel raises serious questions about the investigation. But plaintiff has no right to counsel at a disciplinary investigation. *See Chapman*, 43 F. Supp. 2d. at 317 (*citing Holmes v. Elgin, Joliet & Eastern Ry. Co.*, 815 F.

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[4] The cases plaintiff cites are distinguishable from this in several important, and ultimately dispositive, respects.

Plaintiff relies heavily on *Partida v. Union Pacific R.R*, 221 F.R.D. 623 (C.D. Ca. 2004), which he claims involves "exactly the actions requested of the Plaintiff herein." Even a cursory reading of *Partida* reveals that it does not. In *Partida*, the plaintiff started his lawsuit well *before* his railroad employer requested that he take a physical examination. The court simply ruled that allowing the defendant to do so would subvert plaintiff's rights under the Federal Rules of Civil Procedure in FELA actions. *Id.* at 628-29. The case has no applicability here at all. BNSF's investigation started well before plaintiff filed his action asserting FELA claims here. BNSF is not demanding that plaintiff submit to a physical examination – something governed by Fed. R. Civ. P. 35 when litigation is pending – BNSF is investigating plaintiff's failure to provide information. BNSF is not inquiring into matters underlying plaintiff's FELA claim. *Partida* is inapposite, although it is worth noting that the court acknowledged that a railroad has the right to conduct investigations under the Railway Labor Act and collective bargaining agreements. *See id.* at 627.

Plaintiff also cites *Vicary v. Consolidate Rail Corp.*, 942 F. Supp. 1146 (N.D. Ohio 1996) to support the proposition that this court has the power to grant a TRO. In *Vicary*, while FELA litigation was ongoing the defendant railroad sent plaintiff extensive questionnaires related to his injury and attempted to force the plaintiff to undergo a program of extensive rehabilitation at the railroad's direction. *Id.* at 1148. In that case, where a FELA case was already ongoing, the court simply held that such tactics constituted attempts to "engage in extra-judicial discovery" and "circumvent the rules" of civil procedure. *Id.* at 1147, 1150. Importantly, however, the court in *Vicary* actually stated that it recognized that it was likely "prevented from interfering directly with disciplinary proceedings brought by the railroad against an employee." *Id.* at 1149. As such disciplinary proceedings are exactly what is at issue in this motion, *Vicary* actually supports the position that this court can not enjoin them.

Lastly, plaintiff cites to a restraining order obtained by plaintiff's current counsel on a single occasion fourteen years ago in King County Superior Court in *Gutierrez v. BNSF*, No. 93-2-07954-1. The order is far from persuasive. It was plainly entered without notice or opposition by BNSF, and was set over for further hearing. More to the point, however, the order explicitly states that the investigation was "in connection with the accident which is the subject matter of this litigation." As discussed previously, BNSF has no intention of questioning plaintiff regarding the subject matter of this litigation, as its investigation is related only to plaintiff's failure to provide information requested. The restraining order in *Gutierrez* therefore also does not help plaintiff here.

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Supp. 279, 284 (N.D. Ind. 1992)). *See also Callas v. Norfolk and Western Railway Co.*, 195 Ill.2d 356, 373, 748 N.E.2d 153 (2001) ("the railroad has the right to hold disciplinary proceedings pursuant to the collective-bargaining agreement without attorneys present from either side"). Thus the failure to provide counsel cannot raise serious questions about the proceeding. As such, there is no foreseeable harm sufficient to warrant the issuance of a temporary restraining order halting a lawful investigation.

C. BNSF properly contacted plaintiff.

Plaintiff also argues that BNSF's letters directly to plaintiff are improper because they are an effort to obtain discoverable information without including plaintiff's counsel. It bears repeating that at the time of BNSF's contacts with plaintiff, plaintiff had not yet begun litigation and plaintiff remained (and remains today) an employee of BNSF. Faced with nearly identical facts, courts have stated that direct contact with an employee/plaintiff by a railroad to obtain employment information is not improper, even ***after*** the litigation starts. *See,.e.g., DeFelice v. Consolidated Rail Corp.*, 124 F.R.D. 603, 605 (W.D. Pa 1989) (while the plaintiff and the defendant had a relationship vis-a-vis the litigation, the parties also had a relationship as employer and absent employee. Contacts relating to obligations of absent employees under the collective bargaining agreement fell outside the litigation sphere, and were thus not improper.) Here, as in *DeFelice*, BNSF directly contacted its employee about the employee's obligation to provide BNSF with certain information during a medical absence. Furthermore, unlike in *DeFelice*, BNSF's contacts with plaintiff occurred ***well before*** plaintiff filed this action. Such contacts fall outside the scope of the litigation relationship for which plaintiff had obtained representation, and are thus not improper.

IV. CONCLUSION

For the reasons stated, plaintiff's motion for a temporary restraining order should be denied.

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DATED this 2nd of July, 2007.

Montgomery Scarp MacDougall, PLLC

/s Tom Montgomery
Bradley P. Scarp, WSBA No. 21453
Tom Montgomery, WSBA No.19998
Attorneys for Defendant BNSF Railway Company
1218 Third Avenue, 27th Floor
Seattle, WA 98101
Tel. (206) 625-1801
Fax (206) 625-1807

CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that a true and complete copy of defendant's *MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER* has been sent for filing in United States District Court, Western District of Washington via ECF, which provides notice via email to the following interested party:

Bradley K. Crosta
CROSTA and BATEMAN
ATTORNEYS AT LAW
999 Third Avenue, Suite2525
Seattle, WA 88104
Tel (206) 224-0900
Fax (206 467-8028

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 2nd of July, 2007 at Seattle, Washington.

/s Abigail Pratt
Abigail Pratt, Legal Assistant

MONTGOMERY SCARP MACDOUGALL, PLLC
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Seattle, Washington 98101
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LUCAS LITOWITZ, Plaintiff, vs. THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. C07-993P DECLARATION OF KEN IVERSON IN SUPPORT OF BNSF'S RESPONSE TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

I, Ken Iverson, under penalty of perjury of the laws of the State of Washington, hereby declare as follows:

1. I am over the age of 18, and am otherwise competent to testify as to all matters herein, and make the following statements based on my own personal knowledge.

2. I am Director of Administration for BNSF Railway's Northwest Division. I am familiar with the procedures used by the BNSF in the investigation process and, if necessary, the application of discipline of employees such as Lucas Litowitz.

3. The investigation that Mr. Litowitz seeks to stop in his motion for a temporary restraining order is not in investigation into the facts or circumstances of his injury. The investigation, as Michael J. Babik's June 20, 2007 letter to him states, is solely related to Mr.

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Litowitz's failure to respond to several letters from BNSF asking for his medical and/or return-to-work status.

4. I believe that Mr. Litowitz assertion that he "will be examined and cross-examined about the accident and his medical status" is incorrect. He will be questioned about why he did not respond to BNSF's inquiries about his medical condition so that BNSF could help manage Mr. Litowitz's recovery and return to work.

5. Mr. Litowitz's assertion that "the investigation is being done solely in an effort to terminate him for the purpose of eliminating future wage from his FELA claim and obtain information about the incident and about his medical condition as a result of the incident" is incorrect. The investigation is being undertaken to determine whether an employee violated company rules by failing to respond to BNSF's request for information.

6. Investigations are a vehicle used to determine whether an employee committed a violation of BNSF rules. Violations are classified as "non-serious," "serious," or "dismissible." Mr. Litowitz's non-response to BNSF's requests for his medical and return-to-work status is at worst a "serious," not a "dismissible," rule violation. His employment status, then, if he were found to have violated company rules will depend on any past and future rule violations. It will not be affected by whether he is considered a "red" or "green" employee.

7. The investigation will be conducted pursuant to longstanding procedural rules which, it is my understanding, are the result of collective bargaining agreements. Among the rules, Mr. Litowitz's is entitled to representation by another employee or union officer of his choosing, the right to examine witnesses, and the right to appeal an adverse finding.

DATED this First day of July, 2007 at Seattle, Washington.

Ken Iverson

Ken Iverson

MONTGOMERY SCARP MACDOUGALL, PLLC
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Seattle, Washington 98101
Telephone (206) 625-1801
Facsimile (206) 625-1807

CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that a true and complete copy of defendant's *DECLARATION OF KEN IVERSON IN SUPPORT OF BNSF'S RESPONSE TO MOTION FOR A TEMPORARY RESTRAINING ORDER* has been sent for filing in United States District Court, Western District of Washington via ECF, which provides notice via email to the following interested party:

Bradley K. Crosta
CROSTA and BATEMAN
ATTORNEYS AT LAW
999 Third Avenue, Suite 2525
Seattle, WA 88104
Tel (206) 224-0900
Fax (206 467-8028

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 2nd of July, 2007 at Seattle, Washington.

Abigail Bratt, Legal Assistant

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Seattle, Washington 98101
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LUCAS LITOWITZ, Plaintiff, vs. THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. C07-993P DECLARATION OF TOM MONTGOMERY IN SUPPORT OF BNSF'S RESPONSE TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

I, Tom Montgomery, state as follows:

1. I am one of the attorneys of record for defendant BNSF in the above-entitled action, and have personal knowledge of the facts set forth in this declaration.

2. Attached hereto as Exhibit 1 is a true and correct copy of BNSF Assistant Terminal Superintendent Michael Babik's letter to Lucas Litowitz dated June 12, 2007.

I swear under the penalty of perjury that the foregoing information is true and correct to the best of my knowledge.

///

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Telephone (206) 625-1801
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DATED this 2nd of July, 2007.

Montgomery Scarp MacDougall, PLLC

Tom Montgomery, WSBA #19998
Bradley Scarp, WSBA #21543
Of Attorneys for Defendant BNSF
Tom@montgomeryscarp.com
Brad@montgomeryscarp.com

CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that a true and complete copy of defendant's *DECLARATION OF TOM MONTGOMERY IN SUPPORT OF BNSF'S RESPONSE TO MOTION FOR A TEMPORARY RESTRAINING ORDER* has been sent for filing in United States District Court, Western District of Washington via ECF, which provides notice via email to the following interested party:

Bradley K. Crosta
CROSTA and BATEMAN
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999 Third Avenue, Suite 2525
Seattle, WA 88104
Tel (206) 224-0900
Fax (206 467-8028

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 2nd of July, 2007 at Seattle, Washington.

Abigail Pratt, Legal Assistant

MONTGOMERY SCARP MACDOUGALL, PLLC
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Seattle, Washington 98101
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Exhibit 1

Michael J. Babik
Asst. Terminal Superintendent

BNSF Railway Company
2601 20th Avenue West
Seattle, Washington 98199-2907

(206) 272-3762
(206) 272-3775 Fax

June 12, 2007

File: IN-07-1198
CERTIFIED MAIL 7006 2150 0000 6941 1336

Empl Id 1675503
LUCAS J LITOWITZ
6207 26TH ST NE
TACOMA WA 98422

Attend investigation at the Terminal Superintendent's Office, Balmer Yard, 2601 20th Ave W, Seattle, Washington, at 1100 hours on Wednesday, June 20, 2007, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions issued by BNSF Director of Administration Ken Iverson on May 25, 2007 (letter attached) to either: Report for duty no later than June 6, 2007, or provide information on your physician's letterhead or prescription form to support your continued absence from duty.

In connection with these alleged violations, you are ineligible for Alternative Handling under Part I, Section III G of the Safety Summit Agreement.

Please arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

Request for postponement will not be considered less than 24 hours in advance of the investigation date and time.

Acknowledge receipt by affixing your signature in the space provided on copy of this letter.

Michael J. Babik

Michael J. Babik
Asst. Terminal Superintendent

cc: Crew Management
Ken Iverson – Please arrange to attend as witness

Signature _____ Date _____

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

JOHN McARTHUR
Vice General Chairman
P.O. Box 5100
Fallon, NV 89407
Office: 775-423-2288
Fax: 775-423-3717
E-mail: jomcarthur@charter.net

GROVER PANKEY
General Chairman
P.O. Box 1417
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Office: 909-982-7777
Fax: 909-982-6767
E-mail: gp360@verizon.net

RICK BARTHOLOMEW
Asst. Vice General Chairman
2195 East Avenue
Hayward, CA 94541
Office: 510-582-9161
Fax: 510-582-9161
E-mail: brsbart@sbcglobal.net

September 10, 2007

Mr. William G. Jungbauer
Attorney At Law - Yeager, Jungbauer & Barczak, PLC
745 Kasota Avenue
Minneapolis MN 55414

VIA FACSIMILE
Re: File No. UPGCW-HRSMT-1484

Dear Sir,

I have three cases I have been personally involved in that deal with harassment of on-duty-injuries.

The first case involves Mr. D. R. Vasquez. Mr. Vasquez was cited for two alleged violations of the Carrier's Book of Rules; both involved a single incident of an on-duty-injury; the alleged violations were separated into two separate alleged violations both of which were Level 5, and were dismissal if proven.

The Carrier charged Mr. Vasquez on February 3, 2005 for alleged Conduct/Dishonesty (1.6) for allegedly falsifying an accident report that he in fact never filled out. Mr. Bruce Feld of the Union Pacific Railroad's Claims Department filled out the accident report putting words into Mr. Vasquez mouth while doing so. Then the Carrier charged Mr. Vasquez for allegedly falsifying his accident report. Mr. Vasquez prevailed in this hearing.

Additionally, Mr. Vasquez was charged on February 3, 2005 with alleged violation of Conduct/Careless of Safety (1.6) wherein these charges were also dismissed.

On the date of the injury Mr. Vasquez was not provided any pain medication because of the interference from Dr. Jones and Mr. Feld of the Union Pacific Railroad dictating Mr. Vasquez treatment, to the medical personal treating him. Mr. Vasquez was kept on duty for over twelve hours for re-enactment, drug screens, and accident report.

Mr. Vasquez was required to submit to two separate drug and alcohol tests on the date of his injury; one at the emergency room and the other back at his headquarters point after being treated. All of the drug and alcohol screens were returned negative.

Mr. Vasquez was harassed by the superintendent of the Union Pacific Railroad in violation of the Collective Bargaining Agreement, by the numerous requests for medical information being requested by non-medical personal.

There were numerous letters written to the superintendent and the Vice President of the Western Region Mr. Tom Jacobi, citing that the information being requested by the superintendent was in fact being provided to the HSD (Health Services Department) as required by the Union Pacific Railroads Policy. However the superintendent took exception because the information was not being furnished to him personally. Mr. Vasquez began furnishing the information to the superintendent and then they claimed they never received it. As a result the superintendent's secretary began to make threats on Mr. Vasquez and his job. She made these threats to Mr. Vasquez and to his Union Representative Mr. John McArthur.

On September 2, 2005 Mr. Vasquez was again charged with allegedly failing to Report and Comply with instructions. The Organization was able to provide supporting documentation that in fact Mr. Vasquez had complied with providing the medical information through tx facsimile confirmation and the hearing was canceled.

The second incident involves Mr. Brian Chavez.

Mr. Chavez seniority was terminated after an on-duty-injury citing that he had been absent for more than five working days without proper authority. The hearing was held on April 19, 2005 to show justifiable reason why Claimant was not at work. The Union Pacific Railroads Manager Mr. Lowell Clayton denied having any knowledge of an on-duty-injury that occurred on or about January 28, 2005 involving Mr. Chavez.

It is note worthy that Mr. Chavez was called as a key witness to testify on behalf of Mr. Vasquez at his hearing wherein it was found that Manager Clayton was lying about Mr. Vasquez circumstance. It was after this hearing Mr. Clayton terminated Mr. Chavez seniority under the provisions of the Agreement.

During Mr. Chavez hearing it was again evident Mr. Clayton was still lying and getting caught at every turn. As a result Mr. Chavez seniority was reinstated with all rights and privileges unimpaired.

The Organization asked the FRA to investigate Union Pacific Railroad for harassment of Mr. Chavez on-duty-injury. During the investigation for the harassment it was determined that the Union Pacific Railroads Officers had lied to the FRA.

On August 29, 2005 Mr. Chavez was again charged with alleged violations of the Carrier's Rules 1.2.5; for allegedly failing to report an on-duty-injury.

Again the Carrier failed to prove the alleged charges against Mr. Chavez and it was three of the Union Pacific Managers who were disciplined as a result of lying to the FRA and failing to report the injury to the FRA; and the Union Pacific Railroad was cited for two Code 1 violations.

The Carrier then hired an outside Law Firm and they accused Mr. Chavez and his representatives of fabricating/conspiring the injury.

The third case involves an Amtrak employee Mr. Jaime Lacsina.

Mr. Lacsina had an on-duty-injury involving his knee. He reported the injury late and was disciplined as a result. Mr. Lacsina was also experiencing some pain in his wrist and arm. The doctor treating him informed him it was arthritis. After a few months his wrist and arm was not getting any better and he went to a specialist.

The specialist asked Mr. Lacsina what type of work he did and had him describe his duties. The specialist then informed Mr. Lacsina it was not arthritis but was a result of the repetitive motion work he had been doing. This was on January 19, 2007.

It was late in the afternoon and so Mr. Lacsina called his manager and asked for an appointment to meet with the manager first thing the following morning. Mr. Lacsina informed his manager of the wrist and arm as being an on-duty-injury diagnosed by the doctor.

Two Amtrak Managers then got confrontational with Mr. Lacsina making threats and telling him that if he would not turn it in as an on-duty-injury everything would go away and be alright; but if he wanted to turn in the injury they would cite him under the Carrier's Rules and he would be fired from his job. They gave Mr. Lacsina one week to make a decision. Mr. Lacsina spoke to his Union Representative (John McArthur) and was informed that this was not a choice but he was required to report under Federal Law.

Mr. Lacsina went back to his manager with a Local Representative Mr. Pat Murphy to give them his decision. Mr. Lacsina informed them he must report the accident.

Mr. Lacsina was cited for alleged violations of the Amtrak's Code of Excellence and found guilty.

The FRA investigated the incident and found the manager in violation of harassment and cited a Code 1 violation. The FRA also cited Amtrak for a Code 1 violation for failing to report the injury.

I am enclosing documentation to support all of the above. In addition, I am enclosing another incident involving a Union Pacific railroad Manager Mr. Marv Dunn in Sparks, Nevada.

I have all of the transcripts from the hearings and the deposition I can make available when and if necessary.

Respectfully your,

J. A. McArthur

John McArthur
Vice General Chairman

UNION PACIFIC RAILROAD MEDICAL PROGRESS REPORT

FORM 16920 REV 8/99

TO BE COMPLETED BY EMPLOYEE

EMPLOYEE NAME:	SOCIAL SECURITY NO:	OCCUPATION:	DATE OF ILLNESS OR INJURY
Daniel Vasquez	551 39 7820	Signalman	1-20-05

TO BE COMPLETED BY PHYSICIAN

DATE EMPLOYEE FIRST SEEN:	DATE OF LAST APPOINTMENT	NEXT APPOINTMENT DATE	TODAY'S DATE
22 Feb 2005	6 Sept 2005	20 Sept 05	6 Sept 05

1. Diagnosis: 1. Back int with Sciatica 2. Game Keepers Thumb

Attach copies of supporting objective medical documentation for items listed below:

☐ DIAGNOSTIC STUDIES ____; ☐ SURGICAL REPORTS: ____; ☐ OFFICE NOTES ____; ☐ REFERRALS ____

2. Prognosis: ☐ FULL RECOVERY EXPECTED; ☐ PERMANENT LIMITATIONS EXPECTED; ☐ TEMPORARY LIMITATIONS AT THIS TIME; ☒ UNKNOWN AT THIS TIME

3. Treatment Plan: (written narrative detailing treatment plan attached) or explain

Thumb better post surg 4/1/05

Back improving

RECEIVED
SEP 08 2005
I. O. McARTHUR
VGC

4. Medications: **UP Drug and Alcohol Policy:** Employees must not report for duty or be on company property under the influence of, or use while on duty any over-the-counter or prescription drug or medication which may in any way adversely affect their alertness, coordination, reaction, response, or safety. If an employee is in doubt as to whether an over-the-counter or prescription drug may have an adverse effect on alertness, coordination, reaction, response, or safety, the employee should have their treating medical practitioner make a good faith judgement in writing that the use of the substance by the employee at the authorized dosage is consistent with the safe performance of the employee's duties. The treating medical practitioner must make this judgement based on the available medical history. A copy of the documentation must be kept in the employees possession while on duty.

5. **Current Level of Functional Abilities: Please address only those abilities that relate to this injury.**

ABLE TO:			ABLE TO:	OCCASIONALLY	FREQUENTLY	CONTINUOUS
☒ LIFT	UP TO 10 lbs.	4 TIMES PER HOUR	☐ BEND AT THE WAIST	☒	☐	☐
☒ OVERHEAD LIFT	UP TO 10 lbs.	4 TIMES PER HOUR	☐ BEND AT THE KNEES	☒	☐	☐
☒ CARRY	UP TO 10 lbs.	4 TIMES PER HOUR	☐ WALK ON UNEVEN SURFACES	☒	☐	☐
☒ SIT	UP TO 2	HOURS	☐ CLIMB	☒	☐	☐
☒ STAND	UP TO 2	HOURS	☐ OTHER ____	☐	☐	☐

DESCRIBE ____

OCCASIONALLY = LESS THAN 33% OF THE WORK SHIFT FREQUENTLY = 33% TO 66% OF THE WORK SHIFT CONTINUOUS = MORE THAN 66% OF THE WORK SHIFT

6. **Employability: Union Pacific will match the level of function with the essential functions of the job and make the appropriate employment determination.**

7. **Return to Work Plan:** Union Pacific is committed to returning employees to a safe job and work environment. Transitional work (supervised gradual return to full duty) and other return to work plans are available. These plans are typically offered 2 - 4 weeks prior to full duty. For questions concerning Return to Work or medications please call the employee's supervisor or UPRR Health Services at 1-800-877-0517 option 5 (8:00 am to 5:00 pm., M-F, Central Time).

a. Anticipated Return to Work Date: full duty 10/15/05 light duty 10/15/05

Date available for duty if limitations above can be accommodated: ____

If not now, why not? ____

May begin on-the-job work hardening/ transitional work: ☐ Yes; ☒ No

b. Anticipated date of Maximum Medical Improvement (MMI): 10/15/05

8. **Physician's Comments:** Improved

PRINT PHYSICIAN'S NAME	ADDRESS:	TELEPHONE:
Reese Pulsley MD	120 S. Spalding Dr.	310-659-2910
		SPECIALITY: Orthopedic Surgery

Approval of request for leave of absence is pending the receipt of this completed information.

This information is confidential and maintained by Union Pacific Health Services Department.

Physicians Signature: [signature] Date: 6 Sept 05

July 27, 2005

Mr. J. O. McArthur
Vice General Chairman, BofRS
P.O. Box 5100
Fallon, NV 89407

Dear Mr. McArthur:

Reference previous correspondence ending with your letter of July 23, 2005, regarding Mr. D. R. Vasquez' medical leave of absence and supporting medical documentation.

As I stated in my letter of July 12, General Superintendent Cromwell and his staff (Administrative Aide Kathi Fagan) have an obligation to make sure that employees are fully aware that when off on a medical leave, that in order to protect their employment rights and seniority, progress reports and/or updated medical is to be furnished to Health Services Department periodically (normally every 30 days) along with their approved leave of absence request. The procedures they followed in Mr. Vasquez' case, are no different than how they would treat any other individual on a medical leave of absence. Furthermore, the procedures on this service unit are the same procedures followed by all service units on the UPRR system. Superintendent Bulletin No. 4 is addressed to all employees. Again, similar bulletins can be found on every service unit on the railroad.

Ms. Fagan does have a secure fax. Contrary to your statements in your July 23rd letter and from my recent research, Ms. Fagan has made no verbal or written threats to Mr. Vasquez or yourself. There is no breach of confidentiality. All medical documentation received is furnished to Health Services for a final determination by that department.

In closing, I confidently believe that here was no mishandling with this case. Therefore, I am closing my files regarding these unfounded allegations outlined in your letters.

Sincerely,

Thomas F. Jacobi
Regional Vice President
Western Region

Cc: Oliver Cromwell
Kathi Fagan
Health Services

Thomas F. Jacobi
Regional VP, Operations West

UNION PACIFIC RAILROAD
10031 Foothills Blvd., Roseville, CA 95747
ph. (916) 789-6050 fx. (916) 789-6058
tfjacobi@up.com

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

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Email: tedsting@omnitelcom.com

July 23, 2005

Mr. Tom Jacobi
Regional VP-West - Union Pacific Railroad
10031 Foothills BLVD
Roseville CA 95747

USPS PRIORITY MAIL 0103 8555 7493 8361 5539
Re: File No. UPGCW-1098

Dear Sir:

This letter is in response to your letter dated July 12, 2005, and also an update of the circumstances since my initial letter to Mr. Cromwell.

First, I would like to thank you for your response. Second, it is my desire to work through this matter with you, to achieve a result we can both live with, while staying within the confines of our Agreement and the Union Pacific Railroad Policies.

You have informed me of Ms Fagan's obligation to make sure that employees are fully aware that when off on a medical leave, employees are required to provide medical progress reports and/or updated medical information to Health Services Department, in order to protect their employment rights and seniority.

Mr. Vasquez provided the medical information to Health Services Department; they did receive it, and had acted on that information accordingly. Ms. Fagan took exception to the information being provided to Health Services instead of her and made threats to Mr. Vasquez and me in this regard.

The BRS Agreement grants employees who are off on sickness/injury, medical leave of absence, and they are not required to fill out Form 32006 or make a written request for medical leave of absence. Signal Department employees must only provide documentation to Health Services Department sufficient to support their medical leave.

RULE 62 - LEAVE OF ABSENCE (In pertinent part)

A. Employees will be granted leaves of absence in writing when they can be spared without interference to the service, but not to exceed six months within any twelve month period, except in cases of sickness, organization work, special service with railroad bureaus or commissions, holding public office or work in a Signal Engineer's office. Copy of leave of absence will be furnished to the Local Chairman. Unless satisfactory evidence of being unavoidably detained is provided, any employee who fails to report for duty at the expiration of leave of absence will be considered as voluntarily resigned from service and such position will be declared vacant and bulletined unless an extension has been granted.

Leaves of Absence with permission to work elsewhere must have written approval of the General Chairman.

On May 11, 2005, Mr. Cromwell sent a UPS second day air letter to Mr. Vasquez requesting updated medical information no later than May 25, 2005. Mr. Vasquez sent the updated information to Ms. Fagan VIA facsimile prior to the May 25, 2005 deadline.

On July 1, 2005 Mr. Cromwell sent a second letter UPS second day air to Mr. Vasquez informing him that he had not received the information requested in his letter dated May 11, 2005, and made a second request for medical information to be in his office no later than July 15, 2005.

Mr. Vasquez called my office at this time very concerned that he had sent the information to Ms. Fagan and he had received a letter informing him that Ms. Fagan and Mr. Cromwell had not received his medical update sent VIA facsimile.

I instructed Mr. Vasquez to send the medical update VIA facsimile again to Ms. Fagan, and this time he should get the TX confirmation that the facsimile went through to Ms. Fagan, which he did.

On July 20, 2005 I received a telephone call from Mr. Vasquez very upset, that he had received yet a third letter from Mr. Cromwell, stating, that he had failed to provide the medical update from his second letter, and this was his third letter making such a request. It stated further, that if Mr. Vasquez failed to provide a medical update by August 8, 2005 he would be considered to be overstaying his leave of absence.

I sent a copy of the updated medical the third time this morning on behalf of Mr. Vasquez. I sent it VIA facsimile to Ms. Fagan and it did go through 'OK' at 7.32 am. I also sent a facsimile to Ms. Mary Rankin at Health Services Department in Omaha, Nebraska.

There are 2 concerns in this matter.

1. The information was sent twice, via facsimile to Ms. Fagan, just as it was sent in April. If Ms. Fagan did not receive the medical who did? Is the facsimile machine used by Ms. Fagan a machine used by others in that office and how many other people have access to pick up Mr. Vasquez medical information off of this machine?
2. Or, are the letters stating the information was never received, nothing more than harassment?

In either case, it is unconscionable and immoral. I know for a fact the facsimile in the Health Services Department in Omaha, Nebraska is in a secure office and restricted to only authorized personnel accessed by a key.

The Medical Policy requires confidentiality. In this Case it is obvious there is no security or confidentiality.

Furthermore, the letter from Mr. Cromwell states *"The Health Services Department will use this information to make an informed objective decision concerning your medical status."*

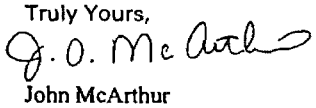
Why is it necessary to send the confidential medical information to Ms. Fagan or Mr. Cromwell where it is not secure or confidential; if they are going to send it to Health Services Department to make the determination? Why wasn't it sufficient to just send the information to the Health Services Department as required by the Medical Policy where this information is subject to security and confidentiality?

Mr. Vasquez confidentiality has been breeched.

Just another observation, Signal Department does not come under the jurisdiction of the Superintendent. This means neither Mr. Cromwell nor Ms. Fagan is familiar with the BRS Agreement; and Policy cannot supersede the Agreement.

I would like to meet with you to discuss this matter further to some resolve. Kindly acknowledge and advise.

Truly Yours,



John McArthur
Vice General Chairman

Cc: Mr. W. D. Pickett, International President-BRS
Mr. R. J. Bartholomew, AVGC-BRS
Mr. R. J. Rich, LC-BRS
Mr. D. R. Vasquez

RECEIVED
JUL 17 2005
J. O. McARTHUR
VGC

July 12, 2005

Mr. J. O. McArthur
Vice General Chairman, BofRS
P.O. Box 5100
Fallon, NV 89407

Dear Mr. McArthur:

I am in receipt of your letter dated July 7, 2005 regarding past correspondence between yourself, and Los Angeles Service Unit General Superintendent Cromwell regarding Mr. D. R. Vasquez' medical leave of absence and supporting medical documentation.

First of all, let me state that I never received your initial letter dated May 5, 2005 addressed to this office. I make every concerted effort to answer correspondence in a timely basis and unfortunately, this is the first letter that I actually received from you regarding this issue.

General Superintendent Cromwell and his staff (Administrative Aide Kathi Fagan) have an obligation to make sure that employees are fully aware that when off on a medical leave, that in order to protect their employment rights and seniority, progress reports and/or updated medical is to be furnished to Health Services Department periodically (normally every 30 days) along with their approved leave of absence request.

On every Service Unit, there is a Superintendent's Bulletin (for the Los Angeles Service Unit, it is Bulletin No. 4 dated 1/1/05) that gives specific instructions to all employees with regard to all leave of absences. I have attached a copy of the bulletin for your ready reference. Again, Superintendent Cromwell and his staff were reminding Mr. Vasquez of his obligation under this bulletin. In no way were they making medical determinations...merely ensuring that the medical would be forwarded to Health Services for review by medical professionals of the Carrier.

Should you need further help on this or any other issues, please do not hesitate to write or call.

Sincerely,

T. F. Jacobi

Thomas F. Jacobi
Regional Vice President
Western Region

Cc: Oliver Cromwell
Kathi Fagan
Health Services

Thomas F. Jacobi
Regional VP, Operations West

UNION PACIFIC RAILROAD
10031 Foothills Blvd., Roseville, CA 95747
ph. (916) 789-6050 fx. (916) 789-6058
tfjacobi@up.com

ITEM 2
MEDICAL LEAVE OF ABSENCE
REQUESTS FOR MEDICAL LEAVE OF ABSENCE (PERSONAL ILLNESS, ON OR OFF DUTY INJURIES, ETC.) IN EXCESS OF 15 DAYS MUST BE SUBMITTED ON FORM 32006 AND INCLUDE STATEMENT FROM THE EMPLOYEE'S PHYSICIAN STATING THE EXPECTED DURATION OF THE LEAVE OF ABSENCE.
ALL MEDICAL LEAVE OF ABSENCE WILL BE REQUESTED AND APPROVED IN INCREMENTS OF 30 DAYS. MEDICAL LEAVES OF ABSENCE MUST BE ACCOMPANIED BY DETAILED MEDICAL DOCUMENTS FROM YOUR TREATING PHYSICIAN PROVIDING THE FOLLOWING INFORMATION:
1) DATE FIRST SEEN/ DATE LAST SEE; NEXT APPOINTMENT DATE
2) DIAGNOSIS OF ILLNESS OR INJURY, SPECIFIC MEDICAL FINDINGS AND CURRENT MEDICATION, PHYSICAL THERAPY AND/OR OTHER TREATMENT BEING PRESCRIBED.
3) A DETAILED PROGNOSIS OF THE EMPLOYEE'S RECOVERY.
4) AN ESTIMATED RETURN TO DUTY DATE WITH OR WITHOUT RECOMMENDED RESTRICTIONS.
5) IDENTIFY AND QUALIFY ANY PHYSICAL LIMITATIONS THE EMPLOYEE MAY HAVE
6) ANY ADDITIONAL COMMENTS, RECOMMENDATIONS, OR MEDICAL REFERRALS.

MEDICAL LEAVES OF ABSENCE WILL NOT BE EXTENDED AUTOMATICALLY. BEFORE A LEAVE OF ABSENCE EXPIRES, IT WILL BE THE EMPLOYEE'S OBLIGATION TO REQUEST AN EXTENSION IF ONE IS DESIRED. SUCH REQUESTS MUST BE COMPLETED ON FORM 32006 AND INCLUDE A STATEMENT OF NECESSITY FROM THE EMPLOYEE'S PHYSICIAN AS OUTLINED ABOVE, BEFORE EXPIRATION OF THE EXISTING LEAVE OF ABSENCE. FAILURE TO APPLY FOR EXTENSION PRIOR TO EXPIRATION OF THE EXISTING LEAVE MAY RESULT IN FORMAL DISCIPLINE. IN SPECIFIC CASES WHERE THE MEDICAL PROBLEM IS CHRONIC AND IRREVERSIBLE, THE LEAVE MAY BE APPROVED AND EXTENDED FOR A PERIOD GREATER THAN 30 DAYS.

ITEM 3
PERSONAL LEAVE OF ABSENCE
PERSONAL LEAVES OF ABSENCE MUST BE REQUESTED IN WRITING ON FORM 32006. IF LEAVE IS REQUIRED TO ASSIST RECOVERY OF A FAMILY MEMBER'S ILLNESS, DOCUMENTATION OF THE FAMILY MEMBER'S ILLNESS MUST BE SUBMITTED PRIOR TO LEAVE BEING APPROVED. SUPPORTING DOCUMENTATION IS PERMITTED FOR ALL OTHER PERSONAL LEAVE OF ABSENCE REQUESTS TO CORROBORATE THE REASON FOR THE LEAVE. ALL INFORMATION IS NEAT CONFIDENTIAL.

ITEM 4
FAMILY LEAVE (FMLA)
FAMILY LEAVES MUST BE REQUESTED IN WRITING ON FORM 16873. THIS FORM INCLUDES A SECTION THAT MUST BE COMPLETED BY THE HEALTH CARE PROVIDER. YOU MAY BE REQUIRED TO SUBMIT MEDICAL CERTIFICATION FORMS AT 30-DAY INTERVALS. NOTE: FMLA APPROVALS ARE FOR A SPECIFIC CALENDAR YEAR. YOU MUST RESUBMIT FMLA MUST ARRIVE A REQUEST IN WRITING ON FORM 16873 EACH CALENDAR YEAR.

ITEM 5
LAYOFFS (COMPANY BUSINESS "OB" AND/OR "VE")
MARK OFFS FOR COMPANY BUSINESS MUST BE AUTHORIZED IN ADVANCE BY A COMPANY OFFICER UNLESS PURPOSE FOR THE MARK OFF IS TO ATTEND COMPANY INVESTIGATION. CMS WILL NOT MARK EMPLOYEE OFF ON "COMPANY BUSINESS" UNTIL A MANAGER IS CONTACTED AND AUTHORIZES SUCH MARK OFF. TIMEKEEPING WILL NOT PROCESS A "COMPANY BUSINESS" TIMESLIP FOR PAYMENT UNLESS APPROVED BY A COMPANY OFFICER.

UNITED STATES POSTAL SERVICE

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Printer Friendly

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1 Label successfully printed Total(to be paid): $3.85 Get Free Package Pickup »

Option Chosen: No Postage
Print Date/Time: 7/23/05 9:51:50 AM CDT

	Return Address	Standardized Delivery Address	Package Information	Service Options	
Single (1 of 1)	JOHN O MCARTHUR UPGC-BRS PO BOX 5100 FALLON, NV 89407-5100	MR. THOMAS JACOBI RVP-UPRR 10031 FOOTHILLS BLVD ROSEVILLE, CA 95747-5146	Weight: 0 lbs. 8 oz. Shipping Date: 07/23/05 From: 89407	Priority Mail Flat Rate Env: Delivery Confirm.:	$3.85 No Charge
				Label Total:	$3.85

Delivery Confirmation™ Label Number: 0103 8555 7493 8361 5539

Total (1 Label): $0.00

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

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July 7, 2005

Mr. Tom Jacobi
Regional VP-West - Union Pacific Railroad
10031 Foothills BLVD
Roseville CA 95747

USPS PRIORITY MAIL 0103 8555 7494 7738 8226
Re: File No. UPGCW-1098

Dear Sir:

This is a follow up letter, to my letter to you dated May 5, 2005, wherein, I am asking for your assistance, in resolving issues in regards to violations of the Union Pacific Railroad Medical Policy.

I wrote a letter to Superintendent Cromwell dated April 1, 2005, and he failed to respond.

I am again enclosing all pertinent documentation in regards to this matter and look forward to hearing from you.

Truly Yours,

J. O. McArthur

John McArthur
Vice General Chairman

Enclosures: Letter to you dated May 5, 2005; Letter to Mr. Cromwell dated April 1, 2005; Facsimile cover sheets to Ms. Kathy Fagan and Ms. Mary Rankin with notes; Letters from Mr. Cromwell to Mr. D. R. Vasquez dated March 15, 2005 & March 30, 2005; 2 pages of medical information provided by Mr. Vasquez; and the Union Pacific Railroad Medical Policy.

Cc: Mr. W. D. Pickett, International President-BRS
Mr. Oliver W. Cromwell, General Superintendent-UPRR
Mr. Lee Roach, General Director-UPRR

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

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Email: tedsting@omnitelcom.com

May 5, 2005

Mr. Tom Jacobi
Regional VP-West - Union Pacific Railroad
10031 Foothills BLVD
Roseville CA 95747

Re: File No. UPGCW-1098

Dear Sir:

I am writing to you in regards to a letter written to Mr. Oliver W. Cromwell, General Superintendent, dated April 1, 2005.

I am enclosing a copy of the letter for your convenience.

Mr. Cromwell has not responded to my letter. I would ask your assistance in getting the answers to my questions and my request for the Policy, Ms. Kathy Fagan claims she is using, in making her threats and requests from employees.

I am enclosing a copy of the Union Pacific Railroad Medical Rules Overview. It is very specific as to who receives, oversees, and determines medical information. It also takes into account the issue of confidentiality which it appears Ms. Fagan has no regard for.

I look forward to your response and cooperation in resolving this matter.

Truly Yours,

J. O. McArthur

John McArthur
Vice General Chairman

Enclosure: Letter to Mr. Cromwell
Cc: Mr. W. D. Pickett, International President-BRS
Mr. Oliver W. Cromwell, General Superintendent-UPRR
Mr. Lee Roach, General Director-UPRR

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

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Email: tedstirling@omnitelcom.com

April 1, 2005

Mr. Oliver W. Cromwell
General Superintendent - UPRR
19100 Slover Avenue
Bloomington CA 92316

VIA USPS PRIORITY MAIL 0103 8555 7494 4249 4532
Re: File No. UPGCW-1098

Dear Sir:

This letter is in response to your letter dated March 15, 2005, to signal employee **D. R. Vasquez, Employee ID No. 99239**, and your request for medical information to be provided to Health Services Department.

In your letter you state: "I have requested a determination be made as to your current medical status and your ability to safely perform your job duties."

You go on to say: "To make this determination, the Health Services Department advised that updated medical information from your doctor is required. You should have your doctor provide ALL the information listed below to this office NO LATER THAN MARCH 29, 2005."

Who is going to review this medical information to make the determination of Mr. Vasquez fitness for duty? Is Ms. Kathy Fagan making this medical decision?

The information requested is personnel and confidential and has never been provided to non-medical personal.

Ms. Kathy Fagan just called me and informed me that if we did not send Mr. Vasquez personal confidential information to her that she would take action to have him terminated as he did not have an approved medical leave of absence after March 29, 2005, and she would have his benefits stopped. I explained to her that because she does not have a medical degree she did not possess the credentials to review Mr. Vasquez personal confidential information.

Ms. Fagan informed me that I had told her three times she was not medically qualified to receive this information.

I then asked her to provide me a copy of the Carrier's Policy which she kept referring to, that required Mr. Vasquez to provide 'layman'; personal, confidential information. Ms. Fagan then hung up on me.

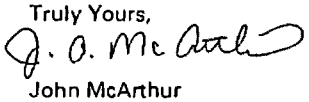
The information requested, was provided to Ms. Mary Rankin on March 23, 2005. Ms. Rankin indicated to Mr. Vasquez and me in separate telephone conversations, that the information was sufficient. Ms. Rankin in a telephone conversation today confirmed she did in fact receive the information on March 23, 2005. She also informed me that she had sent the information on to Ms. Ruth Arnush in your office who is a medical contractor.

Ms. Rankin said that she had wished Mr. Vasquez the best of luck and a successful surgery during their conversation. She also informed me that Health Services Department did not make the request for the information as outlined in your letter, and was not handling this case as it is an on-duty injury, and the Claims Department is handling it.

It appears this is nothing more than harassment of Mr. Vasquez, and I cannot see any benefit in providing medical information to someone for review, who does not have the medical background to make a decision on his current medical status based on the medical documentation.

Because Ms. Fagan has threatened Mr. Vasquez with some very serious ramifications, if the information is not provided to her personally, I am enclosing the medical information already provided to Ms. Mary Rankin in the Health Services Department. I am enclosing this information under duress, for Mr. Vasquez, and we will seek legal advice for the strong arm tactics and violations of Mr. Vasquez rights under HIPPA.

Truly Yours,



John McArthur
Vice General Chairman

Cc: Mr. W. Dan Pickett, International President-BRS
Mr. D. R. Vasquez, Claimant-BRS

rotherhood of Railroad Signalmen
AFL-CIO

HN O. MC ARTHUR
General Chairman • West
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ION PACIFIC GENERAL COMMITTEE
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-423-2288 • 775-423-3717 FAX
)-752-0773 PAGER
)-846-1794 CELL
il: jomcarthur@charter.net

Brotherhood of Railroad Signalmen

Fax

To: Ms. Katy Fagan	From: John O. McArthur
Fax: 909-879-6387	Pages: 8
Phone: 909-879-6386	Date: April 8, 2005
Re: Vasquez	CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

2nd Message 2:30 3:15 Left Message I wanted her To give me a Call So I Could Fax The information To her. I do not want some one else To Pick This up. I left This same message about 3:00 P.m.

3rd Message 3:30 P.m.
I will put The Documents in a Priority envelope and Mail Them Today.

Brotherhood of Railroad Signalmen
AFL-CIO

JOHN O. MC ARTHUR
Vice General Chairman - West
Nevada State Legislative Representative

UNION PACIFIC GENERAL COMMITTEE
P.O. Box 5100 • Fallon, NV 89407
775-423-2288 • 775-423-5717 Fax
888-752-0773 Pager
775-846-1794 Cell
Email: jomcarthur@charter.net

Brotherhood of Railroad Signalmen

Fax

To: Ms. Mary Rankin	From: John O. McArthur
Fax: 402-501-0067	Pages: 4
Phone: 402-544-4326	Date: March 23, 2005
Re: Dan Vasquez	CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

I Am not sure who I should send this to at HSD.
If you have any questions or need other Information
Please Contact me. Thank you

Mary Rankin 4/1/05 Joh
They received the information and sent it on to Mary Arnush.
Dan spoke to Mary Rankin Personally. Claims is handling this not HSD.
Ruth Arnush
909-879-6611
Spoke to her 4/1/05 She does not work with M of W.
She handles Terry. She will Call Mary Rankin and
Get back to me.

UNION PACIFIC RAILROAD COMPANY

OLIVER W. CROMWELL
General Superintendent

BRIAN E. BUSSEY
Manager Administration

13100 Slover Avenue
Bloomington, CA 92316

March 15, 2005
Emp ID No: 0099239

US REGULAR & UPS SECOND DAY AIR
SIGNATURE REQUIRED

Mr. D. R. Vasquez
2000 Linda Rosa Ct
Pasadena CA 91107-2313

Dear Mr. Vasquez:

I have requested a determination be made as to your current medical status and your ability to safely perform your job duties. This request is based on present practice and the policy of Union Pacific Railroad to support the Railroad's commitment to provide employees the opportunity to return to work, along with obtaining the maximum use of our work force.

To make this determination, the Health Services Department advised that updated medical information from your doctor is required. You should have your doctor provide **ALL** the information listed below to this office **NO LATER THAN MARCH 29, 2005.**

1. Your current medical condition, including diagnosis and prognosis.
2. Expected date you may resume work duties.
3. Any work restrictions recommended by your treating doctor(s) and the anticipated duration of the suggested restrictions.
4. Any medications prescribed.
5. Your current level of function.
6. Your return to work plan.
7. How long you will be required to remain on light duty before returning to full duty.

This information will be used to make an informed objective decision concerning your medical status. The information should be provided on either the attached Medical Progress Report form (Form 16920), or a narrative report prepared by your doctor.

If you have any questions regarding this request, please contact me at (909) 879-6386.

Sincerely,

Oliver W. Cromwell/m.
Oliver W. Cromwell
General Superintendent

F41599 MAR 15, 2005 ACT WT LTR #PK 1
SERVICE 2DA BILL WT LTR
TRACKING# 1ZF415993545776521

cc: Ms. Ruth A. Arnush - Emailed
Health Services, Omaha
Records Management, Omaha
Timekeeping, Omaha - Fax: 997-2125
Timekeeping (Benefits), Omaha - Fax: 501-0021

UNION PACIFIC RAILROAD COMPANY

OLIVER W. CROMWELL
General Superintendent

BRIAN E. BUSSEY
Manager Administration

19100 Slover Avenue
Bloomington, CA 92316

March 30, 2005
Emp ID No: 0099239

US REGULAR & UPS SECOND DAY AIR
SIGNATURE REQUIRED

Mr. D. R. Vasquez
2000 Linda Rosa Ct
Pasadena CA 91107-2313

Dear Mr. Vasquez:

As mentioned in my letter dated March 15, 2005, I have requested a determination be made as to your current medical status and your ability to safely perform your job duties. This request is based on present practice and the policy of Union Pacific Railroad to support the Railroad's commitment to provide employees the opportunity to return to work, along with obtaining the maximum use of our work force.

Because you have failed to provide the information, I am making a second request. You should have your doctor provide all information listed below to this office NO LATER THAN APRIL 13, 2005.

1. Your current medical condition, including diagnosis and prognosis.
2. Expected date you may resume work duties.
3. Any work restrictions recommended by your treating doctor(s) and the anticipated duration of the suggested restrictions.
4. Any medications prescribed.
5. Your current level of function.
6. Your return to work plan.
7. How long you will be required to remain on light duty before returning to full duty.

This information will be used to make an informed objective decision concerning your medical status. The information should be provided on either the attached Medical Progress Report form (Form 16920), or a narrative report prepared by your doctor.

If you have any questions regarding this request, please contact me at (909) 879-6386.

Sincerely,

Oliver W. Cromwell/m

Oliver W. Cromwell
General Superintendent

F41599 MAR 30, 2005 ACT WT LTR #PK 1
SERVICE 20A BILL WT LTR
TRACKING# 1ZF415993545715398

cc: Ms. Ruth A. Arnush – Emailed
Health Services, Omaha
Records Management, Omaha
Timekeeping, Omaha – Fax: 997-2125
Timekeeping (Benefits), Omaha – Fax: 501-0021

CEDARS-SINAI MEDICAL GROUP
8635 West Third Street, Suite 990W
Los Angeles, CA 90048
Tel: (310) 423-5900
Fax: (310) 423-0506

MYLES J. COHEN, M.D., FACS
Surgery and Rehabilitation of the Hand

DAVID A. KULBER, M.D.
Plastic and Reconstructive Surgery
Surgery of the Hand

ANTHONY K. AHN, M.D.
Orthopedic Surgery Specializing in
Surgery of the Hand and Upper Extremity

PATIENT NAME: Daniel Vasquez DATE OF SURGERY: 4/6/05

PLEASE GIVE THIS FORM TO YOUR MEDICAL DOCTOR

PRE-SURGICAL TESTING INFORMATION

A History and Physical examination and pre-operative tests are required by the hospital in preparation for your surgery.
These tests and exam must be performed between: 3/31/05 *and* 4/4/05.

(please see reverse side for CSMC requirements)

STOP ASPIRIN PRODUCTS AND ANTI-INFLAMMATORIES 10 DAYS PRIOR TO SURGERY.

STOP HERBAL MEDICATIONS, DIET PILLS, MAO INHIBITORS, AND VITAMINS 2 WEEKS PRIOR TO SURGERY.

TESTS AND EXAMS REQUIRED:

HISTORY AND PHYSICAL	✓	(from your medical doctor)
CBC, HCT, HGB	✓	
URINALYSIS		
EKG		(within 2 wks./ 6 mos.)
CHEST X-RAY		
OTHER		

Please have your physician FAX the required History and Physical examination and the results of the above tests (as required) to our office at (310) 423-0506 NO LATER THAN 12 NOON ON: 4/5/05.

Failure to have this information available at the proper time may necessitate postponement of your surgery.

Thank you.

CS-178

CEDARS-SINAI MEDICAL GROUP

8635 West Third Street, Suite 990W, Los Angeles, California 900
Tel. (310) 423-5900 • Fax: (310) 423-05

PATIENT Daniel Vasquez

Our office has scheduled you for surgery on 04/16/05

Your surgery will be performed at *Cedars Sinai Medical Center / Midway Hospital / Surgicenter.*

PLEASE DO NOT EAT OR DRINK AFTER MIDNIGHT THE NIGHT BEFORE YOUR SURGERY.

Included in this packet you will find the following:

- *Patient Information*
- *Surgical Testing Information*
- *Pre-op / Post-op Office Appointments*

There will be ( ); will not be ( ) an assistant surgeon for your surgery. If an assistant is needed, there will be a separate billing.

There will be ( ); will not be ( ) an Anesthesiologist for your surgery. If an Anesthesiologist is needed, there will be a separate billing.

Take the Pre-Surgical Testing Information form with you when you see your medical doctor for you Pre-Operative appointment,

Your appointments at our office are as follows:

PRE-OP	—	AT OUR OFFICE	—
SURGERY	4/16/05	BE AT THE HOSPITAL AT	10:00 Am
POST-OP	4/12/05	AT OUR OFFICE	1:20 PM
POST-OP	4/26/05	AT OUR OFFICE	1:20 PM
POST-OP	5/03/05	AT OUR OFFICE	1:20 PM

**If you have any questions, please call us between 9AM and 5PM*

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

J. O. MCARTHUR
Vice General Chairman
P. O. Box 5100
Fallon, NV 89407
Office: 775-423-2288
Fax: 775-423-3717
Email: jomcarthur@charter.net

G. PANKEY
General Chairman
P. O. Box 1417
Upland, CA 91785
Office: 909-982-7777
Fax: 909-982-6767
Email: gp360@verizon.net

T. E. STIRLING
General Secretary-Treasurer
1021 Prairie View Place
Rockford, IA 50468
Office 641-749-2587
Fax: 641-749-6013
Email: tedsting@amnitelcom.com

February 23, 2005

WD Pickett
International President
917 Shenandoah Shores Rd
Front Royal VA 22630

Re: File No. UPGCW-FRA-1098

Dear Brother

Enclosed please find copies of two drug screens involving signal employee, D. R. Vasquez, Employee ID No. 0099239.

On January 20, 2005 Mr. Vasquez was working on a trouble call at a hi-way rail crossing. After making repairs to the crossing Mr. Vasquez was putting his ladder away on the truck. He was standing on a step on the back of the truck. The step is made of heavy cable so that it is flexible and if it hits or drags it will give instead of break.

While standing on this step putting his ladder away a semi truck came by; and as the truck reached the rear of Mr. Vasquez truck he blew his air horn startling Mr. Vasquez. Mr. Vasquez rose up, and as he did the step swung under the truck throwing Mr. Vasquez off balance, causing him to fall backwards off of the step, and he injured his wrist and thumb severely.

Mr. Vasquez drove himself to an emergency room where he called his manager Lowell Clayton, before going in to get treatment. Mr. Clayton called Claims Agent Bruce Fenn and Dr. Jones in Omaha, Nebraska, both Union Pacific Railroad Employees.

Mr. Clayton informed me that this is protocol. I asked why he called Dr. Jones in Omaha, Nebraska and he informed me, it was to allow to Dr. Jones call the treating facility in regards to Mr. Vasquez.

Mr. Clayton and Mr. Finn discussed Mr. Vasquez treatment with the emergency room personnel giving care to Mr. Vasquez. They would not give Mr. Vasquez any pain medication as a result.

Mr. Vasquez tried to tell personnel at the emergency room he was not covered by workers compensation. They informed him that he was, he just did not know about it. Mr. Vasquez tried repeatedly to explain to them he was covered under the FELA, but they would not listen.

Mr. Fenn did not help Mr. Vasquez in explaining he was not covered under the State Workers Compensation. Mr. Fenn interfered in the treatment of Mr. Vasquez and miss-represented himself by allowing the emergency room staff to believe he was and agent of the States Workers Compensation. Thereby, allowing Mr. Fenn full privilege of information and interference in Mr. Vasquez care of his injuries.

Manager Clayton ordered a Drug & Alcohol Screening at the emergency room, for post accident. Upon leaving the emergency room Mr. Vasquez was informed he would have to submit to another Drug & Alcohol Screen when they arrived back to his office.

Mr. Vasquez protested but submitted to the second Drug & Alcohol Screen which is for Reasonable Suspicion/Cause, which was done by Lab One.

I asked Mr. Clayton if he had any training in regards to Reasonable Suspicion/Cause, and he informed he did not. I have reason to believe Mr. Clayton is in violation of the FRA standards for testing. I also believe Mr. Clayton is harassing Mr. Vasquez and should not have performed the second test.

Since this has happened Mr. Vasquez has been charged with 2 separate dismissal offenses. The Carrier conducted both hearings on February 18, 2005. Both charges are related to the injury.

Mr. Clayton charged Mr. Vasquez with dishonesty in completing the Accident report. When I ask Mr. Clayton what the dishonesty was he claimed that Mr. Vasquez did not disclose all of his injuries when he filled out the accident report.

Mr. Vasquez did not fill out the accident report Claims Agent Fenn filled it out because Mr. Vasquez was not in any condition to fill it out himself. Mr. Fenn told Mr. Vasquez he had o fill out the accident report and sign a medical authorization release form. Mr. Vasquez told Mr. Fenn he would not sign a release for medical, and Mr. Fenn asked Mr. Vasquez if he knew what a subpoena was. Mr. Vasquez was in excruciating pain and was held on duty for 12 hours while doing a re-enactment and Drug and Alcohol Screen with Mr. Clayton and Mr. Fenn.

There are two issues here, one is the 2 drug and alcohol screens and the other is the harassment for the accident.

Fraternally Yours,

Cc: D. R. Vasquez

WORKCARE
Drug Test Results

12401 Washington Boulevard
Whittier, California 90602-1099
(562) 698-0811 Ext 7504

EMPLOYEE/APPLICANT (Full Name) Danid Vasquez
ID # 551 39 7870 COMPANY NAME: Union Pacific Railroad

DATE OF DRUG TEST (COLLECTION DATE): 1/20/05

TEST COLLECTED AT: ☒ WORKCARE ☐ ED ☐ OTHER SITE: _____

TYPE OF TEST: ☐ **NIDA or DOT** ☐ **NON-NIDA or Non-DOT** ☒ **PIH-10/Non-DOT**
☐ **RAPID/Non-DOT** ☐ **OTHER:** _____

REASON FOR TEST: ☐ PRE-EMPLOYMENT ☒ POST ACCIDENT ☐ RANDOM
☐ FOR CAUSE ☐ FOLLOW – UP ☐ OTHER: _____

TEST ANALYZED AT: ☒ PRESBYTERIAN INTERCOMMUNITY HOSPITAL
☐ OFF-SITE LAB

STATEMENT:	**For NIDA collections the controlled substance test being reported was performed in accordance with Department of Transportation guidelines 49 CFR part 40.**

TEST RESULTS

☒ **NEGATIVE** ☐ **TEST NOT PERFORMED** ☐ **REFUSAL TO TEST**
☐ **POSITIVE** ☐ **FATAL FLAW REASON:** _____

COMMENTS: _____

Controlled Substance Identified: _____

Stanley Sugar MD
Name Of Medical Review Officer (Print or Type)

Signature Of Medical Review Officer — Date 1/21/05

PRESBYTERIAN INTERCOMMUNITY HOSPITAL
PRESBYTERIAN HEALTH

12401 Washington Boulevard
Whittier, California 90602-1099
(562) 698-0811
Hearing Impaired TDD (562) 696-9257

ADDRESSOGRAPH
OC 0C28538E90
VASQUEZ,DANIEL 38 M
MR 83 87 13 DOB 05 10 66
DOS 01/20/05

WORKCARE DRUG TEST RESULTS

NS-1889 (02/04) WHITE- EMPLOYER YELLOW- MRO

PRESBYTERIAN INTERCOMMUNITY HOSPITAL, WHITTIER, CA 90602

DRUG SCREEN REQUISITION

Company Name	Union Pacific Railroad		
Donor Name	David Vasquez	DOB 5-10-66	SSN 551 39 7870

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the table affixed to each specimen bottle is correct

Donor Signature	Date / Time of collection 1 20 05 1310

(ALL DRUGS NEED A MINIUM SPECIMEN OF 30 ML OF URINE)

☒ Drug Abuse Panel (Includes all drugs below)

☐ Amphetamine ☐ Barbiturate ☐ Benzodiazapine ☐ Cannabinoid ☐ Cocaine
☐ Methadone ☐ Methaqualone ☐ Opiates ☐ Phencyclidine ☐ Propoxyphene
☐ Other

TO BE COMPLETED BY COLLECTOR - Specimen Temperature must be read within 4 minutes of collection

Specimen temperature within range: ☐ yes, 90°-100° ☐ No: Record Temp of Urine ____ Oral Temp ____

Collector affixes seals to the bottles. Collector dates the seals. Donor initials the seals.

Date	Specimen Released by	Specimen Received by	Purpose of Change
/ / 1 20 05	DONOR - NO SIGNATURE	Signature Name A. Hernandez	PROVIDE SPECIMEN FOR TESTING
/ / Transporter	Signature Name	Signature Name	
/ / Receiver	Signature Name	Signature Name	
/ / Technologist	Signature Name	Signature Name	
/ / Technologist	Signature Name	Signature Name	

Specific Gravity		1.003 - < 1.020 and Creat > 5	≤1.001 and Creat < 2	< 1.003 and Creat ≥ 2 but ≤ 5	> 1.020 and Creat < 2
Creatinine		Test all urine creat. on chem. analyzer (run as serum creat if urine creat is out of range low)			
Nitrite		< 5.0	> 5.0		
Glutaraldehyde		Negative	Positive		
pH		5.0 to 8.0	☐ < 4.0	☐ > 9.0	

Specific Gravity AND Creatinine

☐ Dilute: < 1.003 and ≥ 2 and ≤ 5 mg/dL

☐ Substituted: ≤ 1.001 and < 2 mg/dL (performed on Chem analyzer)

☐ Substituted: ≥ 1.020 and < 2 mg/dL (performed on Chem analyzer)

☐ Adulterated: ☐ Abnormal pH or ☐ Nitrite or ☐ Glutaraldehyde

S:\FORMS\Chemistry\ndsform 09-18-03.doc

Collected: 01/20/05 1310 VASQUEZ,DANIEL
P00838713 DRUG SCREEN (URINE) P000028542009
Spec. Type: Urine IHS

Result name	Result	N/Range
Cocaine:	NEGATIVE	Negative
Amphetamine, Ur:	NEGATIVE	Negative
Benzodiazepines:	NEGATIVE	Negative
Barbiturates:	NEGATIVE	Negative
Methaqualone, Ur:	NEGATIVE	Negative
Methadone, Ur:	NEGATIVE	Negative
Opiates:	NEGATIVE	Negative
Phencyclidine:	NEGATIVE	Negative
Propoxyphene,Ur:	NEGATIVE	Negative
Cannabinoid,Ur:	NEGATIVE	Negative

End of Report!

[5654610] A/Date: 01/20/05 1458 VNUR T13920 DOB:05/10/66 M
*FINAL Completed: 01/20/05 1550 INDUSTRIAL HEALTH SERVICE 1/1

FORENSIC DRUG TESTING CUSTODY AND CONTROL FORM

LabOne
10101 Renner Blvd
Lenexa, KS 66219
(800) 728-4064

38015793
SPECIMEN ID NO

TEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No

C. Donor SSN or Employee I.D. No.

D. Reason for Test: ☐ Pre-employment ☐ Random ☒ Reasonable Suspicion/Cause ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☒ ☐ ☐

F. Collection Site Address:

ATDS AT 11 PAR
LOS NIETOS SANTA FE SPRINGS CA.

Collector Phone No.

Collector Fax No.

TEP 2: COMPLETED BY COLLECTOR

lead specimen temperature within 4 minutes. Is temperature etween 90° and 100° F? ☒ Yes ☐ No, Enter Remark

Specimen Collection: ☒ Split ☐ Single ☐ None Provided (Enter Remark) ☐ Observed (Enter Remark)

TEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

TEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

EMARKS

ertify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in cordance with applicable Forensic requirements.

llector's Name (PRINT First, MI, Last)

ate of Collection: MO DAY YR

Time of Collection: HR MIN ☐ AM ☒ PM

X Signature of Collector

SPECIMEN BOTTLE(S) RELEASED TO:

Name of Delivery Service Transferring Specimen to Lab

ECEIVED AT LAB

Signature of Accessioner

(PRINT) Accessioner's Name (First, MI, Last)

Date (Mo./Day/Yr.)

Primary Specimen Bottle Seal Intact
☐ Yes
☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

TEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

X Signature of Donor

(PRINT) Donor's Name (First, MI, Last)

Date (Mo./Day/Yr.)

Daytime Phone No. ( ) Evening Phone No. ( ) Date of Birth Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you chose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). - DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

TEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

accordance with applicable Forensic requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELED ☐ REFUSAL TO TEST BECAUSE:
☐ DILUTE ☐ ADULTERATED ☐ SUBSTITUTED

EMARKS _____

Signature of Medical Review Officer

(PRINT) Medical Review Officer's Name (First, MI, Last)

Date (Mo./Day/Yr.)

TEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

accordance with applicable Forensic requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

Signature of Medical Review Officer

(PRINT) Medical Review Officer's Name (First, MI, Last)

Date (Mo./Day/Yr.)

N

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 4)

FORM 10434 REV. 05/04

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name: DANIEL R. VASQUEZ (Print) (First, M.I., Last)

B: SSN or Employee ID No.: 599-39-7870

C: Employer Name: UNION PACIFIC RAILROAD
Street: LOS NIETOS YARD
City, ST ZIP: SANTA SPRINGS, CA

DER Name and Telephone No.: JOHN LIETZEN (800) 840-3784
DER Name / DER Phone Number

D: Reason for Test: ☐ Random ☒ Reasonable Cause ☐ Reasonable Susp ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix Or Print Screening Results Here

Affix With Tamper Evident Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by Union Pacific Policy and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 12 29 05

Affix Or Print Confirmation Re Here

Affix With Tamper Evi

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures specified in the Union Pacific Drug and Alcohol Policy, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☒ BAT ☐ STT DEVICE: ☐ SALIVA ☒ BREATH* 15-Minute Wait: ☐ Yes ☐ No

SCREENING TEST: *For BREATH DEVICES write in the space below only if the testing device is not designed to print.*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

ATDS — 2700 E. SUNSET RD A-7
Alcohol Technician's Company — Company Street Address

LOVEL A. PASHMOUTO — LAS VEGAS — (702) 738-7511
(PRINT) Alcohol Technician's Name (First, M.I., Last) — Company City, State, Zip — Phone Number

Signature of Alcohol Technician — Date Month Day Year: 12 29 05

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
10551 Decatur Road
Ste 200
Philadelphia, PA 19154

2 – FORWARD TO:
Manager D&A Testing
1400 Douglas St, Stop 1020
Omaha, NE 68179

3 – RETAINS

BREATH ALCOHOL TECHNICIAN RETAINS

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-840-3784 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-501-0322

Brotherhood of Railroad Signalmen
AFL-CIO

JOHN O. MC ARTHUR
Vice General Chairman - West
Nevada State Legislative Representative

UNION PACIFIC GENERAL COMMITTEE
P.O. Box 5100 • Fallon, NV 89407
775-423-2288 • 775-423-3717 Fax
888-752-0773 Pager
775-846-1794 Cell
Email: jomcarthur@charter.net

Brotherhood of Railroad Signalmen

Fax

To: Mr. Tim DePeapt	**From:** John O. McArthur
Fax: 540-622-6532	**Pages:** 7
Phone: 540-622-6522	**Date:** February 23, 2005
Re: FRA	**CC:** Mr. W. D. Pickett.

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• **Comments:**

Presbyterian Intercommunity Hospital
WorkCare Department

Examination Consent for Work-Related Drug Screening

ID #: 551 397870 UPR ID

Home Address: _____

_____
City State Zip

Home Phone: _____

ID checked by: Anissa
full name

"I_____, do hereby consent for an examination to be performed on my urine, blood, or breath to check for the presence of drugs or alcohol. The results are kept confidential and will be available only to the ordering physician, WorkCare staff and my employer or prospective employer, unless I give my written consent. I understand I may receive a copy of this consent."

"I understand that I may refuse to undergo an examination for drugs or alcohol if I do so desire."

X _____ _____
Patient Signature Date

_____ _____
Witness Signature Date

"I refuse to undergo an examination of my blood, urine or breath to evaluate the presence of drugs or alcohol. I understand that this is my right. I also understand that my employer or prospective employer will be notified of this refusal."

_____ _____
Patient Signature Date

_____ _____
Witness Signature Date

H:forms: Drug Screen Consent

UNION PACIFIC RAILROAD COMPANY

February 3, 2005

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #Receipt #1ZF423R95841751372
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Please report to the **Union Pacific Railroad Company, Manager Signal Maintenance Office, 326 South Campus Avenue, Ontario, California on February 18, 2005 at 9:00 A.M.,** for investigation and hearing on charges to develop the facts and place responsibility, if any, that you were allegedly dishonest when completing Form 52032, Report of Personal Injury or Illness, dated January 20, 2005.

This allegation, if substantiated, could possibly constitute a violation of Union Pacific Rules 1.6, Conduct (Employees must not be dishonest), 1.1.3 Accidents, Injuries, and Defects, and 1.2.5 Reporting.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

You are being withheld from service pending the outcome of this investigation.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R94441720985
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
D. A. Ring, Director Labor Relations
W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06
(Return receipt to Brooks)

UNION PACIFIC RAILROAD COMPANY

February 7, 2005

POSTPONEMENT NOTICE

LOCATION CHANGE

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R92441249863
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Refer to Notice of Investigation dated February 3, 2005, originally scheduling your investigation for February 18, 2005 at 9:00 A.M. Please be advised the hearing location has changed to:

Manager Signal Maintenance Conference Room
2015 South Willow Avenue
Bloomington, California 92316

Please also be advised Mr. Vasquez is NOT being withheld from service pending the outcome of this investigation.

All other conditions of the original notice of investigation remain the same.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R90141902083
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06

UNION PACIFIC RAILROAD COMPANY

February 3, 2005

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R95841751372
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Please report to the Union Pacific Railroad Company, Manager Signal Maintenance Office, 326 South Campus Avenue, Ontario, California on February 18, 2005 at 1:00 P.M., for investigation and hearing on charges to develop the facts and place responsibility, if any, that you were allegedly careless of your own personal safety on January 20, 2005, by not performing a required daily vehicle inspection of the vehicle assigned to you, by allegedly parking your vehicle in the median of Santa Fe Springs Road, and by allegedly leaving the back of your vehicle in such disarray as to possibly be contributory to personal injury.

This allegation, if substantiated, could constitute a violation of Union Pacific Rules 1.6, Conduct (Employees must not be careless of the safety of themselves or others), 74.1 Vehicle Maintenance, 74.5 Tools and Material, and 1.1.4 Condition of Tools and Equipment.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

You are being withheld from service pending the outcome of this investigation.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R94441720985
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
D. A. Ring, Director Labor Relations
W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06
(Return receipt to Brooks)

UNION PACIFIC RAILROAD COMPANY

February 7, 2005

POSTPONEMENT NOTICE

LOCATION CHANGE

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R92441249863
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Refer to Notice of Investigation dated February 3, 2005, originally scheduling your investigation for February 18, 2005 at 1:00 P.M. Please be advised the hearing location has changed to:

Manager Signal Maintenance Conference Room
2015 South Willow Avenue
Bloomington, California 92316

Please also be advised Mr. Vasquez is NOT being withheld from service pending the outcome of this investigation.

All other conditions of the original notice of investigation remain the same.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R90141902083
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06

UNION PACIFIC RAILROAD COMPANY

RECEIVED
SEP 0 8 2005
J. O. McARTHUR
VGC

September 2, 2005

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #Receipt #7004 1160 0005 9222 7277
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Please report to the Union Pacific Railroad Company, Colton Engineering Building, 250 Marion Way, Bloomington, California 92316, on September 20, 2005 at 1:00 P.M., for investigation and hearing on charges to develop the facts and place responsibility, if any, that you allegedly failed to comply with instructions issued to you to provide medical information as requested.

This allegation, if substantiated, could possibly constitute a violation of Union Pacific Rules 1.13 Reporting, and Comply with Instructions.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786
S. E. Wills, Director Signal Maintenance
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W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06
(Return receipt to Vasquez)

HILDEBRAND, MCLEOD & NELSON, INC.
ATTORNEYS AT LAW

CLIFTON HILDEBRAND (1899-1977)
CHARLES C. McLEOD (1910-1991)

FREDERICK L. NELSON
DAVID B. DRAHEIM
ANTHONY S. PETRU
DUYNH L. NGUYEN
JOHN FURSTENTHAL

WESTLAKE BUILDING
350 FRANK H. OGAWA PLAZA, FOURTH FLOOR
OAKLAND, CALIFORNIA 94612-2008
(510) 451-6732

CA (800) 448-7575
U.S. (800) 447-7500

FACSIMILE
(510) 465-7023

October 28, 2005

RECEIVED
OCT 31 2005
J. O. McARTHUR
VGC

Via Facsimile & U.S. Mail
1-626-935-7640

Mr. Bruce A. Fenn
Claims Representative
Union Pacific Railroad Company
13181 Crossroads Parkway North, Suite 500
City of Industry, CA 91746

Re:	**Our Client:**	**Daniel Vasquez**
	DOA:	**1-20-05**
	DOB:	**5-10-66**
	SS#:	**551-39-7870**

Dear Mr. Fenn:

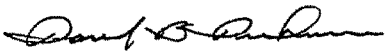
I am greatly disturbed by a letter my client, Daniel Vasquez, received from Union Pacific's local management, directing Mr. Vasquez to appear to discuss his injuries and status. Section 60 of the FELA strictly prohibits this type of contact. Furthermore, California law including certain rules of professional conduct, limit and restrict this type of conduct.

Please contact Mr. Ritter's office and advise them and his staff that they should cease and desist this type of conduct.

I await your response. If you are unwilling or unable to stop to this conduct, let me know and I will obtain the appropriate protective order.

Very truly yours,

HILDEBRAND, McLEOD & NELSON, INC.



DAVID B. DRAHEIM

DBD:sec

cc: Daniel Vasquez
John McArthur

UNION PACIFIC RAILROAD COMPANY 'B' (16 pages)

February 3, 2005

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R95841751372
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Please report to the **Union Pacific Railroad Company, Manager Signal Maintenance Office, 326 South Campus Avenue, Ontario, California on February 18, 2005 at 1:00 P.M.,** for investigation and hearing on charges to develop the facts and place responsibility, if any, that you were allegedly careless of your own personal safety on January 20, 2005, by not performing a required daily vehicle inspection of the vehicle assigned to you, by allegedly parking your vehicle in the median of Santa Fe Springs Road, and by allegedly leaving the back of your vehicle in such disarray as to possibly be contributory to personal injury.

This allegation, if substantiated, could constitute a violation of Union Pacific Rules 1.6, Conduct (Employees must not be careless of the safety of themselves or others), 74.1 Vehicle Maintenance, 74.5 Tools and Material, and 1.1.4 Condition of Tools and Equipment.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

You are being withheld from service pending the outcome of this investigation.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R94441720985
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
D. A. Ring, Director Labor Relations
W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-08
(Return receipt to Brooks)

UNION PACIFIC RAILROAD COMPANY

February 7, 2005

POSTPONEMENT NOTICE

LOCATION CHANGE

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R92441249863
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Refer to Notice of Investigation dated February 3, 2005, originally scheduling your investigation for February 18, 2005 at 1:00 P.M. Please be advised the hearing location has changed to:

Manager Signal Maintenance Conference Room
2015 South Willow Avenue
Bloomington, California 92316

Please also be advised Mr. Vasquez is NOT being withheld from service pending the outcome of this investigation.

All other conditions of the original notice of investigation remain the same.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R90141902083
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent.
3. Insubordinate.
4. Dishonest
5. Immoral.
6. Quarrelsome.

   or

7. Discourteous.

1.6.1 Motor Vehicle Driving Records

Employees certified as locomotive engineers, whatever class of service, must report convictions for:

- Operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance.
- Refusal to undergo such testing when a law enforcement official seeks to find out whether a person is operating under the influence of alcohol or a controlled substance.

State-sponsored diversion programs, guilty pleas, and completed state actions to cancel, revoke, suspend, or deny a driver's license are considered convictions as applied to this rule.

An employee must report any conviction to an employee assistance representative no later than the end of the first business day immediately following the day the employee receives notice of the conviction.

1.7 Altercations

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property.

1.8 Appearance

Employees reporting for duty must be clean and neat. They must wear the prescribed uniform when required.

- Obey posted speed limits. Regardless of posted speed limits, drivers must not exceed a safe and prudent speed for their vehicle when weather, traffic, road conditions, vehicle load or any other prevailing conditions necessitates operating at a lower speed.

- Ensure that required emergency equipment and tools are on the vehicle.

74.4 Impaired Driver

Do not drive when suffering fatigue, illness, lack of sleep or any other physical condition which may affect alertness and ability to operate the vehicle safely.

74.5 Tools and Material

Good housekeeping must be maintained in the vehicle at all times. Loose items must not be kept on the dash or on rear window shelf. Tools, equipment, material and freight must be properly secured. Gross Vehicle Weight (GVW) of vehicle must not be exceeded. Do not exceed load limit of trailers.

74.6 Clearing Obstructions

The driver must know the vehicle and load will clear all obstructions or close clearances. Do not park the vehicle foul of any railroad track. Do not park vehicle foul of the traveled portion of a roadway unless proper warning to approaching traffic is provided.

74.7 Passengers

Only employees or authorized passengers are permitted to ride in company vehicles.

74.0 VEHICLES/BATTERIES

74.1 Vehicle Maintenance

Driver or supervisor assigned to a vehicle is responsible for lubrication and proper maintenance per vehicle maintenance or leasing company specifications. Drivers must record vehicle maintenance information and retain the maintenance record inside the vehicle.

Driver must know that the vehicle is in good working order and free of any defects. They must notify their supervisor if the vehicle becomes defective. Required repairs must be completed before the vehicle is returned to service.

74.2 Driver Requirements

Only authorized employees may operate company vehicles. All employees who drive company vehicles must:

- possess a current, valid driver's license or commercial driver's license (CDL),
- notify their supervisor and discontinue operating vehicles at any time their license or permit has expired, been suspended, revoked or restricted.

74.2.1 DOT-Qualified Drivers

Drivers of company vehicles that meet one or more of the following criteria will be required to pass a knowledge and skills (driving) test to become Department of Transportation (DOT) qualified:

- operate a vehicle with gross combination weight of 26,001 pounds or more,
- operate a vehicle designed to carry 16 or more persons, including the driver,

1.0 General Responsibilities

1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course.

1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

1.1.3 Accidents, Injuries, and Defects

Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals, or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.

1.1.4 Condition of Equipment and Tools

Employees must check the condition of equipment and tools they use to perform their duties. Employees must not use defective equipment or tools until they are safe to use. Employees must report any defects to the proper authority.

1.2 Personal Injuries and Accidents

1.2.1 Care for Injured

When passengers or employees are injured, do everything possible to care for them.

1.2.2 Witnesses

If equipment is involved in personal injury, loss of life, or damage to property, the employee in charge must immediately secure the names, addresses, and occupations of all persons involved, including all persons at the scene when the accident occurred and those that arrived soon after. The employee in charge must secure the names regardless of whether these persons admit knowing anything about the accident.

The employee in charge must also obtain the license numbers of nearby automobiles. When necessary, other employees can assist in obtaining this information, which must be included in reports covering the incident.

TRUCK # 61317

#	DESCRIPTION
1 EA.	SHOW ME LIGHT W/ CHARGER
2 EA.	PEAK METER
1 EA.	TS-111 W/CASE & 22.5V. BATT.
1 EA.	SIMPSON 260 (YELLOW) W/LEADS
1 EA.	FLUKE DIGITAL METER W/LEADS
1 EA.	SC SHORT FINDER
1 EA.	SMALL NICOPRESS
2 EA.	LARGE NICOPRESS
1 EA.	MAKITA BLOWER
1 EA.	KLEIN CABLE CUTTERS
1 EA.	TAPE MEASURE 25' (LUFKIN)
1 EA.	CRESCENT WRENCH 12"
1 EA.	CRESCENT WRENCH 15"
1 EA.	GATE MECH. TORQUE WRENCH
1 EA.	BONDING HAMMER
1 EA.	HIGWAY FLAGGING KIT
1 EA.	HACKSAW
1 EA.	RYOBI SAWZ-ALL
1 EA.	SMALL NEEDLE NOSE PLIERS
1 EA.	LEVEL
2 EA.	PUNCHES
1 EA.	CHISEL
1 EA.	LONG DIGGING BAR
1 EA.	COFFIN HOIST
1 EA.	JUMPER CABLES
1 EA.	SPOTLIGHT
1 EA.	MAKITA GRINDER
1 EA.	R/R FLAGGING KIT
1 EA.	COMB. LADDER
1 EA.	DRILL BIT INDEX (COMPLETE)
1 SET	SOCKETS & RATCHET
1 EA.	RAYO-VAC 6V. LANTERN
1 EA.	STOP WATCH
1 EA.	GATE SCALE
1 EA.	WIRE STRIPPERS
1 EA.	HT 1000 WALKIE TALKIE W/CHARGER & 1 SPARE BATTERY
1 EA.	MEGGER (AMP-PROBE)
1 EA.	ERICO GAS GRINDER
1 EA.	.06 SHUNT LEAD
5 EA	OPEN END WRENCHES

BREA IND. LEAD MNTR.

#	DESCRIPTION
1 EA.	CHAIN
1 SET	BONDING EQUIP. / W/MOLDS
1 EA	VEHICLE GAS CARD IN GLOVE BOX
MISC.	SIGNAL MAINT. MATERIAL

February 18, 2005

Opening Statement Daniel Vasquez Hearing

The Carrier has the burden of proving the charges. While the Carrier may not be bound by the requirements of proof necessary for a conviction of a charge in a court of law in order to invoke disciplinary action, the Carrier must produce and submit direct, positive, substantial, material and relevant evidence to sustain its charges and actions. The principle is well established in prior Awards of the Board that in discipline cases the burden of proof rests squarely upon the Carrier to demonstrate convincingly that Mr. Woodford is guilty of the offense upon which his disciplinary penalty is based. Although hearsay evidence is admissible for whatever probative value it may have, unsubstantiated hearsay testimony would have little, if any, probative value. The American system of justice is based upon the fundamental principle that a person is presumed innocent unless the burden of proving otherwise has been satisfied.

The question to be determined in this investigation is whether or not the Claimant violated an operating rule in connection with his employment.

Generally, for a proper compliance with the investigation rule, it is necessary that such investigation be had prior to the administration of discipline. As the purpose of the investigation is to determine whether or not the rules have been violated and then punishment administered, it is a condition precedent that the investigation precede the punishment according to the rule. If discipline is to be administered, it must be well grounded on a proper investigation in which the disciplined individual participated.

It appears the Claimant was discharged on February 3, 2005, prior to the holding of an investigation as required by Rule 68 of the Current CBA. Such imposition of discipline is clearly prohibited by the Rule and cannot be sustained.

The time for holding this investigation is under the control of the Carrier. The Carrier is the moving party. The hearing is conducted by and is under the control of the Carrier. It is the duty of the Carrier, not the accused, to set the time for the investigation. Nevertheless, the Carrier must exercise this power judiciously and in conformity with the requirements of the Collective Bargaining Agreement.

When time limitations, for the performance of an act, are embodied in an Agreement, with precision, the parties are contractually obligated to comply with them. Whether the limitations are found to be in practice to be harsh, not equitable, or unreasonable, the terms of the contract must be met.

A charge is fundamentally deficient when an employee's ability to prepare an adequate defense is obstructed by a lack of basic elements of information. As a minimum, Claimant has an absolute right to be informed prior to the consideration as to the particular incident complained of: the date, time if possible, and act in question. Without these basic elements in advance, Claimant's ability to prepare an adequate defense is irreparably impaired. "No man can defend himself against a charge to him unknown:" the time when, the place where and the person before whom the acts transpired are designated.

In this case Carrier cited Claimant stating: "Your responsibility, if any, that you were allegedly dishonest when completing Form 52032, Report of Personal Injury or Illness, dated January 20, 2005. These charges are too vague to meet the requirements of Rule 68 of the current CBA.

Furthermore, the Carrier removed Claimant from service pending the outcome of the investigation.

The current CBA requires that when any employee is removed from service pending investigation, the investigation must be held within fifteen days from the date of knowledge.

The Carrier changed the Hearing Notice; by letter dated February 7, 2005, putting Claimant back in service because they realized they were in violation of the current Agreement, because they had scheduled the hearing out side the 15 days from the date of knowledge which did not conform with the time limits of the Current CBA.

Mr. Brooks called Mr. Vasquez home and left a message, that he wanted Mr. Vasquez to return to work on light duty on January 31, 2005. Mr. Vasquez returned Mr. Brooks call in regards to this matter and Mr. Brooks changed his mind and did not return Mr. Vasquez as he had indicated in his message. Then on February 7, 2005, Mr. Vasquez was notified that he was not being withheld from service pending investigation.

The Notices of Investigation are in violation of the Carrier's Policy and Procedure for Ensuring Rules Compliance. The Policy expressly requires; if there is a single incident with multiple rules infractions they must be combined to prevent a higher level of discipline being assessed. In this case the Carrier is holding two separate hearings which are both directly related to an on duty injury sustained on January 20, 2005.

The Claimant was charged with alleged violations of Rules: 1.6 Conduct (Careless of safety of himself or others); 74.1 vehicle maintenance; 1.1.4 condition of tools and equipment, for the personal injury sustained on January 20, 2005, at Santa Fe Springs Road.

Carrier is holding another investigation for alleged violations of Rules: 1.6 Conduct (dishonest); 1.1.3 accidents, injuries, and defects, and reporting. This is an egregious violation of the Carrier's Discipline Policy. It is obvious the Carrier is not interested in Rules of Fair play in conducting a fair and impartial investigation.

Carrier required the Claimant to submit to 2 drug screens on the date of the injury, one for Post Accident and another for reasonable suspicion.

The Carrier would not allow the treating physician to administer and medication for pain. Claims Agent Bruce Fenn, allowed the Emergency Room personal to believe that Mr. Vasquez was covered by workers compensation and he must approve any treatment administered to Mr. Vasquez.

Mr. Fenn filled out the form 52032 prompting Mr. Vasquez and putting words into Mr. Vasquez mouth as to what he should write down on the form. This is also in violation of the Current CBA Rule 67 Reports:

RULE 67 - REPORTS

All reports required from signal employees by the Carrier may be made out during regular assigned hours. Accident reports will be filed promptly, however, employees injured while on duty will not be required to make an accident report before they have been given proper medical attention and are in physical and mental condition to do so.

Now the Carrier is trying to say Mr. Vasquez was dishonest in completing the Form. Mr. Vasquez did not complete the Form Claims Agent Fenn completed the form for Mr. Vasquez and instructed Mr. Vasquez to sign it.

1- Accident happened on The 20th January 2005
2- Received notice on February 5, 2005 notice dated February 3, 2005
3- Then February 7, changed notice because They realized They were in violation of The Agreement!

Dishonest Filling out Form 52032. Dan did not fill out The Form 52032. Bruce Fenn filled out The form because Dan was not in any Condition To do so.

1. In excruciating Pain.
2. Would not Let Dan have any Pain meds. Lowell Told Dr not To give him any meds.
3. Because of The Pain in his Thumb he did not recognize any other injuries at The Time.

Lowell was notified by Dan when Dan Arrived at Hospital! Dan ask Lowell if he should go into The hospital? Lowell said Since your There go ahead and go in. Lowell said you got hurt? and started Cursing and informed Dan he would get everyone and Be down There.
While Dan was getting x-Rays Fenn + Clayton had a Lengthy discussion with Doctor. They Told The Doctor not To give any meds. (Longmeyer showed up at yard! ask Lowell if he had Told The Doctor not To give Dan meds. Lowell said yes he had But it Didn't make any difference because They had Done X Rays + given him a Splint!)

Put Splint on and Then Lowell requested a Drug Screen and Breathalizer. Did Drug Screen. Reasonable Suspicion. After Completing Drug Screen @ hospital Lowell said we are going back To Los Nietos yard. and you are going To do another Drug Screen. Went To yard.

WENT TO WORK AT 7:00 A.M.
Released To go home at 7:00 P.M. at night!

Longmeyer, Bruce Fenn + Lowell Clayton at Los Matos yard.
Did not evaluate Dan at any Time.
Dan said he wanted ~~Dan~~ To call Grover and Lowell berated and ~~berated~~ Belittled Dan. STATING he (Clayton) would Do as many Drug screens as They wanted him To Take!
Gave The Second Drug Screen + Breathalizer within 90 minutes.

Does Lowell have The Training To Determine reasonable suspicion!

Then Bruce Fenn, Lowell Clayton + Longmeyer instructed Dan To return To the Scene of The accident!

Rueben + Gary Sheppard were at The location Santa Fe Springs Road. Gary + Rueben were Parked in The spot where Dan had been Parked when accident happened. They Told Them To move. They left The location!
Dan Parked Truck in The location where accident happened.
Re created The accident. Longmeyer played Dan.
At That point The Truck was determined To have been in an accident. They said it appeared To have been broken for months. (They did not see That The step was pulling away from The Truck until Longmeyer stood on The step.) They wanted The Log Book. Dan did not have The Log Book. (no Log Book for Truck)
Brian Chavez said The Truck had been ~~[illegible]~~ That way for at least 2 months. He was with Rueben and had stepped on The step and Told Rueben it needed To be fixed. Rueben said To Keep it quiet!
During re-enactment Dan Told Them he has banged his Knee. Fenn ast him if it was bothering him. Dan Told him not right now.

Went back to yard. Dan ask Bruce Fenn for copy of accident Report. Fenn told Dan He didn't need a copy. Bruce ask if anything else was bothering Dan or ~~and~~ any other injuries. Dan said no.
Bruce Fenn then told Dan he needed to fill out an accident Report and sign a medical release.
Dan told him he would not sign a medical release.
Bruce Fenn told Dan have you heard of a subpeona? Thats alright when you hired out you signed one and it might be faded but it is still good!
Dan ask How am I to fill out this accident report my hand is hurt and I am in allot of pain. Bruce said I'll do it for you! Bruce told Dan to take some Ibuprofeun. Obviously something happened to you but I'm not sure it is as you said!
Lowell said you can take your truck Home and you can still work inspecting crossings. Dan left at that time and took truck home.
After Dan got home he went to take a shower and noticed he had bruises & scratch's on his knee! Had some old prescription meds (pain killers) and took a couple. Friday morning he woke up and was in allot of pain all over and wrist was worse. Had pain in his back. Took vacation day. Started having muscle spasms. On monday Dan tried calling Lowell and Lowell was on vacation. Went to Doctor and the Doctor took him out of service. On the morning of January 25, 2005 Dan called Glen Brooks to tell him the Doctor had taken him out of service and he couldn't get ahold of anyone else. Glen told Dan to hang out to the Doctor's note and call Bruce fenn. Bruce then called Dan at around 4:30 p.m on Jan. 25, 2005. Be out of service for one month.

Aluminum
Sheet, Coil and Strip
Plate
Wire, Rod and Bar
Structural/Extruded Shapes
Painted Sheet and Coil
Pipe and Tubing
Electrical Bus Bar

Brass & Copper
Sheet, Coil and Strip
Plate
Wire, Rod, and Bar
Electrical Bus Bar
Structural/Extruded Shapes
Pip and Tubing
Condenser Tube
Roofing Copper

Carbon/Alloy Steel
Sheet, Coil and Strip
Cold Rolled
Galvanized
Aluminized
Plate Alloy/Carbon
Pipe Alloy/Carbon
Rod Alloy/Carbon
Bar Alloy/Carbon
Tube Alloy/Carbon
Pre-paintd
HRPO

Nickel Alloys
Nickel 200
Nilo 36, 42
Alloy 400, R-405
Monel K-500
Inconel 600, 601, 617, 625, 690, 718, X-750
Incoloy 800, 800H/HT 825, 925
Inco Alloy C-276, 020, 330
Sheet and Coil
Plate wire, Rod and Bar
Pipe and Tubing
Extruded Pipe and Tubing
Condenser Tube

Stainless Steel
Sheet, coil and Strip
Plate
Wire, rod and Bar
Structurals/Extruded Shapes
Angles
Flat Bar
Pipe and Tubing
Condenser Tube
Structural/Ornamental Tube

Roofing Products
AlumaKlad
ColorKlad
ColorKlad LS
MegaKlad
Roofing Profiles

Integris
METALS

6446 E. Washington Blvd.
Los Angeles, California 90040
800-372-6560
323-726-7111
Fax 323-726-8003

Date: 2/11/05.

To: John McCarthen

From: Daniel Vasquez

Number of pages (including cover): 10

Comments: If any questions. Please call 626/396-6902

Got Truck one week before the Accident
Cable steps removed from all construction.
Foreman made inspection of truck &
Tool one week before Ax.
Ax on 20th accident Report on same day 5:30 P.
12-24-05 - I went to Doctor + was diagnosed
with other injuries.

If you do not receive all pages, please call back as soon as possible.

MINK RADIOLOGIC IMAGING

Main Tel: 310.358.2100
Scheduling Tel: 310.358.2121
Scheduling Fax: 310.358.2131

YOUR APPOINTMENT DATE: 2-12-05 TIME: 4:15 PM

NAME: Daniel Vasquez

CLINICAL INDICATION: R-WRIST / HAND ADDITIONAL REPORTS TO:

TRAUMA HISTORY REMOTE FRACTURE

REFERRING PHYSICIAN: Carpal Scafoid - Dr Marlowitz

SELECT EXAMINATION TYPE ☒ MR ○ CT ○ XRAY

SKELETAL ☒ R ○ L
- ○ SHOULDER
- ☒ WRIST
- ○ ELBOW
- ☒ HAND
- ○ KNEE
- ○ HIP/PELVIS
- ○ ANKLE
- ○ FOOT
- ○ ARTHROGRAM (W/ W/O CONTRAST)
- ○ MR ANGIOGRAM

BODY
- ○ CHEST
- ○ ABDOMEN
- ○ PELVIS
- ○ MR CHOLANGIOGRAM
- ○ W/O CONTRAST
- ○ W/ W/O CONTRAST

SPINE
- ○ CERVICAL
- ○ THORACIC
- ○ LUMBAR
- ○ SURVEY
- ○ LUMBAR NEUROGRAM
- ○ CERVICAL NEUROGRAM
- ○ W/O CONTRAST
- ○ W/ W/O CONTRAST

PAIN MANAGEMENT
- ○ EPIDURAL
  - ○ TRANSLAMINAR
  - ○ TRANSFORAMINAL
  - ○ CAUDAL
- ○ FACET BLOCK
- ○ DISCOGRAPHY

LEVELS_____

MYELOGRAPHY
- ○ CERVICAL
- ○ THORACIC
- ○ LUMBAR

ANGIOGRAPHY
- ○ CIRCLE OF WILLIS
- ○ NECK/CAROTID
- ○ AORTA/RENALS
- ○ AORTA/RUNOFF
- ○ UPPER EXTREMITY

HEAD AND NECK
- ○ BRAIN
- ○ PITUITARY
- ○ ORBITS
- ○ IAC
- ○ NECK
- ○ SINUS
- ○ FACIAL
- ○ W/O CONTRAST
- ○ W/ W/O CONTRAST

XRAY EXAMINATION

_____
_____
_____

SPECIAL EXAM INSTRUCTIONS

_____
_____
_____
_____
_____
_____

ISO 9002 FM 57641
6446 E. Washington Boulevard
Commerce, CA 90040-4294
Phone: (323) 726-7111
Toll-free: (800) 372-6560
Fax: (323) 726-3205
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METALS

Brian Chavez

909/994-2318.

Witness

[illegible]

Witness

'A' (13 pages)

UNION PACIFIC RAILROAD COMPANY

February 3, 2005

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #Receipt #1ZF423R95841751372
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Please report to the **Union Pacific Railroad Company, Manager Signal Maintenance Office, 326 South Campus Avenue, Ontario, California on February 18, 2005 at 9:00 A.M.,** for investigation and hearing on charges to develop the facts and place responsibility, if any, that you were allegedly dishonest when completing Form 52032, Report of Personal Injury or Illness, dated January 20, 2005.

This allegation, if substantiated, could possibly constitute a violation of Union Pacific Rules 1.6, Conduct (Employees must not be dishonest), 1.1.3 Accidents, Injuries, and Defects, and 1.2.5 Reporting.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

You are being withheld from service pending the outcome of this investigation.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R94441720985
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(Return receipt to Brooks)

UNION PACIFIC RAILROAD COMPANY

February 7, 2005

POSTPONEMENT NOTICE

LOCATION CHANGE

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R92441249863
Daniel R. Vasquez
EID 0099239
2000 Linda Rosa Ct.
Pasadena, CA 91107-2313

Dear Sir:

Refer to Notice of Investigation dated February 3, 2005, originally scheduling your investigation for February 18, 2005 at 9:00 A.M. Please be advised the hearing location has changed to:

Manager Signal Maintenance Conference Room
2015 South Willow Avenue
Bloomington, California 92316

Please also be advised Mr. Vasquez is NOT being withheld from service pending the outcome of this investigation.

All other conditions of the original notice of investigation remain the same.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance

LGC/ams

cc: G. E. Pankey, General Chairman, BRS, 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R90141902083
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Programs
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06

38015793
SPECIMEN ID NO.

10101 Renner Blvd
Lenexa, KS 66219
(800) 728-4064

EP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

Exhibit 1-Y

Donor SSN or Employee I.D. No.

Reason for Test: ☐ Pre-employment ☐ Random ☒ Reasonable Suspicion/Cause ☐ Post-Accident
☐ Return to Duty ☐ Follow-up ☐ Other (specify)

Drug Tests to be Performed: ☒ ☐ ☐

Collection Site Address:
ATDS AT HAR
L.C. Medical Center Springs, CA.

Collector Phone No.

Collector Fax No.

EP 2: COMPLETED BY COLLECTOR

ad specimen temperature within 4 minutes. Is temperature ween 90° and 100° F? ☒ Yes ☐ No, Enter Remark

Specimen Collection
☒ Split ☐ Single ☐ None Provided (Enter Remark) ☐ Observed (Enter Remark)

EP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

EP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

MARKS

rify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in ordance with applicable Forensic requirements.

ector's Name (PRINT First, MI, Last)

Signature of Collector

of Collection Time of Collection
DAY YR HR MIN ☐ AM ☒ PM

SPECIMEN BOTTLE(S) RELEASED TO:
Name of Delivery Service Transferring Specimen to Lab

CEIVED AT LAB
Signature of Accessioner
(PRINT) Accessioner's Name (First, MI, Last) Date (Mo./Day/Yr.)

Primary Specimen Bottle Seal Intact
☐ Yes
☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

EP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

Signature of Donor (PRINT) Donor's Name (First, MI, Last) Date (Mo./Day/Yr.)

Daytime Phone No. Evening Phone No. Date of Birth Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you chose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). - DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

EP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

accordance with applicable Forensic requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELED ☐ REFUSAL TO TEST BECAUSE:
☐ DILUTE ☐ ADULTERATED ☐ SUBSTITUTED

MARKS

Signature of Medical Review Officer (PRINT) Medical Review Officer's Name (First, MI, Last) Date (Mo./Day/Yr.)

EP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

accordance with applicable Forensic requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON

Signature of Medical Review Officer (PRINT) Medical Review Officer's Name (First, MI, Last) Date (Mo./Day/Yr.)

N

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 4)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last): DANIEL R. VASQUEZ

B: SSN or Employee ID No.: 598-39-7870

C: Employer Name: UNION PACIFIC RAILROAD
Street: LOS NIETOS YARD
City, ST ZIP: SANTA FE SPRINGS, CA

DER Name and Telephone No.: JOHN LIETZEN (800) 840-3784
DER Name / DER Phone Number

D: Reason for Test: ☐ Random ☒ Reasonable Cause ☐ Reasonable Susp ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix Or Print Screening Results Here

Affix With Tamper Evident Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by Union Pacific Policy and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 1 20 05

Affix Or Print Confirmation Re Here

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures specified in the Union Pacific Drug and Alcohol Policy, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☒ BAT ☐ STT DEVICE: ☐ SALIVA ☒ BREATH* 15-Minute Wait? ☐ Yes ☐ No

SCREENING TEST: *(For BREATH DEVICES write in the space below only if the testing device is not designed to print).*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix With Tamper Evident Tape

ATDS — Alcohol Technician's Company
2700 E SUNSET RD A-7 — Company Street Address
LIONEL A PASHMONTE — PRINT Alcohol Technician's Name (First, M.I., Last)
LAS VEGAS — Company City, State, Zip
(702) 738-7511 — Phone Number
Signature of Alcohol Technician
1 20 05 — Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year

COPY 1 – ORIGINAL – FORWARD TO: (YELLOW)
University Services
10551 Decatur Road
Ste 200
Philadelphia, PA 19154

2 – FORWARD TO:
Manager DOT Testing
1400 Douglas St, Stop 1020
Omaha, NE 68179

3 – RETAINS

BREATH ALCOHOL TECHNICIAN RETAINS

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-840-3784 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-501-0322

Presbyterian Intercommunity Hospital
WorkCare Department

1-3

Examination Consent for Work-Related Drug Screening

ID #: 551 397870 UPR ID

Home Address: _____

_____
City State Zip

Home Phone: _____

ID checked by: Anissa
full name

"I_____, do hereby consent for an examination to be performed on my urine, blood, or breath to check for the presence of drugs or alcohol. The results are kept confidential and will be available only to the ordering physician, WorkCare staff and my employer or prospective employer, unless I give my written consent. I understand I may receive a copy of this consent."

"I understand that I may refuse to undergo an examination for drugs or alcohol if I do so desire."

X _____ _____
Patient Signature Date

_____ _____
Witness Signature Date

"I refuse to undergo an examination of my blood, urine or breath to evaluate the presence of drugs or alcohol. I understand that this is my right. I also understand that my employer or prospective employer will be notified of this refusal."

_____ _____
Patient Signature Date

_____ _____
Witness Signature Date

H:forms: Drug Screen Consent

PRESBYTERIAN INTERCOMMUNITY HOSPITAL, WHITTIER, CA 90602 1-4

DRUG SCREEN REQUISITION

Company Name: Union Pacific Railroad

Donor Name: David Vasquez | DOB: 5-10-66 | SSN: 551 39 7870

I certify that I provided my urine specimen to the collector: that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the lable affixed to each specimen bottle is correct.

Donor Signature: [signature] | Date / Time of collection: 1-20-05 1310

(ALL DRUGS NEED A MINIUM SPECIMEN OF 30 ML OF URINE)

☒ Drug Abuse Panel (Includes all drugs below)

☐ Amphetamine ☐ Barbiturate ☐ Benzodiazapine ☐ Cannabinoid ☐ Cocaine
☐ Methadone ☐ Methaqualone ☐ Opiates ☐ Phencyclidine ☐ Propoxyphene
☐ Other

TO BE COMPLETED BY COLLECTOR - Specimen Temperature must be read within 4 minutes of collection

Specimen temperature within range: ☐ yes, 90°-100° ☐ No: Record Temp of Urine ____ Oral Temp ____

Collector affixes seals to the bottles. Collector dates the seals. Donor initials the seals.

Date	Specimen Released by	Specimen Received by	Purpose of Change
/ / 1 20 05	DONOR – NO SIGNATURE	Signature [signature] Name A. Hernandez	PROVIDE SPECIMEN FOR TESTING
/ / Transporter	Signature Name	Signature Name	
/ / Receiver	Signature Name	Signature Name	
/ / Technologist	Signature Name	Signature Name	
/ / Technologist	Signature Name	Signature Name	

Specific Gravity		1.003 - < 1.020 and Creat > 5	≤1.001 and Creat < 2	< 1.003 and Creat ≥ 2 but ≤ 5	> 1.020 and Creat < 2
Creatinine		Test all urine creat. on chem. analyzer (run as serum creat if urine creat is out of range low)			
Nitrite		< 5.0	> 5.0		
Glutaraledhyde		Negative	Positive		
pH		5.0 to 8.0	☐ < 4.0	☐ > 9.0	

Specific Gravity AND Creatinine

☐ Dilute: < 1.003 and ≥ 2 and ≤ 5 mg/dL
☐ Substituted: ≤ 1.001 and < 2 mg/dL (performed on Chem analyzer)
☐ Substituted: ≥ 1.020 and < 2 mg/dL (performed on Chem analyzer)
☐ Adulterated: ☐ Abnormal pH or ☐ Nitrite or ☐ Glutaraldehyde

WORKCARE
Drug Test Results

12401 Washington Boulevard
Whittier, California 90602-1099
(562) 698-0811 Ext 7504

EMPLOYEE/APPLICANT (Full Name) Danied Vasquez

ID # 551397970 COMPANY NAME: Union Pacific Railroad

DATE OF DRUG TEST (COLLECTION DATE): 1/20/05

TEST COLLECTED AT: ☒ WORKCARE ☐ ED ☐ OTHER SITE: _____

TYPE OF TEST: ☐ **NIDA or DOT** ☐ **NON-NIDA or Non-DOT** ☒ **PIH-10/Non-DOT**
☐ **RAPID/Non-DOT** ☐ **OTHER:** _____

REASON FOR TEST: ☐ PRE-EMPLOYMENT ☒ POST ACCIDENT ☐ RANDOM
☐ FOR CAUSE ☐ FOLLOW – UP ☐ OTHER: _____

TEST ANALYZED AT: ☒ PRESBYTERIAN INTERCOMMUNITY HOSPITAL
☐ OFF-SITE LAB

STATEMENT:	**For NIDA collections the controlled substance test being reported was performed in accordance with Department of Transportation guidelines 49 CFR part 40.**

TEST RESULTS

☒ **NEGATIVE** ☐ **TEST NOT PERFORMED** ☐ **REFUSAL TO TEST**

☐ **POSITIVE** ☐ **FATAL FLAW REASON:** _____

COMMENTS: _____

Controlled Substance Identified: _____

Stanley Sugar MD
Name Of Medical Review Officer (Print or Type)

Signature Of Medical Review Officer — Date 1/21/05

PRESBYTERIAN INTERCOMMUNITY HOSPITAL
PRESBYTERIAN HEALTH

12401 Washington Boulevard
Whittier, California 90602-1099
(562) 698-0811
Hearing Impaired TDD (562) 696-9267

ADDRESSOGRAPH
0C0C28538690
VASQUEZ,DANIEL 38 M
MR 83 87 13 DOB 05 10 66
DOS 01/20/05

WORKCARE DRUG TEST RESULTS

NS-1889 (02/04) WHITE- EMPLOYER YELLOW- MRO

Collected: 01/20/05 1310 VASQUEZ,DANIEL
P00838713 DRUG SCREEN (URINE) P000028542009
Spec. Type: Urine IHS

Result name	Result	N/Range
Cocaine:	NEGATIVE	Negative
Amphetamine, Ur:	NEGATIVE	Negative
Benzodiazepines:	NEGATIVE	Negative
Barbiturates:	NEGATIVE	Negative
Methaqualone, Ur:	NEGATIVE	Negative
Methadone, Ur:	NEGATIVE	Negative
Opiates:	NEGATIVE	Negative
Phencyclidine:	NEGATIVE	Negative
Propoxyphene,Ur:	NEGATIVE	Negative
Cannabinoid,Ur:	NEGATIVE	Negative

End of Report!

[5654610] A/Date: 01/20/05 1458 VNUR T13920 DOB:05/10/66 M
*FINAL Completed: 01/20/05 1550 INDUSTRIAL HEALTH SERVICE 1/1

FORM 32002 (Rev. 1-67)
Replaces 2611-R & 32002

UNION PACIFIC RAILROAD
REPORT OF PERSONAL INJURY OR ILLNESS

INSTRUCTIONS:
Answer all questions in each applicable section in your own handwriting as soon as possible after an accident/incident occurs. If injured, either on or off duty or suffer a work-related illness. (If unable to complete the report, necessary information must be furnished the person doing so in the employe's behalf.)

(1) NAME OF ILL/INJURED (First, Middle, Last): DANIEL REYNALDO VASQUEZ
(2) RESIDENCE PHONE: (626) 396-6902
(3) AGE: 38
(4) BIRTH DATE: 05-10-66
(5) ADDRESS (Number, Street, City, State & Zip Code): 2000 LINDA ROSA COURT, PASADENA, CA 91107
(6) SOCIAL SECURITY NUMBER: 551-39-7870
(7) ☒ Male ☐ Female
(8) MARITAL STATUS: ☐ Single ☐ Married ☒ Divorced ☐ Widow/Widower ☐ Legally Separated
(9) OCCUPATION: SIGNALMAN
(10) DEPARTMENT: ENGINEERING
(11) DATE ENTERED SERVICE: 08-06-97
(12) IMMEDIATE SUPERVISOR: LOWELL CLAYTON
(13) TIME SHIFT OR TRIP BEGAN: 0700 HOURS
(14) ASSIGNED REST DAYS: SATURDAY; SUNDAY

(1) DATE OF ACCIDENT/INCIDENT: 01-20-05
(2) TIME: 0930 ☒ AM ☐ PM
(3) LOCATION (Street, Track, Building, etc.) (City or Town) (State): SANTA FE SPRINGS ROAD, SANTA FE SPRINGS, CA
(4) MILE POST: 498.24 DIVISION: LOS ANGELES ☒ MAIN TRACK ☐ YARD
(5) WAS ILL/INJURED PARTY: INJURED ☒ ON DUTY ☐ OFF DUTY ☐ ON COMPANY PROPERTY ☒ OFF COMPANY PROPERTY
(6) WEATHER: ☒ CLEAR ☐ CLOUDY ☐ RAIN ☐ SNOW ☐ SLEET ☐ FOG ☐ OTHER (Explain) TEMPERATURE 65°
(7) VISIBILITY: ☒ DAYLIGHT ☐ DARK ☐ DAWN ☐ DUSK ☐ ARTIFICIAL LIGHTING
(8) NAMES AND OCCUPATIONS OF OTHERS ON CREW: NONE
(9) SPECIFIC JOB OR ACTIVITY BEING PERFORMED AT TIME OF ACCIDENT/INCIDENT: STOWING AWAY LADDER IN REAR OF TRUCK
(10) HOW DID ACCIDENT/INCIDENT OCCUR? I WAS STARTLED BY THE BLAST OF AN AIR HORN OF A PASSING BIG RIG CAUSING MY FEET TO GET TANGLED ON THE TRUCK'S SWING STEP RESULTING IN MY FALLING TO THE GROUND.
(11) WHAT SPECIFICALLY CAUSED THE ACCIDENT/INCIDENT: STARTLED AS A RESULT OF MALICIOUS ACT OF BIG RIG DRIVER BLOWING HIS AIR HORN.
(12) DID EQUIPMENT, TOOLS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT? ☐ Yes ☒ No IF YES, PROVIDE COMPLETE DETAILS (including equipment ID number)
(13) DID WORKING CONDITIONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT? ☐ Yes ☒ No IF YES, PROVIDE COMPLETE DETAILS
(14) DID OTHER PERSONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT? ☒ Yes ☐ No IF YES, PROVIDE COMPLETE DETAILS: MALICIOUS ACT OF BIG RIG DRIVER BLOWING HIS AIR HORN.

(15) NAMES, OCCUPATIONS AND ADDRESSES OF ALL PERSONS WHO WITNESSED OR HAVE ANY KNOWLEDGE OF ACCIDENT/INCIDENT

NO WITNESSES.

(1) TRAIN SYMBOL: N/A

(2) ENGINE NUMBER: N/A

(3) CONSIST (Loads, Empties, Tons): N/A

(4) IDENTIFYING INITIALS & NUMBERS OF ENGINE, CABOOSE, CAR OR OTHER EQUIPMENT INVOLVED IN ACCIDENT/INCIDENT: N/A

(5) EQUIPMENT WAS: N/A ☐ STOPPED ☐ MOVING-SPEED _____ TIME TABLE DIRECTION N/A

(6) IF ACCIDENT INVOLVED A CABOOSE, WAS IT EQUIPPED WITH SEAT BELTS? ☐ Yes ☐ No IF YES, WERE THEY IN USE? ☐ Yes ☐ No N/A

(7) WERE THERE ANY DEFECTS IN THE ENGINE, CABOOSE, OR CAR? ☐ Yes ☐ No IF YES, STATE THE NATURE OF SUCH DEFECTS & IDENTIFY THE DEFECTIVE EQUIPMENT

N/A

(8) WERE THE BAD WEATHER CONDITIONS MARKED? N/A ☐ Yes ☐ No _____

(9) DID THIS ACCIDENT/INCIDENT RESULT FROM RIDING ON, BOARDING, OR ALIGHTING FROM, OR BEING STRUCK OR RUN OVER BY MOVING ENGINES, CARS, CAR LADING OR OTHER EQUIPMENT? ☐ Yes ☐ No N/A

(10) COMMENTS

NONE

(1) PARTS OF BODY AFFECTED: RIGHT THUMB

(2) SIDE OF BODY: ☒ RIGHT ☐ LEFT ☐ BOTH

(3) NATURE AND EXTENT OF INJURY/ILLNESS: SWELLING AND SPRAIN

(4) WAS ILL/INJURED PARTY EXAMINED BY A DOCTOR? ☒ Yes ☐ No IF YES, DOCTOR'S NAME AND ADDRESS: DR. BAMY, 12401 E. WASHINGTON BLVD., WHITTIER, CA

(5) TREATMENT REQUIRED: ☐ NONE ☐ FIRST AID ☒ TREATED & RELEASED ☒ X—RAYS ☐ HOSPITALIZED ☒ OTHER (Explain) SPLINT

(6) IF HOSPITALIZED, NAME AND ADDRESS OF HOSPITAL: N/A

(7) WAS ILL/INJURED ABLE TO RETURN TO WORK ON NEXT WORK ASSIGNMENT? ☒ Yes ☐ No _____

(8) COMMENTS: NONE

+ David Vizyanos

Witness to Signature Lowell C Clayton

I certify that the foregoing information is true and correct.

Bruce A. Fenn

(Signature of person completing report)

JANUARY 20, 2005 ~~19~~

(Date)

ON JANUARY 31st, 2005 AT 3:00PM GLENN BROOKS CALLED ASKING FOR DANNY. I TOLD HIM HE WAS NOT IN. GLENN ASKED HOW DANNY WAS DOING AND WANTED HIM TO COME BACK TO WORK SO HE CAN BE IN CHARGE OF SAFETY AND LOOK OUT FOR THE OTHER GUYS. HE THEN LEFT HIS PHONE NUMBER AND ASKED IF DANNY CAN RETURN HIS CALL. I TOLD GLENN THAT I WOULD RELAY THE MESSAGE TO HIM

LINDA AGALSOFF
(626) 592-2156
2000 LINDA ROSA CT.
PASADENA, CA. 91107

Harold B. Markowitz, MD, F.A.C.S.
2080 Century Park East, Suite 300
Los Angeles, Ca 90067
(310) 553-8440 Fax (310) 277-0329

Date: 1-24-05

TO WHOM IT MAY CONCERN,

RE: Daniel Vasquez

The above patient is currently being treated in my office for injuries sustained to:
R. Hand, Back, L. Knee

The above patient is unable to work from 1-24-05 and is able to return to work on 3-24-05 with the following restrictions:

If you have any further questions, please call my office.

Thank you,

Harold B. Markowitz, M.D.

Find Answers to Your Tracking Questions

Go to Tracking Number FAQ

Track by Tracking Number

View Details

Status:	Delivered
Delivered on:	Feb 5, 2005 9:22 A.M.
Signed by:	AGALSOFF
Location:	RESIDENTIAL
Delivered to:	PASADENA, CA, US
Shipped or Billed on:	Feb 4, 2005
Tracking Number:	1Z F42 3R9 58 4175 137 2
Service Type:	NEXT DAY AIR

Package Progress:

Date/ Time	Location	Activity
Feb 7, 2005		
6:20 A.M.	BALDWIN PARK, CA, US	OUT FOR DELIVERY
Feb 5, 2005		
9:22 A.M.	BALDWIN PARK, CA, US	DELIVERY
7:29 A.M.	BALDWIN PARK, CA, US	ARRIVAL SCAN
7:22 A.M.	ONTARIO, CA, US	DEPARTURE SCAN
5:12 A.M.	ONTARIO, CA, US	ARRIVAL SCAN
4:07 A.M.	LOUISVILLE, KY, US	DEPARTURE SCAN
12:10 A.M.	LOUISVILLE, KY, US	ARRIVAL SCAN
Feb 4, 2005		
9:43 P.M.	KANSAS CITY, MD, US	DEPARTURE SCAN
8:51 P.M.	KANSAS CITY, MD, US	ARRIVAL SCAN
8:05 P.M.	LENEXA, KS, US	DEPARTURE SCAN
7:27 P.M.	LENEXA, KS, US	ORIGIN SCAN
7:21 P.M.	US	BILLING INFORMATI(RECEIVED

Tracking results provided by UPS: Feb 17, 2005 10:26 P.M. Eastern Time (USA)

NOTICE: UPS authorizes you to use UPS tracking systems solely to track shipments tende you to UPS for delivery and for no other purpose. Any other use of UPS tracking systems a information is strictly prohibited.

Back to Tracking Summary

Back to Top

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'D' (17 Pages)

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Telephone (626) 844-8800
Facsimile (626) 844-8944

William K. Lane, Of Counsel

July 6, 2007

Via Federal Express
Mr. John McArthur
60 Deer Trail
Fallon, NV 89406-8479

Re: **Bryan Chavez vs. Union Pacific Railroad Company**
Norwalk Superior Court Case: VC 046 065
Old Trial Date : 2/28/07
New Trial Date: 7/24/07

Dear Mr. McArthur:

Enclosed herewith, please find a condensed copy (plus exhibits) of your deposition transcript for your file.

If you have any questions or concerns please contact me or Mr. Ernster.

Respectfully,

Lori Abajian

Lori Lindsey-Abajian
Senior Paralegal

:ll
encs.

Brotherhood of Railroad Signalmen

917 Shenandoah Shores Road
Front Royal, VA 22630

Phone: (540) 622-6522
Fax: (540) 622-6532

W. Dan Pickett
International President

Walt A. Barrows
International Secretary-Treasurer

March 16, 2006

Freedom of Information Act Coordinator
Office of Chief Counsel
Federal Railroad Administration
1120 Vermont Ave. N.W., Stop 10
Washington, DC 20590

Re: FRA File No.: RRS-05-004328
BRS File No.: 49CFR225 UP 7-13-05

Dear Sir or Madam:

Please accept this letter as are written request for information under the Freedom of Information Act (FOIA). This involves FRA File No. RRS-05-004328, concerning a violation of 49CFR225 *Railroad Accidents/Incidents: Reports Classification, and Investigations* that occurred on January 28, 2005, on the Union Pacific (UP) Railroad.

The FRA investigation into this matter concluded that UP did not comply with Section 225.25 (f), 49CFR Part 225, by its failure to establish the required information on FRA Form F 6180.98, or an alternative railroad-designed equivalent form, for Mr. B.K. Chavez' on-duty injury of January 28, 2005, within seven working days after receiving information or acquiring knowledge of his injury. Additionally UP did not comply with Section 225.11, 49CFR Part 225, by failing to make a report of Mr. Chavez' injury to FRA within 30 days following the month in which the reportable injury occurred. I am specifically requesting to know the settlement amount for this violation or the outcome of this case.

My telephone number is: 540-622-6522 and my fax number is 540-622-6532. My mailing address is 917 Shenandoah Shores Road, Front Royal, Virginia, 22630-6418. In response to fees that may be charged, the amount of time required to notify me of the final resolution of this violation should be negligible. The Office of Chief Counsel is already aware of my request and the reason I am making it under FOIA is I was informed that I would get a response quicker using FOIA. Please contact me if the cost is going to exceed $10.00. Thank you.

Your prompt attention in this matter is greatly appreciated. We look forward to your reply.

Sincerely,

W. Dan Pickett

W. Dan Pickett
International President

enc: 10/18/2005 RRS-05-004328 FRA Office of Chief Counsel Letter

cc: Mr. George Jones, International Vice President - West
Mr. Grover Pankey, General Chairman - UP
Mr. John McArthur, Vice General Chairman - UP
Mr. B.K. Chavez, Member

U.S. Department
of Transportation

**Federal Railroad
Administration**

1120 Vermont Ave., N.W.
Washington, D.C. 20590

OFFICE OF
PRESIDENT
OCT 24 2005
B. OF R. S.

OCT 18 2005

Mr. W. Dan Pickett
International President
Brotherhood of Railroad Signalmen
917 Shenandoah Shores Road
Front Royal, Virginia 22630

Dear Mr. Pickett:

Thank you for your letter regarding possible noncompliance by Union Pacific Railroad (UP) with the Federal Railroad Administration's (FRA) anti-harassment provision of our accident reporting rule, found at Section 225.33, Title 49, Code of Federal Regulations (C.F.R.), Part 225 *Railroad Accidents/Incidents: Reports Classification, and Investigations.* Your has been assigned FRA control number RRS-05-004328.

In your letter you state, "[t]his incident involves the FRA reportable injury that UP signal employee B.K. Chavez suffered on January 28, 2005, and the harassment and intimidation he experienced after testifying as a witness of an injury to Mr. Daniel Vasquez [on February 18, 2005] in the vicinity of Los Nietos Yard, Santa Fe Springs, California." I must clarify, that FRA will only address harassment and/or intimidation allegedly suffered by Mr. Chavez in relation to Mr. Chavez' own injury per 49 C.F.R. section 225.33 (a)(1), which states in part, "that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated ...". The issues you raise in your letter regarding "retribution [against Mr. Chavez] for testifying as a witness to Mr. Vasquez's on-duty injury ..." are not matters governed by the FRA. You may, however, be able to obtain helpful information on this particular aspect of the complaint from the National Mediation Board (www.nmb.gov).

The FRA has completed its investigation of this matter. We found insufficient evidence to support a claim that UP harassed or intimidated Mr. Chavez in an effort to discourage him from receiving proper medical treatment or from reporting his injury under 49 C.F.R. section 225.33. Our investigation did reveal, however, that UP did not comply with Section 225.25 (f), 49 C.F.R. Part 225, by its failure to establish the required information on FRA Form F 6180.98, or an alternative railroad-designed equivalent form, for Mr. Chavez' on-duty injury of January 28, 2005, within seven working days after receiving information or acquiring knowledge of his injury. Additionally, UP did not comply with Section 225.11, 49 C.F.R. Part 225, by failing to make a report of Mr. Chavez' injury to FRA within 30 days following the month in which the

reportable injury occurred. Therefore, we are recommending to our Office of Chief Counsel that civil penalties be assessed against the railroad for these two separate violations.

I appreciate you bringing this matter to our attention.

Sincerely,

Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

Brotherhood of Railroad Signalmen

917 Shenedoah Shores Road
Front Royal, VA 22630

Phone: (540) 622-6522
Fax: (540) 622-6532

W. Dan Pickett
International President

Walt A. Barrows
International Secretary-Treasurer

RECEIVED
JUL 17 2005
J. O. McARTHUR
VGC

July 13, 2005

Mr. Dan Smith
Associate Administrator for Safety
Federal Railroad Administration
400 Seventh Street, SW
Washington, D.C. 20590

Re: Violation 49CFR225.33 UP 7-13-05

Dear Mr. Smith:

This is a formal complaint under 49CFR225 *Railroad Accidents/Incidents: Reports Classification, and Investigations* and that occurred beginning on January 28, 2005, on the Union Pacific (UP) Railroad. This incident involves the FRA reportable injury that UP signal employee B.K Chavez suffered on January 28, 2005, and the harassment and intimidation he experienced after testifying as a witness of an injury to Mr. Daniel Vasquez in the vicinity of Los Nietos Yard, Santa Fe Springs, California.

Field reports indicate that the following events took place:

- On January 28, 2005, Mr. Chavez suffered an on-duty injury.
- He was first treated for that injury on February 1, 2005.
- On February 18, 2005, Mr. Chavez was called by the Brotherhood of Railroad Signalmen (BRS) as a witness to a personal injury to Mr. Daniel Vasquez.
- On February 28, 2005 Manager Signal Maintenance Lowell Clayton discussed the injury with Mr. Chavez and informed him he was not to try to return to work until he could provide a full medical release.
- By letter dated, March 17, 2005, UP notified Mr. Chavez of the following: "This letter is to inform you that you have forfeited your seniority rights and employment relationship with the UP RR per the provisions of Rule 62D of the Agreement between the Company and the BRS."
- After a series of letters between Mr. Chavez and UP, on April 4, 2005, UP terminated Mr. Chavez.

- On April 19, 2005, a hearing was held where evidence was introduced which clearly supported Mr. Chavez on-duty injury.

It is the position of the BRS that as retribution for testifying as a witness to Mr. Vasquez's on-duty injury, the Union Pacific Railroad set into action a series of events culminating in the termination of Mr. Chavez from the Union Pacific Railroad.

The Brotherhood of Railroad Signalmen contend that the actions of UP management constitute a clear violation of 49 CFR225.33, *Internal Control Plans*. 49CFR225.33 states as follows:

> "225.33 Internal Control Plans.
>
> (a) Each railroad shall adopt and comply with a written Internal Control Plan that shall be maintained at the office where the railroad's reporting officer conducts his or her official business. Each railroad shall amend its Internal Control Plan, as necessary, to reflect any significant changes to the railroad's internal reporting procedures. The Internal Control Plan shall be designed to maintain absolute accuracy and shall include, at a minimum, each of the following components:
>
> (1) A policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, in absolute terms, *that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment* or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation. *(Emphasis added.)*"

The record shows that after appearing as a witness to another individual's injury and suffering his own on-duty personal injury UP conspired to wrongfully terminate Mr. Chavez. UP's actions constitute a clear violation of the harassment and intimidation portion of the 40 CFR 225.233. This is indicative of the type of treatment that injured railroad employees go through after suffering an on-the-job injury.

As information, Ms. Alisa Dwiggins, Senior Investigator for the FRA was the individual who is currently conducting the investigation of harassment and intimidation of an on-duty injury for Mr. Vasquez. As such, Ms. Dwiggins is familiar with some of the circumstances relating to the harassment and intimidation of Mr. Chavez.

In view of the foregoing, we respectfully request that the FRA investigate this violation and advise this office of its findings and actions. If you need further information, please contact BRS Union Pacific General Committee Vice General Chairman John McArthur at (775) 423-2288.

Sincerely,

W. Dan Pickett

W. Dan Pickett
International President

cc: Mr. George Jones, International Vice President – West
Mr. Grover Pankey, UP General Committee General Chairman
Mr. John McArthur, UP General Committee Vice General Chairman
Mr. Tim DePaepe, BRS Director of Research
Mr. B.K. Chavez
Mr. Grady Cothen, FRA

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

J. O. MCARTHUR
VICE GENERAL CHAIRMAN
P. O. Box 5100
FALLON, NV 89407
OFFICE: 775-423-2288
FAX: 775-423-3717
EMAIL: jomcarthur@charter.net

G. PANKEY
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T. E. STIRLING
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1021 PRAIRIE VIEW PLACE
ROCKFORD, IA 50468
OFFICE 641-749-2587
FAX: 641-749-6013
EMAIL: tedsting@omnitelcom.com

May 20, 2005

WD Pickett
International President
917 Shenandoah Shores Rd
Front Royal VA 22630

Re: File No. UPGCW-FRA-1105

Dear President Pickett

This is a request for your office to file a complaint and to ask the FRA to investigate the Union Pacific Railroad for harassment of an injury for signal employee, **Brian Chavez, Employee ID No. 353798,** for the following incident.

- On January 28, 2005 Mr. Chavez sustained an on duty injury.
- Mr. Chavez was first treated for the injury on February 1, 2005.
- On February 18, 2005, Mr. Chavez was called by the Brotherhood of Railroad Signalmen as a key witness to an investigation for a co-worker (Mr. Daniel Vasquez) being charged for alleged offenses in which were related to an on- duty injury to which the FRA is already conducting an investigation for harassment of an injury.
- On February 18, 2005 Manager Signal Maintenance Lowell Clayton discussed with Mr. Chavez his injury and informed him he was not to try to return to work until he could provide a full medical release.
- By letter dated March 17, 2005, the Union Pacific Railroad notified Mr. Chavez: **"This letter is to inform you that you have forfeited your seniority rights and employment relationship with the Union Pacific Railroad per the provisions of Rule 62D of the Agreement between the Company and the Brotherhood of Railroad Signalmen."**
- On March 22, 2005 The Organization requested a hearing per Agreement Rule 62D.
- By letter dated March 30, 2005 Mr. Chavez was notified that the Carrier had scheduled a hearing for April 5, 2005.
- On April 1, 2005 The Organization confirmed by letter, a telephone conversation with Mr. L. G. Clayton on March 31, 2005 wherein, we mutually agreed to a postponement of the hearing until April 19, 2005.

- April 4, 2005, Union Pacific Railroad terminated Mr. Chavez Seniority.
- April 5, 2005, Union Pacific Railroad sent Mr. Chavez a check, Payroll Voucher No. 5546124 for vacation for the year 2005. The Union Pacific Railroad withheld from his payroll in the amount of $99.99 Health and Welfare Offset Pretax ME Pretax UP Hosp $.01, for his Health and Welfare benefits.
- On April 12, 2005 (postmark on envelope) the Union Pacific Railroad sent Mr. Chavez a check, Payroll Voucher No. 5546671 dated April 13, 2005, in the amount of $100.00 returning his cost sharing for his Health and Welfare Benefits.
- The hearing was held on April 19, 2005 at the designated time and place.
- Evidence was introduced at this hearing which clearly supports Mr. Chavez, on-duty injury, and his Medical Leave of Absence per Rule 62 A of the Agreement; part of which, was Manager Clayton's conversation with Mr. Chavez on February 18, 2005, wherein, he instructed Mr. Chavez not to even try to return to work, until he had a full medical release. (Copies of exhibits introduced at the hearing attached.)
- On May 11, 2005, I called Union Pacific Railroad Health Systems in regards to Mr. Chavez Insurance Coverage being terminated.
- On May 18, 2005, I again called Union Pacific Railroad Health Systems to determine the date the Union Pacific Railroad in fact terminated Mr. Chavez. I was informed that Mr. Chavez records indicate he was terminated by Union Pacific Railroad on April 4, 2005, well in advance of the hearing conducted on April 19, 2005.

The Carrier was required by Agreement to render a decision within 15 days from the close of the hearing. In addition, if the Carrier's decision was to uphold their decision of termination of seniority they were required to provide a copy of the full transcript so the Organization could advance an appeal on behalf of Mr. Chavez. To date Mr. Chavez remains terminated, and neither Mr. Chavez nor his Representative has received a decision or a transcript.

The Organization believes that the Actions of the Union Pacific Railroad were:

1. Retaliatory for Mr. Chavez acting as a witness in a previous hearing in regards to Daniel Vasquez on-duty injury wherein the Union Pacific Railroad was trying to terminate Mr. Vasquez.
2. The Union Pacific Railroad is now terminating Mr. Chavez for his own on-duty injury.

Mr. Chavez was never required to fill out an on-duty injury report by Union Pacific Railroad. Furthermore, the Organization has reason to believe that Union Pacific Railroad has never reported Mr. Chavez's on-duty injury to the FRA as required by Law.

Ms. Alisa Dwiggins, SR. Investigator, FRA, is currently conducting the investigation for harassment of an on-duty injury for Mr. Vasquez, and is familiar with some of the circumstances in Mr. Chavez case.

Kindly acknowledge and advise.

Fraternally Yours,

John McArthur
Vice General Chairman-UPGC

Cc: Mr. B. K. Chavez, Claimant-BRS

UNION PACIFIC RAILROAD
REPORT OF PERSONAL INJURY OR OCCUPATIONAL ILLNESS

FORM 1 Rev.

RULE 1.2.5. UNION PACIFIC RAILROAD OPERATING RULES STATES: "All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed. A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service. If an employee receives a medical diagnosis of occupational illness, he or she must report it immediately to the proper manager. If an employee is injured on duty he must report to his manager any follow-up visits to any doctor or other medical care provider resulting from the injury. Specifically, the injured employee must report all physical therapy or chiropractic treatments, prescriptions issued, work restrictions and medical treatments."

INSTRUCTIONS: Answer all questions in each applicable section in your own handwriting as soon as possible after an accident/incident occurs if injured, either on or off duty or if you are reporting a work-related illness. (If unable to complete the report, necessary information must be furnished by the person doing so in the employee's behalf.)

SECTION I - IDENTIFICATION INFORMATION

(1) YOUR NAME (First, Middle, Last)	(2) YOUR HOME ADDRESS	(3) CITY	(4) ST	(5) ZIP CODE
Bryan Keith Chavez	9813 Alder Ridge Pl	Alta Loma	Ca	91737

(6) YOUR OCCUPATION ON DAY OF INJURY	(7) YOUR HOME PHONE	(8) YOUR AGE	(9) HIRE DATE
Lead Signalman	(909) 944-1921	25	June 2001

(10) YOUR SOCIAL SECURITY NUMBER	(11) YOUR EMPLOYEE ID NUMBER	(12) YOUR SUPERVISORS NAME	(13) ASSIGNED REST DAY
565-95-0538	0353798	Lowe, Clayton	Sat & Sun

SECTION II - DETAILS OF ACCIDENT/INJURY

(1) DATE OF INJURY	(2) TIME	(3) WHERE WERE YOU INJURED (NEAREST CITY, STATE, RR LOCATION, ETC.)?	(4) TIME SHIFT OR TRIP BEGAN
01-28-2005	1:00 ☐ AM ■ PM	Serapis St, Pico Rivera, Ca	7:00 am

(5) MILE POST: 1.31 ■ MAIN/TRACK ☐ YARD SUB DIVISION:
(6) WEATHER: ☐ CLEAR ■ RAIN ☐ CLOUDY ☐ SLEET TEMPERATURE ___ ° ☐ SNOW ☐ FOG ☐ OTHER
(7) VISIBILITY: ■ DAYLIGHT ☐ DARK ☐ DAWN ☐ ARTIFICIAL LIGHTING ☐ DUSK

(8) WERE YOU INJURED: ■ ON DUTY ■ ON COMPANY PROPERTY ☐ OFF DUTY ☐ OFF COMPANY PROPERTY

(9) SPECIFIC JOB OR ACTIVITY BEING PERFORMED AT TIME OF ACCIDENT/INJURY:
Removing and Replacing Flashers Told to do so by Art Guzman

SECTION III - DETAILS OF ACCIDENT/INJURY/OR OCCUPATIONAL ILLNESS

(1) DESCRIBE FULLY HOW THE ACCIDENT/INJURY OCCURRED:
performing duty's ordered to do by my superviser & M.G.R.

(2) WHAT SPECIFICALLY CAUSED THE ACCIDENT/INJURY:
improper tools, "advised superviser at start of shift did not have proper tools and was told to do what it takes to get the job done"

(3) DID EQUIPMENT OR TOOLS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? ■ YES ☐ NO IF YES, PROVIDE DETAILS (INCLUDING EQUIPMENT TO NUMBER)
company should have provided me with a improper tool

(4) DID WORKING CONDITIONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? ■ YES ☐ NO IF YES, PROVIDE COMPLETE DETAILS
weather and improper tools

(5) DID OTHER PERSONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? ■ YES ☐ NO IF YES, PROVIDE COMPLETE DETAILS
Superviser & M.G.R

(6) NAMES, OCCUPATIONS AND ADDRESSES OF ALL CREW MEMBERS AND/OR OTHER PERSONS WHO WITNESSED OR HAVE ANY KNOWLEDGE OF ACCIDENT/INCIDENT:
unknown to me at this time

SECTION IV - IF OCCUPATIONAL ILLNESS - PROVIDE ADDITIONAL DETAILS

(1) WHAT IS YOUR ILLNESS OR CONDITION?

(2) WHEN DID YOU FIRST BECOME AWARE THAT THIS CONDITION MAY HAVE BEEN CAUSED BY YOUR WORK? HOW DID YOU LEARN THIS?

(3) LIST ANY JOB(S), EXPOSURE(S), OR LOCATION(S) THAT YOU BELIEVE MAY HAVE CAUSED OR CONTRIBUTED TO YOUR SYMPTOMS (PLEASE PROVIDE DATES):

(4) DO YOU HAVE ANY CURRENT EXPOSURES? IF SO, PLEASE EXPLAIN:

SECTION V - NATURE OF INJURY/OCCUPATIONAL ILLNESS AND TREATMENT

(1) DESCRIBE INJURY OR ILLNESS: Back at this time

(2) WHAT ARE YOUR SYMPTOMS? pain

(3) WHEN DID YOU FIRST NOTICE SYMPTOMS? (GIVE DATE) 01-28-2005 shortly after incident

(4) WHEN WERE YOU FIRST TREATED OR DIAGNOSED? Feb 2, 2005

(5) PARTS OF BODY AFFECTED Back at this time SIDE OF BODY ☐ RIGHT ☐ LEFT ☐ BOTH

(6) WERE YOU EXAMINED BY A MEDICAL PROFESSIONAL? ☒ YES ☐ NO IF YES, GIVE MEDICAL PROFESSIONAL'S NAME AND ADDRESS: family doctor B-Tran Pomona, Ca, 175 west LaVerne Ave

(7) TREATMENT REQUIRED: ☐ NONE ☐ FIRST AID ☐ TREATED & RELEASED ☒ X-RAYS ☐ HOSPITALIZED ☒ OTHER (Explain): Medication, and time off work at this time

IF HOSPITALIZED, NAME AND ADDRESS OF HOSPITAL

(8) WHAT TREATMENT WAS GIVEN? at this time stay off work + Rest, Medication

(9) MEDICATION INSTRUCTIONS

WAS A PRESCRIPTION WRITTEN? ☒ YES ☐ NO IF YES: MEDICATION Naperson DOSAGE

IF NO PRESCRIPTIONS WERE WRITTEN, WERE OTHER MEDICATIONS ISSUED OR RECOMMENDED?

☐ YES ☐ NO IF YES: MEDICATION DOSAGE

(10) INDICATE YOUR CURRENT HEALTH CARE COVERAGE PLAN: ☒ UPREHS ☐ UHC ☐ OTHER LIST:

SECTION VI - EQUIPMENT INVOLVED IN ACCIDENT/INJURY (IF APPLICABLE)

(1) TRAIN SYMBOL	(2) ENGINE NUMBER	(3) CONSIST (Loads, Empties, Tons)	(4) IDENTIFYING INITIALS & NUMBERS OF EQUIPMENT INVOLVED IN ACCIDENT/INCIDENT

(5) WAS EQUIPMENT ON ☐ MAINTRACK ☐ YARD TIMETABLE DIRECTION ____

(6) WERE THERE ANY DEFECTS IN THE EQUIPMENT? ☐ YES ☐ NO

(7) IF THE ANSWER TO QUESTION 6 IS YES, STATE THE NATURE OF THE DEFECTS, IDENTIFY THE DEFECTIVE EQUIPMENT, AND COMPLETE (8).

(8) WERE THE DEFECTIVE CONDITIONS MARKED? ☐ YES ☐ NO

(9) DID THIS ACCIDENT/INCIDENT RESULT FROM RIDING ON, BOARDING, OR ALIGHTING FROM, OR BEING STRUCK OR RUN OVER BY MOVING EQUIPMENT? ☐ YES ☐ NO

(10) COMMENTS:

I certify that the foregoing information is true and correct.

Bryan Chavez (Signature of Employee)

Feb 18 2005 (Date Completed)

(Signature of Witness)

(Printed Name of Witness)

■ REQUEST FOR LEAVE OF ABSENCE
☐ REQUEST FOR SICK LEAVE

FORM 00000 (Rev. 04-04)

TO: G.A. Brooks

10031 Foothill Blvd. Rancho Cu. 91737 June 15 2005
Location Date

Bryan K Chavez 0953798
Name Employee ID Number

I request ☐ Leave of Absence ☒ Sick Leave of 01 month 31 day from Jan 2005 through unknown 20

For the following reason: On duty Back injury

I entered the service June 25 2001 Last leave days to 20

My Group Life Insurance should be ■ CONTINUED ☐ CANCELLED. Premium contributions for this period are to be ☐ PAID IN CASH ☐ DEDUCTED FROM PAYROLL IN ADVANCE

I understand that insurance will be cancelled if premium contributions are not paid on or before the tenth (10th) day of the first month following that to which they apply. I further understand that if my employee relationship is terminated, insurance will be cancelled as of midnight of the thirty first day after such termination, and any unearned premium paid will be refunded. This leave is requested in accordance with and, if approved, will be subject to all applicable provisions of the current rules and regulations of the company governing the conditions of my employment. I understand that if I accept any employment except as provided for herein, my leave and all employment rights with the Union Pacific Railroad shall be automatically terminated.

My address during leave will be 9813 Alder Ridge Pl Alta Loma Ca. 91737

Lead Switchman Stand Bryan Chavez
Title of Position Department or Bureau Card Number Signature

THIS FORM OR REQUEST WHEN PROPERLY APPROVED WILL CONSTITUTE A LEAVE FOR THE PERIOD SET FORTH ABOVE.

RECOMMENDED: Service and Absence Records Correct: I Recommend Request be Granted.

Supervisor

APPROVED:

(Title)

I hereby certify that the foregoing request for leave of absence or sick leave has been properly approved and the original has been:
☐ Delivered to: ☐ Personally
☐ Sent to: (Person Requesting Leave) ☐ By U.S. Mail to the address referred to above.

This day of 20

(Head of Department or Person Authorized to Handle)

My Union Rep has advised me that itis not nessasary to complet this form for a medical Leave of absence how ever I will comply with your instructions and have completed this form per your Request.

Exhibit 'A'

UNION PACIFIC RAILROAD COMPANY

August 29, 2005

RECEIVED
SEP 08 2005
J. O. McARTHUR
VGC

NOTICE OF INVESTIGATION

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #7004 1160 0005 9222 7055
Brian Chavez
EID 0353798
9813 Alder Ridge Pl.
Alta Loma CA 91737

Dear Sir:

Please report to the **Union Pacific Railroad Company, Colton Engineering Building, 250 Marion Way, Bloomington, California 92316, on September 20, 2005 at 9:00 A.M.,** for investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Lead Signalman, you allegedly filed a report of personal injury on August 22, 2005, for an injury which allegedly occurred on January 28, 2005.

Your alleged actions indicate a possible violation of the current Union Pacific Rule 1.2.5 Reporting.

This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or class. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense.

L. G. Clayton/ams
L. G. Clayton
Manager Signal Maintenance
909-879-6358

LGC/ams

cc: G. E. Pankey, General Chairman, BRS
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 909-982-7777
S. E. Wills, Director Signal Maintenance
G. A. Brooks, Manager Signal Projects
10031 Foothills Blvd., Roseville, CA 95747; 916-789-5349
D. A. Ring, Director Labor Relations
W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06
(Return receipt to Clayton)

Exhibit C

UNION PACIFIC RAILROAD COMPANY

June 9, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt #1ZF423R92594987661
Delivery Confirmation #D254 2687 583
Brian Chavez
EID 0353798
9813 Alder Ridge Pl.
Alta Loma CA 91737

Dear Sir:

Based on the evidence adduced at the Rule 62(D) hearing held April 19, 2005, it has been determined that you demonstrated a justifiable basis for your absence commencing February 18, 2005 through March 18, 2005, from your position as Signalman, Gang 6417, at Los Angeles, California. Accordingly, your seniority rights and employment relationship with Union Pacific Railroad Company are restored unimpaired.

In the course of the hearing above, you testified that you had sustained personal injury while working as signalman, but have not submitted information regarding such injury on the proper form, 52032, Report of Personal Injury or Occupational Illness. Attached herewith is Form 52032 which you must complete and return as soon as possible.

I have also enclosed Form 32006, Request for Leave of Absence, which you must complete and return as soon as possible if it is anticipated that the necessity for your absence is continuing. Form 32006 must be accompanied by a note from your doctor stating the necessity and expected duration of continued absence.

Please complete and submit the enclosed forms to me as soon as possible. Thank you.

G. A. Brooks/ams
G. A. Brooks
Manager Signal Programs

GAB/ams

cc: G. E. Pankey, General Chairman, BRS; 909-982-7777
1150 N. Mountain Ave., Ste #206, Upland, CA 91786; 1ZF423R90194881275
J. O. McArthur, Vice General Chairman, BRS; 775-423-2288
PO Box 5100, Fallon, NV 89407; 1ZF423R90192535081
K. R. Edgar, Local Chairman, BRS
637 Laurel St., Brea, CA 92821; 1ZF423R90191313090
S. E. Wills, Director Signal Maintenance
D. A. Ring, Director Labor Relations
W. E. Naro, General Director Labor Relations
L. Jensen, Personnel Records, MS 0730
O. S. Gutierrez, NPS Specialist, PNG-06

BUILDING AMERICA™

Operating

Union Pacific Rules
GENERAL RESPONSIBILITIES

1.2.5: Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.

If an employee receives a medical diagnosis of occupational illness, he or she must report it immediately to the proper manager.

System Special Instructions

If an employee is injured on-duty he must report to his manager any follow-up visits to any doctor or other medical care provider resulting from the injury. Specifically, the injured employee must report all:

- Physical therapy or chiropractic treatments
- Prescriptions issued
- Work restrictions
- Medical treatments

Updated: 3/30/2005

'E' (18 Pages)

Brotherhood of Railroad Signalmen

917 Shenandoah Shores Road
Front Royal, VA 22630

Phone: (540) 622-6522
Fax: (540) 622-6532

W. Dan Pickett
International President

Walt A. Barrows
International Secretary-Treasurer

July 23, 2007

RECEIVED
JUL 30 2007
J. O. McARTHUR
VGC

Mr. S. Mark Lindsey, Office of Chief Counsel
Federal Railroad Administration
1120 Vermont Avenue
Washington, DC 20005

Re: RS&I Violation - UP
BRS File No. 49CFR225.33 Amtrak 4-27-07
FRA File No. None

Dear Mr. Lindsey:

The enclosed correspondence from FRA Associate Administrator for Safety, Jo Strang, dated July 6, 2007, concerns the FRA's investigation of a formal complaint filed under 49CFR225 *Railroad Accidents/Incidents: Reports Classification, and Investigations* that occurred on January 19, 2007, on Amtrak.

The FRA concluded that two separate violations did occur. As indicated in the FRA's notice, the agency confirmed the circumstances reported to this office and concluded that Amtrak had violated the relevant safety regulations.

The agency further indicated it is advancing the case to the next step in its enforcement procedures, and forwarding its findings to the Office of Chief Counsel. This action indicates that the FRA has recommended a penalty be assessed against the railroad for the violation.

The Brotherhood of Railroad Signalmen respectfully requests that you notify this office of the penalties that will be assessed against Amtrak for these violations.

Sincerely,

W. Dan Pickett

W. Dan Pickett
International President

Encl: FRA letter dated 06/29/07

cc: Grand Executive Council
Mr. George Jones, International Vice President, West
Mr. Grover Pankey, UP GC General Chairman
Mr. John McArthur, UP GC Assistant General Chairman
Mr. Tim DePaepe, BRS Director of Research
Mr. J.S. Lacsina

U.S. Department
of Transportation

**Federal Railroad
Administration**

1120 Vermont Ave., N.W.
Washington, D.C. 20590

JUN 29 2007

OFFICE OF
PRESIDENT
JUL 6 2007
B. OF R. S.

Mr. W. Dan Pickett
International President
Brotherhood of Railroad Signalmen
917 Shenandoah Shores Road
Front Royal, VA 22630

Dear Mr. Pickett:

Thank you for your April 26, 2007, letter on behalf of your member, Mr. Jaime Lacsina of Hayward, California. Mr. Lacsina, an Amtrak signal employee, expressed concern about allegedly being intimidated and harassed by Amtrak managers following an on-duty injury he sustained on January 19, 2007, at Amtrak West in Menlo Park, California. In your letter, you requested that the Federal Railroad Administration (FRA) investigate this concern. We have concluded our investigation of the circumstances involved in this case, and our findings are summarized below.

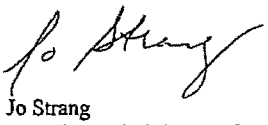
After conducting the necessary interviews and obtaining records and witness statements, it has been determined that the Amtrak supervisors you referred to in your letter were in noncompliance with Title 49 Code of Federal Regulations (CFR) Section 225.33(a)(1). The railroad failed to follow the policy statement of its Internal Control Plan by permitting or allowing an employee, supervisor, manager, or officer of the railroad to commit harassment or intimidation of any person by means of a calculated act. In this case, the supervisors committed an act designed to discourage or prevent the injured employee from reporting his personal injury.

The FRA has also determined that Amtrak is in violation of 49 CFR § 225.11 for failing to report, using Form FRA F 6180.55A, the reportable injury involving Mr. Lacsina, who had been diagnosed with a work-related cumulative trauma injury to his right hand on January 18, 2007.

We are recommending to FRA's Office of Chief Counsel that civil penalties be assessed against Amtrak for each of the two above-mentioned areas of noncompliance.

We appreciate you bringing this matter to our attention, and look forward to working with you on other safety issues of importance to you and your members.

Sincerely,



Jo Strang
Associate Administrator for Safety

John O. McArthur

From: "Jaime Lacsina" <jaime.lacsina@gmail.com>
To: "John McArthur" <jomcarthur@charter.net>
Sent: Friday, May 18, 2007 1:11 PM
Subject: Personal Report.....

Jaime S Lacsina
715 Eastwood Way
Hayward CA 94544

Jan 18 2007 – I saw a hand specialist for my hand problem. His Diagnosis work related injury due to repetitive use of the hand. He gave me an injury report form he filled up his portion and I did mine. Before he diagnosed me he questioned me about what work I do, what I have been doing the past months. I told him what I do especially during the last ten (10) months plus my job in general. After the check up, I called my **Supervisor** (Mr. Jamie Lynch) I told him I need to see him tomorrow to give him some paper from my doctor about the result of my check up. I did not tell him it is an injury because I want to tell him in person. He agreed to see me the next day.

Jan 19 2007 I met with Jamie Lynch (my supervisor) with Mr. Dough Weber (the **Safety Manager**) and on the telephone is Mr. Leo Caniezo (**Claim Department**) in Jamie Lynch office. We talk told them everything and showed them the paper from the doctor. They ask me question how I got injured. I explain to them what I have done or what work I did during our last project. They talk about what to do and took a copy of my doctor's paper and MRI result. Mr. Weber and Mr. Caniezo got a copy, Mr. Caniezo said he will send those papers to Washington DC and see what they will say. And will go from there.

Feb 06 2007 My first day to work with Right Care Day One program, a modified duty for me due to disability. I spoke to Mr. Lynch if he got some answer from Washington or from Mr. Leo Caniezo. He said no, and he said I should call Mr. Caniezo. I called Mr. Caniezo and ask him about what is going on. He said according to the people in Washington I have to fill up some form for the injury, and I ask him to tell Mr. Jamie Lynch on what need to be done, so I can do what I need to do so I can have my hand and wrist fix.

Feb 06 2007 Mr. Jamie Lynch approached me with his lap top computer. And we started filling up the form (accident report form).

Feb 07 2007 Mr. Jamie Lynch approached me about the form that we filled up the

other day (accident report form). He said Mr. Weber has a problem with the accident reporting date **Jan 18 2007**, he want the date **Nov 04 2006** the first day that I got treatment from my hand. I said to Mr. Jamie Lynch that that's not the date that the doctor diagnosed me with my injury. Mr. Jamie Lynch said it is just a date and do not worry about it. And he said so Mr. Dough Weber will take the report in (The Safety Manager). So we replace the date to their liking.

Feb 08 2007 Mr. Jamie Lynch approached me and said he want to talk to me. I said ok. So we went to this conference room when we are inside he said he want to give me a heads up because the safety manager Mr. Dough Weber want to talk to me about my injury report. He told me that they have problem about me reporting the injury. We went to Mr. Weber office (I and Mr. Jamie Lynch). Mr. Weber said they have problem about the injury claim. He said I don't Know what you've been doing in your house or some where but if you will take the injury report back we will forget about all this just like it never happen. Then he stood up towering over me and removed his company ID from his neck and throws it on top of his desk. And he started saying that if I will not take the injury claim back more likely the person who will look at my case will find me guilty and I will get fired by the company. He said they don't want that to happen to me because they look after me and my family. He also said the person who will look at my case is very good in that kind of case. He never lost a case. He also said that if I don't take it back he will write a report that's not going to be in my favor more likely because of that I will loose my case and get fired. When he is done talking I told him during our last that project from answer to him that day (I am to shaky about what just happen I need to calm down and talk to my family and my union rep.) I said CP De la Cruz to CP Franklin. The only thing that I did is work on project most of the time 12 hours a day and some times 7 days a week, doing mostly wiring control point house, signals and switches, making all this eyelet on number six solid wire at CP HOUSE to SIGNAL BOX and to SWITCHES junction box. And sometimes helping out on pulling cable because we don't have enough people to do the work and I have to stop doing my work (wiring) to help. And I never work anywhere else even at home. The only thing I did after work is rest (because I am so tired after work). He also said if I will take it back (the injury claim) the paper will never be turn in. just like nothing happen. The paper will only stay on that desk (his desk) and everything will be forgotten. And they

want an answer from me at the end of working day (Feb 08 2007). I was also told that if I don't report it I will always have a job in the company. They need a worker like me with the years of experience knowledge I have. I ask if I can get that in writing he said no. with me when I see them the next day (Feb 9 2007). I left that office really scared and confused don't know what to do. After so many minutes of trying to calm my self I called my union representative John Mc Arthur (Union vice General Chairman) and Pat Murphy (Local Chairman). Told them what just happen. During that day I was approached so many times if I what my decision going to be. End of working day I told Mr. Jamie Lynch I don't have tomorrow. Mr. John Mc Arthur also suggest to me to have my union representative

Feb 9 2007 I and Pat Murphy met with Jamie Lynch and told him we will not take it back.

Brotherhood of Railroad Signalmen

917 Shenandoah Shores Road
Front Royal, VA 22630

Phone: (540) 622-6522
Fax: (540) 622-6532

W. Dan Pickett
International President

Walt A. Barrows
International Secretary-Treasurer

April 26, 2007

Mr. Grady Cothen
Associate Administrator for Safety
Federal Railroad Administration
400 Seventh Street, SW
Washington, D.C. 20590

Re: ACC-IN Harassment-Intimidation\49CFR225.33 Amtrak 04-27-07

Dear Mr. Cothen:

Please accept this letter as a formal complaint for a violation of 49 CFR 225 RAILROAD ACCIDENTS/INCIDENTS: REPORTS CLASSIFICATION AND INVESTIGATIONS, Section 225.33 that occurred on January 19, 2007, on Amtrak West in Menlo Park, California.

Field reports indicate that on January 19, 2007, Amtrak supervisors Mr. James Lynch and Mr. Doug Weber threatened Amtrak signal employee J.S. Lacsina, in order to prevent him from reporting an on-the-job injury. Supervisors Lynch and Weber threatened Mr. Lacsina by towering over him and throwing a pencil at him, while telling him that if he reported this injury as an on-duty injury they would charge him and hold an investigation for the late reporting of an injury. After the threat was made by the Amtrak officers they gave Mr. Lacsina seven days to make a decision as to whether or not he wanted to report the injury as an on-duty injury.

Mr. Lacsina's union representative, Mr. John McArthur, called Mr. Lynch via telephone and during this conversation Mr. Lynch admitted that they had told Mr. Lacsina if he did not report the injury as on-duty "...everything would go away and he would not be cited."

49 CFR 225.33 (a)(1) *Internal Control Plans*, states that no individual shall "discourage or prevent such person from receiving proper medical treatment or from reporting such incident" relating to a personal injury. §225.33(a)(1) states as follows:

"225.33 Internal Control Plans.

(a) Each railroad shall adopt and comply with a written Internal Control Plan that shall be maintained at the office where the railroad's reporting officer conducts his or her official business. Each railroad shall amend its Internal Control Plan, as necessary, to reflect any significant changes to the railroad's internal reporting procedures. The Internal Control Plan shall be designed to

maintain absolute accuracy and shall include, at a minimum, each of the following components:

(a)(1) A policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, in absolute terms, *that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation." (Emphasis added.)*

The actions and intent of the carrier officers was clearly meant to harass and intimidate the injured employee in order to suppress the reporting of an accident or injury.

The above quoted FRA regulation was written to prevent the harassment and intimidation that occurs when management tries to coerce an employee from reporting an on-duty accident or injury.

This FRA regulation was written to prevent the harassment and intimidation that Mr. Lacsina suffered at the hands of Amtrak supervisors. Violations of regulations are seldom much clearer.

In view of the foregoing, we respectfully request that the FRA investigate this violation and advise this office of the stated disciplinary action, as provided for in 49 CFR 225.33 (a)(1) *Internal Control Plans*, that Amtrak will take against Mr. Lynch and Mr. Weber, along with the actions that the FRA will take against Amtrak for allowing this blatant violation of the current accident/incident regulations.

The BRS respectfully requests that the FRA advise this office of its findings and actions taken for the violation of the regulation. If you need further information, please contact UP Assistant General Chairman, John McArthur at his office, 775-423-228 or on his cell phone, 775-846-1794.

Sincerely,

W. Dan Pickett

W. Dan Pickett
International President

cc: Mr. George Jones, BRS International Vice President, West
Mr. Grover Pankey, BRS General Chairman, UPGC
Mr. John McArthur, BRS Assistant General Chairman, UPGC
Mr. Tim DePaepe, BRS Director of Research

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

JOHN McARTHUR
Vice General Chairman
P.O. Box 5100
Fallon, NV 89407
Office: 775-423-2288
Fax: 775-423-3717
E-mail: jomcarthur@charter.net

GROVER PANKEY
General Chairman
P.O. Box 1417
Upland, CA 91785
Office: 909-982-7777
Fax: 909-982-6767
E-mail: gp360@verizon.net

RICK BARTHOLOMEW
Asst. Vice General Chairman
2195 East Avenue
Hayward, CA 94541
Office: 510-582-9161
Fax: 510-582-9161
E-mail: brsbart@sbcglobal.net

April 3, 2007

WD Pickett
International President
917 Shenandoah Shores Rd
Front Royal VA 22630

Re: File No. UPGCW-AD-1424

Dear Sir:

This is a request of your office to ask the Federal Railroad Administration to investigate the incident documented in the attached letter for harassment on behalf of signal employee, **J. S. Lacsina, Local No. 153.**

Truly Yours,

J. O. McArthur

J. O. McArthur
Vice General Chairman

Cc: Mr. P. J. Murphy, Local Chairman-BRS
Claimant

Brotherhood of Railroad Signalmen

UNION PACIFIC GENERAL COMMITTEE

JOHN McARTHUR
Vice General Chairman
P.O. Box 5100
Fallon, NV 89407
Office: 775-423-2288
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General Chairman
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Asst. Vice General Chairman
2195 East Avenue
Hayward, CA 94541
Office: 510-582-9161
Fax: 510-582-9161
E-mail: brsbart@sbcglobal.net

April 3, 2007

Mr. E. K. Holt
Deputy Chief Engineer-C&S - Amtrak
30th Street Station, South Tower Box 41
Philadelphia PA 19104

USPS CERTIFIED MAIL 7006 0810 0005 4114 3954
Re: File No. UPGCW-AD-1424

Dear Sir:

This is an appeal for a violation of Rule 57 to the decision rendered by Mr. Patrick Gallagher in connection with discipline on behalf of signal employee, J. S. Lacsina, Case No. 057.07, herein after, referred to as Claimant.

First, the hearing was held in violation of the current CBA inasmuch as, the hearing was to be conducted February 16, 2007 at 11:00 am in the conference room at 4000 Campbell Avenue, Menlo Park, CA 94025. Claimant and his representative Mr. Pat Murphy were present and available and the Carrier had failed to notify Claimant and Mr. Murphy that the hearing had been postponed. Claimant was available and ready to proceed as instructed by Mr. Christopher D. Sheppard, the Charging Officer. The charges cannot be sustained on this alone. Mr. Gallagher failed in his responsibilities while making his decision in light of this fact.

Second, it was brought out during the hearing that on January 19, 2007 Mr. James Lynch and Mr. Doug Weber had threatened Claimant by towering over him and throwing a pencil getting in his face telling him that if he reported this injury as an on-duty injury they would charge him and take him to investigation for late reporting. After this threat was made by the Carrier's Officer's, they gave Claimant 7 days to make a decision as to whether or not he wanted to report this as on-duty related. Claimant called his Union Representative Mr. Murphy and Mr. John McArthur and conferred with them on this matter describing the conduct of Mr. Lynch and Mr. Weber. Claimant's Representatives advised Claimant that he could not let these Carrier Officers threaten and intimidate him in this matter that it is a violation of Federal Law if this was an on-duty related injury then he must report it as such.

Mr. McArthur called Mr. Lynch via the telephone and discussed their (Mr. Lynch and Mr. Weber)) behavior, and Mr. Lynch admitted they had told Claimant if he did not make this on-duty everything would go away and he would not be cited. The Organization took this matter very seriously that they (Mr. Lynch and Mr. Weber) would even entertain such a proposal than alone carry it out. Mr. Lynch claimed it was out of his hands and that it was Mr. Weber who was in charge of safety and who was responsible.

It is illogical that Mr. Lynch was a party to this and then claims he had nothing to do with it, that it was the Safety Officer.

I find this very disturbing that Mr. Gallagher knowing all of this and finding Claimant guilty of the charges while it is just as important for the Carrier Officers to be in compliance with the same Standards of Excellence overlooked the fact that is just as important to fill out the accident report and file it immediately as it is to report an injury immediately. Claimant called Mr. Lynch late on the afternoon of January 18, 2007, and asked for an appointment to meet with him first thing the following morning. It took Mr. Lynch and Mr. Weber 7 days to do their immediate responsibility waiting to see if their threat had worked.

Mr. Lynch and Mr. Weber were threatening and intimidating Claimant to be dishonest, what does the Standards of Excellence say about this? Does Amtrak condone this kind of behavior of their Carrier Officers? Mr. Lynch and Mr. Weber should be on trial not the Claimant! Their conduct is unethical and immoral and in violation of the Federal Railroad Administration Regulations.

Mr. Lynch and Mr. Weber took 7 days to take the accident report from Claimant in violation of the same standards they accused Claimant of and the Carrier looks the other way.

Obviously, the Carrier is not disciplining Claimant for violations of the Standards of Excellence; they are disciplining him for reporting the injury as on-duty related as they had threatened him they would do. They threatened Claimant telling him if he did not report it everything would go away!

The Organization is also disturbed over the fact that Mr. Lynch filled out the Accident Report and did not allow Claimant to do this without interference.

We are requesting a hearing within 15 days as described in the Agreement Rule 57 and the discipline must be suspended as a result.

For these reasons the decision must be overturned and Claimant made whole for all lost time including overtime; and any benefits lost as a result of this egregious decision.

Truly Yours,

G Pankey J.M.

G Pankey
General Chairman

Cc: Mr. J. O. McArthur, VGC-BRS
Mr. P. J. Murphy, Local Chairman-BRS
Mr. K. Perez, Representative
Claimant

Exhibit #1

National Railroad Passenger Corporation, 510 West San Fernando Street, San Jose, CA 95110

Monday, February 12, 2007

NOTICE OF FORMAL INVESTIGATION
Federal Express tracking # 7901 7898 4553
ODI# 057.07
Employee # 00032081

Mr. Jaime Lacsina
715 Eastwood Way
Hayward, CA 94544

Dear Mr. Lacsina,

You are hereby directed to appear for a formal investigation as indicated below:

Date:	Friday February 16, 2007
Time:	11:00 AM
Place:	Conference Room 4000 Campbell Avenue Menlo Park, CA 94025

The purpose of this investigation is to develop the facts and determine your responsibility, if any, in connection with:

CHARGE 1 Alleged violation of Amtrak's Standards of Excellence, Safety section, part of which reads " Immediately report to your supervisor all injuries and illnesses that occur – to you, a fellow employee or the general public – while you are performing your duties or on Amtrak property.

CHARGE 2 Alleged violation of Amtrak Safety Rules and Instructions for Maintenance of Way Employees, rule # 4000, part of which reads, "When you are injured, immediately: A. Report the injury to your immediate supervisor."

SPECIFICATION On January 19, 2007 you reported to Assistant Division Engineer – C&S James R. Lynch that you had sustained an injury as a result of events that took place on railroad property while you were on duty previous to that date. It is alleged that you failed to provide immediate notification of your injury to a supervisor as required.

You may produce any witnesses you so desire, and you may be accompanied by a representative as provided for in your current and governing agreement without expense to the National Railroad Passenger Corporation.

Any requests for postponements must be handled through the hearing office at (213) 683-6863.

Sincerely,

Christopher D. Sheppard

Christopher D. Sheppard
Charging Officer

cc: Jay Commer - General Manager PCS Amtrak
Pat Gallagher - Hearing Officer, Amtrak
Pat Murphy-Local Chairman, Brotherhood of Railroad Signalmen
John McArthur-Asst. General Chairman, Brotherhood Of Railroad Signalmen
James Lynch – witness
Doug Weber - witness

Collett
Will Check On The 22nd and
Call me back.

Exhibit #2

810 North Alameda Street, Los Angeles, California 90012

NOTICE OF POSTPONEMENT OF INVESTIGATION

February 22, 2007

RECEIVED
FEB 23 2006
J. O. McARTHUR
VGC

Case #057.07

FedEx Tracking #7990 9168 0312

Mr. Jaime S. Lacsina
715 Eastwood Way
Hayward, CA 94544

Dear Mr. Lacsina:

Reference is made to Notice of Formal Investigation dated February 12, 2007. By mutual agreement, the investigation has now been rescheduled as follows:

Date: Thursday, March 8, 2007

Time: 11:00 a.m.

Location: Amtrak
Conference Room
4000 Campbell Avenue
Menlo Park, CA 94025

Sincerely,

Patrick Gallagher

Patrick Gallagher
Hearing Officer Western Region

cc: John McArthur/BRS
James Lynch
Christopher Sheppard

Exhibit #3

810 North Alameda Street, Los Angeles, California 90012

NOTICE OF POSTPONEMENT OF INVESTIGATION

February 27, 2007

Case #057.07

FedEx Tracking #7906 8131 2926

Mr. Jaime S. Lacsina
715 Eastwood Way
Hayward, CA 94544

Dear Mr. Lacsina:

Reference is made to Notice of Formal Investigation dated February 12, 2007. By mutual agreement, the investigation has now been rescheduled as follows:

Date:	Wednesday, March 21, 2007
Time:	11:00 a.m.
Location:	Amtrak Conference Room 4000 Campbell Avenue Menlo Park, CA 94025

Sincerely,

Patrick Gallagher

Patrick Gallagher
Hearing Officer Western Region

cc: John McArthur/BRS
James Lynch
Christopher Sheppard

Exhibit #4

AMTRAK

EMPLOYEE INJURY/ILLNESS REPORT

(To be completed by the supervisor of injured person)

Fax the completed form to Central Reporting at 1-800-888-2185.

Incident Information:

1. Incident Date	Incident Time	2. Res/Cen:	3. Specific Incident location: (i.e. #6 Track etc.)
10/4/2006	14:00 ☐ AM ☒ PM	7262	CP Franklin MP 44.8

4. City:	5. State:	6. County:	7. Nearest Amtrak Station:	8. Mile Post:
Santa Clara	CA	Santa Clara	Santa Clara	MP 44.8

Injured Person Information:

9. FRA Class of Person: ☒ A= Amtrak employee on duty ☐ B= Amtrak employee not on duty

10. Injured Persons Railroad:	11. Injured Persons Division:	12. Injured Persons Department:	13. Latitude / Longitude
☐ Amtrak ☒ Commuter Agency (name) CalTrain	Pacific	☐ Corporate ☐ Mechanical ☒ Engineering ☐ Operations	

14. Last Name:	15. First Name:	16. MI:	17. Injured Persons Employee ID No.
Lacsina	Jaime	S	00032081

18. Home Address:	19. City:	20. State:	21. Zip:
715 Eastwood Wy	Hayward	CA	94544

22. Home Phone Number:	23. Date of Birth:	24. Gender	25. Rest Days	26. Work Order No:
(510) 728-8938	3/30/1952	☒ Male ☐ Female	☒ Su ☐ Mo ☐ Tu ☐ We ☐ Th ☐ Fr ☒ Sa	

27. Occupation	28. Was employee working Extra Board?	29. Employee's Tour Start Time:	30. Employee's Sched. Tour End Time:
Signal Maintainer	☐ Yes ☒ No	07:00 ☒ AM ☐ PM	15:30 ☐ AM ☒ PM

Description of Injury/Illness:

31. What task does the injured person say he/she was performing when they became injured or ill? (i.e. Cleaning Coach)
Making eyelets and rewiring signal control house.

32. How does the injured person say the injury/illness occurred? (i.e. Tripped over loose carpet)
Repetative motion of right hand and wrist.

33. What object or substance does the injured person say caused the injury/illness? (i.e. Loose carpet)
Hand held device for bending solid # 6 AWG copper wire into loop shape for placing on 1/4 inch mounting stud.

34. What injury/illness does the injured person report? (i.e. Bruised knee and sprained wrist)
Pain in right wrist and hand.

35. Train number (if applicable)	36. Locomotive/Car Number (if applicable)	37. Was a Drug/Alcohol Test Performed?
		☐ Yes ☒ No

Treating or Medical Facility/Provider:

38. Did the injured person decline first aid and/or medical treatment?	39. Was injured person taken to a Medical Facility? If so, PRINT name of accompanying supervisor:
☐ Yes ☒ No	☐ Yes ☒ No Printed Name:

40. Name of Treating or Medical Facility/Provider:	41. Telephone number of Treating or Medical Facility Provider:
Basil Besh MD, Gregory Horner MD 925-460-0454	(510) 857-1000

Point of Contact Information:

42. Empl. ID No. of person completing form:	43. Printed name of person completing form:	44. Title of person completing form:
00034786	James R. Lynch	Assistant Division Engineer - C&S

45. Phone number of person completing form:	46. Date/Time Event was Reported:	47. Date/Time form Completed:
(408) 271 - 3583	1/19/2007 11:00 ☒ AM ☐ PM	2/7/2007 11:30 ☒ AM ☐ PM

48. Supervisors Name:
James R. Lynch

NRPC 260 (12/05) Page 1

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Exhibit # 5

AMTRAK

MEDICAL INFORMATION AND CONSENT

(To be completed and signed by the injured person and the medical provider)

Fax the completed form to Central Reporting at 1-800-888-2185.

Injured Person Information:

Last Name:	First Name:	MI:	Employee ID No.:
Lacsina	Jaime	S	00032081

Address:	City:	State:	Zip:
715 Eastwood Wy	Hayward	CA	94544

Occupation:	Place of Injury/Illness:	Railroad:	Division:
Signal Maintainer	various, repetative motion	CalTrain	Pacific

Injury/Illness Date:	Incident Time:	Date of Initial Treatment:	Department:
10/4/2006	14:00 ☐ AM ☒ PM	10/4/2006	☐ Transportation ☐ Mechanical ☒ Engineering ☐ Operations ☐ Other

Release of Information/Case Consent:

I hereby authorize and direct you to release to Amtrak and its authorized representatives any and all health and medical information, including all records, reports, notes, diagnostic tests and imaging studies, and all other information relating to my medical history, diagnosis, and treatment.
This also authorizes you to communicate with Amtrak, in writing, orally, or by other means (e.g. electronically, by e-mail) in order to discuss and/or exchange information concerning my injuries, illness, condition, and treatment.
A copy of this authorization shall be as effective as the original. This authorization shall remain in full force and effect until revoked by me in writing.

Jaime Lacsina (Printed Name) on February 07, 2007 (Date)

Signature of the Injured Person: **Date: February 07, 2007**

Medical Treatment Information:

Diagnosis of Injury/Illness:

How did injury occur?

Were X-Rays Taken? If yes, Type: Results: ☐ Yes ☐ No

Was prescription Medication given at time of treatment? ☐ Yes ☐ No

Was prescription Medication Prescribed? ☐ Yes ☐ No

If yes, type: Prescription Name: Prescription Strength:

Prescription Name: Prescription Strength:

Primary Care Physician: Name: Phone Number:

Height: ft in Weight:

Did the injured person receive a closure device (i.e. sutures, stitches etc.)? If yes, Type: ☐ Yes ☐ No

Did the injured person receive an immobilization device (i.e. cast, sling, etc)? If yes, Type: ☐ Yes ☐ No

Is the injured person able to resume normal work activities immediately after treatment? ☐ Yes ☐ No

If No:

Total days of restricted activity: As of: / / Total days of lost time: As of: / /

Did the injured person lose consciousness? ☐ Yes ☐ No

Was the injured person hospitalized for treatment as an inpatient? ☐ Yes ☐ No

Describe prior Injuries/Problems to the symptomatic area:

Prior work/lifting/sports/traumatic/MVA injuries? If yes, describe: ☐ Yes ☐ No

Prior PT/Chiropractic/Orthopedic treatment? If yes, describe: ☐ Yes ☐ No

Describe the Treatment Given:

List of hobbies:

Comments:

Printed Name of Treating Facility: Phone Number of Treating Facility:

Physician's Signature: **Date: / /**

NRPC 488 (10/06)

Amtrak is a registered service mark of the National Railroad Passenger Corporation.

Ex-6

STATE OF CALIFORNIA — DOCTOR'S FIRST REPORT OF OCCUPATIONAL INJURY OR ILNNESS

Within 5 days of your initial examination, for every occupational injury or illness, sent two copies of this report to the employer's workers' compensation insurance carrier or the insured employer. Failure to file a timely doctor's report may result in assessment of a civil penalty. In the case of diagnosed or suspected pesticide poisoning, send a copy of the report to Division of Labor Statistics and Research, P.O.Box 420603, San Francisco, CA 94142-0603, and notify your local health officer by telephone within 24 hours.

1. INSURER NAME AND ADDRESS: UNITED HEALTHCARE/WC

PLEASE DONOT USE THIS COLUMN

2. EMPLOYER NAME: AMTRAK (510 WEST SANFERNANDO SANJOSE CA)

Case No.

3. Address — No. and Street: 510 WEST SANFERNANDO — City: SAN JOSE CA — Zip:

Industry

4. Nature of Business (e.g., food manufacturing, building construction, retailer of women's clothes.): RAILROAD

Country

5. PATIENT NAME (first name, middle initial, last name): JAIME SLACSINA

6. Sex: ✓ Male __ Female

7. Date of Birth: Mo. Day Yr. 3-30-52

Age: 54

8. Address — No. and Street: 715 EASTWOOD WAY — City: HAYWARD — Zip: CA 94544

9. Telephone number: (510-782-2958

Hazard

10. Occupation (Specific job title): SIGNAL MAINTAINER

11. Social Security Number: 573-49-9460

Disease

12. Injured at: No. and Street: SAN JOSE — City: CA — Country:

Hospitalization

13. Date and hour of injury or onset of illness: Mo. Day Yr. MAY — AUGUST — Hour __am __pm

14. Date last worked: Mo. Day Yr. 10-30-06 — Occupation: 9 years 6 months

15. Date and hour of first examination or treatment: Mo. Day Yr. ? — Hour __am __pm

16. Have you (or your office) previously treated patient? Y or N

Return Date/Code

Patient please complete this portion, if able to do so. Otherwise, doctor please complete immediately, inability or failure of a patient to complete this portion shall not affect his/her rights to workers' compensation under California Labor Code.

17. DESCRIBE HOW THE ACCIDENT OR EXPOSURE HAPPENED: (Give specific object, machinery or chemical. Use reverse side if more space is required)

HOUSE WIRING and twisting #6 solid wires (making eyes)

18. SUBJECTIVE COMPLAINTS (Describe fully. Use reverse side if more space is required)

pain wrist / thumb

19. OBJECTIVE FINDINGS (Use reverse side if more space is required)

A. Physical examination: (+) tend wrist / thumb

B. X-rays and laboratory results (State if non or pending.): MRI - inflammation DJD

20. DIAGNOSIS (if occupational illness specify etiologic agent and duration of exposure) Chemical or toxic compounds involved? Y or N — ICD-9 Code: 719.43

Wrist pain

21. Are your findings and diagnosis consistent with patients account of injury or onset of illness? Y or N If "no", explain.

yes

22. Is there any other current condition that will impede or delay patients recovery? Y or N If "yes", please explain.

seronegative arthropathy

23. TREATMENT RENDERED (Use reverse side if more space is required)

splint, NSAIDs

24. If further treatment required, specify treatment plan/estimated duration

wrist arthroscopy

25. If hospitalized as inpatient, give hospital name & location — Date admitted Mo. Day Yr. — Estimated stay

26. WORK STATUS- is patient able to perform usual work? Y or N

If "no", date when patient can return to: REGULAR WORK __/__/__

MODIFIED WORK 1/8/7 specify restrictions one hand work

Doctor's Signature: [signature] — CA License Number: 18582

Doctor Name and Degree (please type): BASIL R. BESH MD — IRS Number: 32-222-1135

Address: 3555 BEACON AVENUE — Telephone (510) 527-1000

Brotherhood of Locomotive Engineers & Trainmen
Division 6
Local Committee of Adjustment

October 14, 2007

The Honorable James L. Oberstar
Congressman, Eighth Congressional District
State of Minnesota
2365 Rayburn House Office Building
Washington, D.C. 20515

Subject: Harassment of Injured Railroad Employees
Union Pacific Railroad

VIA FACSIMILE

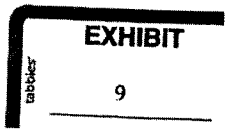
Dear Sir:

I am writing to convey our Organization's concern over the incessant harassment of injured railroad employees in this great nation of ours, in general, and on Union Pacific property, specifically. As you may already be aware, injured employees are subjected to the most egregious of sanctions, and their daily lives are adversely affected by the constant harassment, ridicule, unauthorized surveillance, and intimidation perpetrated on them by Carrier Management.

I will give you an example. On June 27, 2007, Union Pacific Locomotive Engineer S.D. Leitchliter was operating train MCPFW-26 on carrier's Mason City subdivision. At approximately 0400 hours, Mr. Leitchliter (hereafter grievant) encountered rough track at mile post 152 to mile post 153. As his southward trip from Mason City to Des Moines, Iowa progressed, he experienced pain in his back. The pain continued to worsen as the train traveled south.

Grievant operated his train to Des Moines, Iowa, where a crew van transported them from Des Moines to their home terminal of Boone, Iowa, a distance of approximately fifty (50) miles. Subsequent to his arrival at Boone, grievant contacted local Union Pacific managers and informed them of his back pain and possible injury. He then requested medical treatment, which involved an examination at the Boone County Hospital.

Sometime after he tied up his job, grievant was removed from the Carrier's service, and investigation notice TC103 dated July 3, 2007, was sent to his residence (attached). Grievant was charged with a level 5



discipline, which is permanent dismissal from the company, for allegedly putting other employees in harm's way. Carrier managers summoned to the formal hearing testified that no dangerous or rough track existed (thereby attempting to discredit grievant in a potential F.E.L.A. case) yet grievant, despite a current level 0 (no discipline) was issued a level 5 permanent dismissal verdict over the signature of Twin Cities superintendent Lance Hardisty (attached). The discipline issued was arbitrary, excessive, capricious, and despotic. It only serves to reinforce our assertions that Union Pacific employees injured on the job will be subjected to the most odious harassment. Grievant, at the time of the alleged incident, was on a level zero (0) discipline, which means he was not on carrier's discipline system. He was an excellent employee. He was or was about to start his thirtieth year on the railroad. His case is currently under appeal. It will be heard by an arbitrator who will hopefully employ wisdom and jurisprudence when rendering a decision on this case, something his employer didn't bother to do.

Mr. Leichliter's case is only a small cross section of the sordid treatment injured Union Pacific employees are subjected to. Engineer Gidget Blankman recently sustained an injury while employed by Union Pacific. A staffer at the Boone, Iowa yard office confided in her, on condition of anonymity, that she "had a target on her back for being injured". Sure enough, despite the requirement that each locomotive engineer be given a check ride for proficiency every calendar year, Engineer Blankman has been subjected to five rides by Union Pacific managers. Other sleazy practices the carrier indulges in are as follows:

1) Constant annoying phone calls by UP managers to attempt to get injured employees to reveal privileged medical information, under the guise of veiled threats.
2) Directives, in the form of certified U.S. Mail, wherein Injured employees are told comply with the most harebrained and unreasonable instructions imaginable; up to and including providing medical "updates" every ten days to two weeks, under threat of discipline.
3) Injured employees having their right to privacy compromised by privately contracted surveillance teams.
4) Disciplinary investigations, the sole purpose of which is to confuse the injured employee and bombard him/her with questions in the hope of getting them to change one word of testimony, opening the door for permanent dismissal on a trumped up dishonesty charge.
5) Subjecting injured employees to the carrier's PAL (preferred attention list) list, in order to justify increased and unwarranted scrutiny of that employee. Constant reminders to management that this violates our Collective Bargaining Agreements concerning discipline have been ignored by UP management.

Congressman Oberstar, this information needs to made part of the record of your committee, so that voting taxpayers in this great nation of ours can see how poorly employees are treated in the railroad industry.

If our Organization can be of assistance to you in getting this message out, please feel free to contact us.

Thanking you in advance for your assistance in this matter, I remain

Yours truly,

Kevin T. Christians

Kevin T. Christians
Local Chairman
BLET Division 6
Boone, Iowa

Cc: BLET Advisory Board
All Concerned

July 19, 2007

CERTIFIED MAIL NO. 7004 1350 0002 9782 99451
Return Receipt Requested

Mr. Curtis E. Craig III. 0406223
1402 SE Rio Drive
Ankeny, IA 50021-3981

CERTIFIED MAIL NO. 7004 1350 0002 9782 9937
Return Receipt Requested

Mr. Stephen D. Leichliter 0105182
PO Box 427
Boone, IA 50036-0427

DISCIPLINE NOTICE – TC103

Dear Mr. Craig and Mr. Leichliter:

You are hereby notified that after your investigation held on Thursday, July 12, 2007 at 0800 Hrs. in the Office of the MTO, 900 Story Street, Boone, IA 50036 for your alleged failure to report an unsafe condition that allegedly resulted in a personal injury while employed as crew member on MCPFW-26 at Mason City, IA near milepost 152 to 153 on the Mason City Subdivision at approximately 0400 Hrs. on June 27, 2007, **the following discipline has been applied:**

EXHIBIT # A

July 3, 2007

CERTIFIED MAIL NO. 7004 1350 0002 8782 8944
Return Receipt Requested

Mr. Curtis E. Craig III. 0408223
1402 SE Rio Drive
Ankeny, IA 50021-3981

CERTIFIED MAIL NO. 7004 1350 0002 8782 9920
Return Receipt Requested

Mr. Stephen D. Leichliter 0105182
PO Box 427
Boone, IA 50036-0427

INVESTIGATION NOTICE – TC103

Dear Mr. Craig and Mr. Leichliter:

You are hereby notified to be present in the Office of the MTO, 900 Story Street, Boone, IA 50036 on Thursday, July 12, 2007 at 0800 Hrs. for a formal investigation.

The purpose of this investigation is to develop the facts and determine responsibility, if any, when you allegedly failed to report an unsafe condition that allegedly resulted in a personal injury while employed as crew member on MCPFW-26 at Mason City, IA near milepost 152 to 153 on the Mason City Subdivision at approximately 0400 Hrs. on June 27, 2007.

The investigation will be conducted in accordance with applicable provisions of the collective bargaining agreement between the organization representing your craft or class. You are entitled to representation and witnesses as provided in the agreement.

The proposed discipline for this offense is a **Level 5**. Your current status is **Level 0** which will result under the UPGRADE discipline system as a **Level 5**.

You are being withheld from service pending the results of this investigation.

You may contact K. W. Hearrell, Sr. MTO at Mason City, IA, at 641/421-3508 and arrange a meeting to discuss the offense and discipline level.

Any request for a postponement must be submitted in writing, including reason therefore, to the charging manager K. W. Hearrell at 402/997-4221.

Bruce T. Branigan

Bruce T. Branigan, Manager
Purchasing and Administration

cc: D. Schultz, DRO – Holding Officer
K. W. Hearrell, Sr.MTO – Charging Officer
C. Crawford, MTM – Please arrange to appear as company witness
M. Kohles, MTO – Please arrange to appear as company witness
D. Huntley, MOP – Please arrange to appear as company witness
K. T. Christians, Local Chairman, BLET
J. R. Emery, Local Chairman, UTU

Twin Cities Service Unit
Union Pacific Railroad
206 Eaton Street, St. Paul, MN 55107-1603

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Risk Identifiers Based On The Following Points

Incident(s) Date	POINTS					
	Reportable Injury (excludes 9A/B)	Non-Reportable Injury (excludes 9A/B)	Reportable Human Factor Accident (excludes H312)	Non-Reportable Human Factor Accident (excludes H312)	Ops Testing Failure (excludes 600 series)	Ops Testing Failure (600 series, including 699)
0 – 12 months	40	5	30	15	20	5
13 – 36 months	25	3	15	8	13	3
37 – 60 months	10	1	5	3	7	2
60 + months	0	0	0	0	0	0

Listed below are the thresholds for each work group.

	Red	Yellow	Green
MOE	25+	6-24	0-5
MOW	28+	10-27	0-9
OTHER	11+	1-10	0
TYE	47+	24-46	0-23

EXHIBIT

10

500

UNION PACIFIC RAILROAD POLICY AND PROCEDURES FOR ENSURING RULES COMPLIANCE

Effective October 15, 1998
(Revised November 1, 2006)
PB-20861

EXHIBIT

11

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INTRODUCTION

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, shareholder value is created, and the safety of the public and our employees is our top priority.

Compliance with company rules is required to meet the commitments of Union Pacific. The intent of this policy is to provide a uniform structure to address rule and policy violations in a consistent and fair manner. This policy serves as a tool to change behavior to ensure the safe and efficient operation of the railroad and for the protection of the public, our employees, our customers and our shareholders. Certain rule violations and/or patterns of behavior may be so serious, however, that dismissal is the only option. In all cases, the policy will be used to protect the safety of the public and our employees and otherwise meet the commitments of Union Pacific.

This policy is effective *November 1, 2006* and supersedes previous company discipline policies.

DISCIPLINE POLICY - UPGRADE

Policy Guidelines:

1. All collective bargaining agreements apply.

2. When practicable, incidents involving possible rule violations, except certain Level 5 violations, should be reviewed with the Employee to determine whether sufficient cause exists **prior** to proceeding to a formal hearing or waiver offer, as appropriate.

3. Employees must be allowed the opportunity to discuss waivers of formal hearing with Union Representatives when considering whether to waive or proceed with hearing. *Reduced retention periods, according to the table on page 3, will be offered to employees who choose to waive investigations.*

4. Managers are strongly encouraged to use informal coaching with Employees when appropriate.

5. All discipline is determined using the Discipline Assessment Table and Progressive Discipline Table following procedures described herein.

6. Current Discipline Status corresponds to the most recent level of discipline assessed, begins with the date of the incident prompting the disciplinary action, and remains the status for the retention period specified below. If there is no further disciplinary action within the retention period specified, the status reverts to Level 0 for future reference.

Retention Period Table (Months)		
Level	**Waiver**	**Hearing**
2	9	12
3	12	18
4	18	24
4C	24	24

Note 1: Employees who are assessed Level 4 by virtue of a single incident will have their status reduced to Level 3 after a 6-month period from the date of the incident if there is no further disciplinary action during that period. However, **if an employee commits two Level 4/4C infractions under this policy within a 24-month period, the discipline will be assessed at Level 5.**

7. Existing policy and procedures pertaining to Rule 1.5 violations shall continue to be followed and such cases shall be considered Level 5 violations. Employees returning to service through the Employee Assistance Program (EAP) after a first offense for Rule 1.5 will revert to the discipline status in effect prior to the Rule 1.5 dismissal.

8. Corrective Action Plans, when appropriate, are required for all Employees assessed discipline at Levels 2-4C.

9. FRA Engineer Certification Requirements, with regard to suspension of certificate for certain rules infractions, are not preempted by this policy.

10. The Regional Vice President, equivalent senior manager, or their designated representative will be consulted before an Employee is charged with a Level 5 offense, other than for Rule 1.5. Dismissal for Level 5 offenses, except for Rule 1.5, will be only with the concurrence of the Vice President or equivalent.

11. Except when totally exonerated, an employee returned to service from Level 5 dismissal (for other than Rule 1.5) as the result of an arbitration award, will be returned at the employee's previous status level or a status Level 3, whichever is greater. The retention period begins with the date of return to active service.

DISCIPLINE ALTERNATIVES

Conferencing, counseling, coaching and education are effective tools for rules compliance. Informal Coaching or Formal Conferencing may be used at the discretion of the manager. Managers will be accountable for the fair and consistent application of the Discipline Policy.

INFORMAL COACHING

Employees may be provided informal coaching without being formally charged with a rule violation. The intent of informal coaching is to assist an employee in changing behaviors that are not in compliance with company rules and/or policies. Informal coaching is not documented.

FORMAL COACHING (Level 1 Violations)

Employees charged with Level 1 infractions will be coached without being formally charged with a rule violation. Employees will be allowed up to two coaching sessions for Level 1 violations within a six month period. A third Level 1 violation within a six month period will result in violation of Rule 1.13, a Level 2 violation. The formal coaching session(s) will be documented and entered into the employee's record. No new discipline level is established for the first two violations within a six month period.

FORMAL CONFERENCING: (Level 2 Violations)

Employees charged with Level 2 infractions may be offered the opportunity to divert from the normal discipline process to a Corrective Action Plan consisting of formal conferencing, counseling, and/or education as outlined below. When formal conferencing is utilized, no new discipline level is established.

Guidelines for Formal Conferencing.

1. For formal conference, the employee may arrange for union representation and the supervisor will meet with the employee's union representative and the employee to discuss appropriate rules application and provide suitable assistance/education.

2. Formal conferencing will be conducted while the employee is under pay.

3. The formal conferencing session will be documented on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record the rule(s) discussed and the date of the incident. The formal conference agreement will also be noted in the Employee's electronic discipline record.

4. The formal conference will consist of the following:
   - Discussion of the reason for conference.
   - A review of related or associated rules/policies regarding incident.
   - Discussion on how the incident could have been prevented.
   - Q & A and discussion by conference participants.
   - Review and completion of the Conference Form – including signatures.

TRAINING / EDUCATION (Level 3 and 4 violations)

For Level 3 and 4 violations, employees may be offered education in lieu of discipline by the Superintendent (or equivalent) or his/her representative.

The agreement on a formal education session will be recorded on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record a date of occurrence and the corresponding discipline level for retention purposes only. The formal education agreement will also be noted in the employee's electronic discipline record.

Note: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

Training / Education for FRA De-Certifiable Events

For events that resulted in the revocation of their 49 CFR Part 240 certification for 30 days or less, employees may be offered the opportunity to receive remedial training and to qualify for a reduced certificate revocation period as permitted by 49 CFR part 240.117(h)(5). All train crew members charged with responsibility for a decertifiable event, as defined by 49 CFR Part 240, except rules identified as 4C such as failure to stop for a signal when required or occupying Main track without authority, will serve a minimum of a 15-day suspension.

DISCIPLINE MONITORING PROCESS

I. Labor or management may request a quarterly review of the discipline process at the Superintendent or Regional Vice president level.

II. To ensure that the discipline policy is meeting its stated goals and likewise being fairly administered, Senior Management will conduct semi-annual reviews of the administration and effectiveness of the discipline policy as part of the overall safety and rules compliance effort. Upon request, labor representatives from the labor / management Culture & Discipline committee may participate in this review. Measures reviewed will include the number of discipline cases, including conferencing and training in lieu of formal discipline, personal injuries, human-factor caused accidents, 4-C violations, and any other similar measures deemed to provide insight into policy effectiveness.

Discipline Assessment Table

Introduction — Use the chart below to determine the appropriate discipline level for any rule infraction, and to find the level of discipline called for.

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	**Level ?**	**Discipline**
General Code of Operating Rules - Chapter 1.0 General Responsibilities - Chapter 3.0 Standard Time - Chapter 4.0 Timetables - Chapter 5.0 Signals & Their Use **UPRR Safety Rules (Ch. 70-83)**	**1**	**Employee coaching session. If more than two Level 1 violations occur in six month period, the employee will be charged with violation of Rule 1.13, a Level-2 rule.**
General Code of Operating Rules - Rule 1.1.4 Condition of Tools & Equipment - Rule 1.2.5 Reporting - Rule 1.6.1 M.V. Driving Records - Rule 1.6.2 – Notification of Felony Convictions - Rule 1.6.3 – Notification of Deteriorating Vision or Hearing - Rule 1.9 Respect of Railroad Co. - Rule 1.11 Sleeping - Rule 1.13 Comply with Instructions - Rule 1.15 Duty – Reporting or Absence (No Show) - Rule 1.33 Inspection of Freight Cars - Rule 5.4 – 5.5 Flags and Signs (Placement) - Rule 5.6 Unattended Fusee - Rule 5.9 – 5.9.5 Headlight Display - Rule 5.10 – 5.10.2 Markers - Chapter 2.0 Railroad Radio Rules - Chapter 6.0 Movement of Trains and Engines - Chapter 7.0 Switching - Chapter 8.0 Switches **Train Dispatcher Rules (Ch. 20-26)** **Air Brake and Train Handling Rules (Ch. 30-34)** **Hazardous Materials Instructions (Form 8620)** **Maintenance of Way Rules (Ch. 40-57)** - Rules 1.3.1 & 1.3.3 (Chief Engrs. Inst; Proc. Manual & Stnds.; Signal Dept. FRA Insp, & Mtce. Inst.; Book of Standards.) **Timetable and Special Instructions**	**2**	**Up to one day or one round trip alternative assignment with pay to develop a Corrective Action Plan to modify behavior.** **Pay will be in accordance with Employee Involvement Guidelines.**

See footnotes on page 10

Discipline Assessment Table

Violation of these rules*	Results in..... Level ^	Discipline
General Code of Operating Rules - Rule 1.47 Duties of Crew Members - Rule 2.13 (Radio) in Place of Hand Signals - Rule 2.6 Comm. Not Understood - Rule 5.3.3 Signal Disappearance - Rule 5.3.7 Radio Response - Rule 5.8.1 Ringing Engine Bell - Rule 5.8.2 Sounding Whistle - Rule 6.4 Reverse Movements - Rule 6.13 Yard Limits - Rule 6.14 Restricted Limits - Rule 6.16 Approaching Railroad Crossings - Rule 6.19 Flag Protection - Rule 6.23 Emergency Stop or Severe Slack Action - Rule 6.29 Inspecting Trains - Rule 7.1 Switching Safely and Efficiently - Rule 7.5 Testing Hand Brakes - Rule 7.6 Securing Cars or Engines - Rule 8.2 Position of Switches - Rule 8.3 Main Track Switches - Rule 8.12 Crossover Switches - Rule 8.15 Switches Run Through - Rule 8.20 Derail Location and Placement - Chapter 9.0 Block System Rules - Chapter 10.0 Rules App. Only in CTC - Chapter 11.0 Rules App. Only in ACS/ATS - Chapter 12.0 Rules App. Only in ATS - Chapter 13.0 Rules App. Only in ACS - Chapter 14.0 Rules App. Only within TWC - Chapter 15.0 Track Bulletin Rules - Chapter 16.0 Rules App. Only in DTC - Chapter 17.0 Rules App. Only in ATC **Air Brake and Train Handling Rules** - Rule 32.1 Securing Equipment **UPRR Safety Rules** - Rule 74.8 Seat Belts - Rule 78.8 Electrical Power Supply Turned Off - Rule 78.10 L.O.T.O. Electrical Power **Cardinal Safety Rules,** as designated by the employing department, will be Level 3 unless listed by specific rule number at a higher level. Employees are responsible for all Cardinal Safety Rules which may apply to the nature of the work being performed. **Maintenance of Way Rules** - Chapter 42 On-Track Operations - Rule 56.1.2 Testing for Quality **Chief Engineer's Bulletins** - CE Bulletin 135.3.2 L.O.T.O. for Roadway Machines and Work Equipment - CE Bulletin 136 On-Track Safety **Engineering Track Mntce Field Handbook** - Chapter 4.5.1 through 4.5.6 Rail and Joints - Chapter 4.15.1 through 4.15.8 Rail and Joints - Chapter 6.3 through 6.3.11 R of W and Other Facilities - Chapter 7.5 through 7.8.7 Track Buckling Prevention Guidelines	3	**<u>Five days</u> off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	**Level ^**	**Discipline**
F.R.A. Regulations (Part 213 Track Safety Standards) **System Special Instructions** - Item 8 Descending Grade Operations - Item 10B Remote Control Operations - Item 10K Main Track Switches in Non-Signaled Terr.	3	**Five days off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**
General Code of Operating Rules - Rule 1.23.1 Tampering with Safety Devices - Rule 5.4-5.5 Flags & Signs (Speed & Stopping Requirements) - Rule 5.12 Protection of Occ. Outfit Cars - Rule 5.13 Blue Signal Protection of Workers - Rule 5.14 Signs Protecting Equipment - Rule 6.2 Initiating Movement - Rule 6.3 Main Track Authorization - Rule 6.5.1 Remote Control Movements - Rule 6.7 Remote Control Zone - Rule 6.25 Movement Against Curr. Of Traffic - Rule 6.27 Movement at Restricted Speed - Rule 6.28 Movement Other than Main Track (except Subrules 1, 2, 3) - Rule 6.31 Max. Authorized Speed (when exceeds auth. speed by 10 mph or ½ auth. speed, whichever is less) - Rule 9.15 Track Permits - Rule 14.1 Authority to Enter TWC Territory - Rule 15.1 Track Bulletins - Rule 15.3 Auth. Movement Against Current of Traffic **Air Brake and Train Handling Rules** - Rule 30.10 Initial Terminal Brake Test - Rule 30.11 Transfer Train Movements Test - Rule 30.12 1000 Mile Test - Rule 30.15 Application and Release Test **Maintenance of Way Rules** - Rule 42.3 Main Track Authority - Rule 42.4 Track and Time - Rule 42.4.2 Using Track and Time Authority - Rule 42.5 Use of Yard Limits - Rule 42.7 RR Crossings at Grade - Rule 42.13 Lineups - Rule 42.15 Flag Protection - Rule 42.16 Foul Time - Rule 43.10 Protecting Against Passing Equip. - Rule 44.2 Excavation - Rule 56.1.3 Compromising Signal Safety **UPRR Safety Rules** - Rule 78.7 Boom Near Overhead Power Lines **Chief Engineer's Bulletins** - C.E. Bulletin 121 Protection for Gangs from Trains on Adjacent Tracks - C.E. Bulletin 122.3.1 Bridge Worker Safety - C.E. Bulletin 136.4 – 136.5 On Track Safety **Timetable and Special Instructions** - Rules 9.2.15, 9.2.18, 9.2.22 - Item 10-B.A.1 – Operators Manual and Equipment - Item 10-B.B.B.1 – Linked and Tested - Item 10-B.C.(1-4) – Operating the Equipment	4	**Level 4: Thirty days off work without pay or up to five days training without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table

Violation of these rules*	Results in..... Level ^	Discipline
General Code of Operating Rules - Rule 1.47 Failure to Maintain Conductors Log (Missing Multiple Entries) - Rule 6.3 Main Track Authorization (Resulting in FRA Decertification Event) - Rule 6.27 Restricted Speed (Resulting in FRA Decertification Event) - Rule 6.5 Handling Cars ahead of Engine (Unprotected Shove) - Rule 7.6 and 32.1, 32.1.1, 32.1.2, 32.1.3 Securing Cars or Engines (Resulting in Uncontrolled Movements) - Rule 8.3 Switch Left in Other than Normal Position in Non Signaled Territory - Rule 9.5 Where Stop Must be Made (except Rule 9.5.5) (Resulting in FRA Decertification Event) - Rule 15.2 Protection by Track Bulletin Form B.	4C	**180 days off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.** **If EQMS score is 950 or greater, 120 days off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.**
General Code of Operating Rules - Rule 1.5 Drugs and Alcohol (Rule "G") - Rule 1.12 Weapons - Rule 1.6 Conduct Employees must not be: 1. Careless of Safety 2. Negligent 3. Insubordinate 4. Dishonest 5. Immoral 6. Quarrelsome (excludes 1.6.1) - Rule 1.7 Altercation - Felony Conviction; Fraud; or Theft - EEO Policy Infractions*** - Overstaying Leave of Absence Without Authority - Workplace Violence Policy Infractions~~	5	**Permanent dismissal**

* Where Chapter Numbers are shown, all Rules within Chapter(s) are Violation Level indicated EXCEPT FOR: Specific Rules which may be listed by rule number at a different level. Where rule numbers are shown, it includes Sub-Rules unless specified otherwise. Rules include any modification to rule through General Order, M of W General Order, SALERT, Timetable Special Instruction, or change of rule number.

^ Any rule violation which results in $150,000 property damage will receive the next higher level discipline except when a level 4 status results from a one time occurrence or for 4C rule violations

*** A lesser Level of Discipline may be issued in some EEO cases when consistent with EEO Policy Application and when recommended be the Director-EEO.

~~ A lessor Level of Discipline may be issued in some cases pursuant to review and recommendation of the Workplace Violence Committee.

GLOSSARY

The following definitions, while not all inclusive or absolute, are intended to guide the determination of whether various acts by employees meet necessary criteria to be considered a violation of applicable Level 5 Rules.

ALTERCATION: When an employee's actions cause or result in a vehement quarrel characterized by physical activity such as pushing, shoving or fighting.

CARELESS OF SAFETY: When an employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidenced by repeated safety rules infractions. When a specific rule(s) infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public.

DISHONEST: When an employee's actions or statements constitute lying, cheating or deception.

FELONY CONVICTION: The conduct of an employee leading to the conviction of a felony in state or federal court is prohibited. Guilty pleas, diversion programs, deferred decisions or adjudication, and other alternative sentencing or adjudication procedures, regardless of local nomenclature, are considered convictions under this policy.

FRAUD: When an employee's actions or statements are intentional misrepresentations of fact for the purpose of deceiving others so as to secure unfair or unlawful gain.

IMMORAL: When an employee's actions are contrary to commonly accepted moral principles.

INSUBORDINATION: When an employee's actions or statements indicate a refusal (as opposed to a failure for cause) to carry out the instructions of a supervisor which are work, safety or policy related and which conform to accepted Company and industry practice, or when an employee demonstrates gross disrespect towards a supervisor. NOTE: Any failure to comply with Union Pacific's Drug and Alcohol Policy will be considered insubordination.

NEGLIGENT: An employee demonstrates negligence when his or her behaviors/actions cause, or contribute to, the harm or risk of harm to the employee, other employees, the general public or company property.

QUARRELSOME: When an employee's continued behavior is inclined or disposed toward an angry verbal confrontation with others in the workplace.

THEFT: When an employee's action is intended to and/or results in the taking and/or removing of property or other items of value from the Company, its customers, or other employees without proper authority.

PROGRESSIVE DISCIPLINE TABLE

Introduction

Determining the correct level of discipline to be assessed for a current rules infraction requires use of the Progressive Discipline Table. Accurate use of the Progressive Discipline Table requires knowledge of the Current Discipline Level, the Level of the Infraction, and the Discipline Assessment Table.

Progressive Discipline Table

If the Alleged Violation Level is..	And	
1	If less than two Level-1 coaching sessions in the last six months, hold coaching session.	
	If two Level-1 coaching sessions have been held in the last six months, Rule 1.13 applies. (Go to Level-2 section of table.)	
If the Alleged Violation Level is..	And the Current Discipline Status is..	Then the Discipline Level to assess is..
2	0	2
	2	3
	3	4
	4	5*
	4C	5*
3	0	3
	2	3
	3	4
	4	5
	4C	5
4	0	4
	2	4
	3	4
	4	5
	4C	5
4C	0	4C
	2	4C
	3	4C
	4	5
	4C	5

* If the employee's discipline status is Level 4 or 4C due to a single violation and the current violation is Level 2, the discipline will again be assessed at Level 4 and will no longer be considered as being due to a single violation.

NOTE: If an employee commits three repetitions of the same rule infraction during a 36 month period (excluding missed calls and tardiness) the discipline will be assessed at Level 5 – Permanent Dismissal.

GUIDE TO DETERMINING DISCIPLINE LEVEL

Step 1 – Determine the primary (highest level) alleged rule violation.

Step 2 – Complete the Discipline Calculation Worksheet as follows:

a. Specify the rule(s) violation(s) in Section One.

b. Check or list the applicable rule(s) or policy publications in Section One.

c. Determine the level of alleged rule infraction by reviewing the Discipline Assessment Table. Locate the Discipline Level corresponding to the primary rule and complete Section Two.

d. Obtain the Employee's current discipline status (level):

- For Level 2 through 4C violations, review the PeopleSoft Discipline History for the previous 24 months.

- Apply the Discipline Level Retention Periods from the Policy Guidelines found in the retention table (retention period changes if employee waived a hearing) to the most recent entry in the discipline record to determine whether the status reflected remains in effect for current consideration.

e. Utilizing the Progressive Discipline Table and the information from Sections Two and Three, complete Section Four-A.

f. Determine whether the infraction resulted in property damage greater than $150,000 requiring the next higher level of discipline. Complete Section Four-B. **This is the Level of Discipline required for the infraction.**

DISCIPLINE CALCULATION WORKSHEET

FORM 20063

DISCIPLINE CALCULATION WORKSHEET			TODAY'S DATE FILE NUMBER
Last Name	First Name / MI		Emp ID#
Job Title	Hire Date	Dept / Svc Unit	Work Location / Gang

SECTION ONE

EVENT DESCRIPTION, LOCATION AND DATE:

_____

_____

_____

Event described indicates possible violation of Rule(s)

_____

_____

_____

Found in the following Union Pacific Railroad publication(s):
Check the appropriate box:

- ☐ Union Pacific Rules
- ☐ Timetable
- ☐ Other: (specify)

SECTION TWO

Under the Discipline Assessment Table, violation of the rule(s) listed in Section One requires a minimum discipline of:
LEVEL

SECTION THREE

Disciplinary action within the past 24 months for which retention period has not expired (Rule and description)

RULE	DESCRIPTION OF VIOLATION	LEVEL	DATE

This equates to a Current Discipline Status of: LEVEL

SECTION FOUR

A. Using the Progressive Discipline Table, a current violation of the rule(s) cited in Section One plus the Current Discipline Status requires the assessment of: LEVEL_____

B. The incident ___ Did ___Did Not have results requiring assessment of the next higher level of discipline per the footnote to the Discipline Assessment Table. Therefore, **the required discipline is:** LEVEL_____.

LEVEL 1 COACHING SESSION FORM

FORM 20064

Date:_____ Employee Name:_____

Emp. ID:_____ Manager Name:_____

Manager Title:_____

Description of Event:_____

_____

_____

_____

_____

_____

Rules(s) Discussed:_____

_____

_____

_____

_____

Previous Level 1 coaching session(s) in last six months: _____

_____

Comments:_____

_____

_____

_____

NOTE: This form is to be used for Level 1 coaching events. The third level 1 violation in a six month period will result in a disciplinary charge of violating Rule 1.13 – Complying with Instructions.

FORMAL CONFERENCING / TRAINING

FORM 20065

Date:_____ Name:_____

Employee ID:_____ Check One:
__ Conference (L 2)
__ Training (L 3 / 4)

Mr. / Ms. _____

This is to confirm our conference on _____, 20_____, at _____ AM / PM at _____ (location) in connection with events described below:

Description of Event: _____

_____

_____

_____

Rule(s) Discussed: _____

_____

_____

___ I agree to have a conference. ___ I agree to Training.

___ I decline to have a conference. ___ I decline Training

_____ _____
Employee Signature Manager's Signature

_____
Title

Comments:_____

_____

_____

_____

NOTE: This letter is NOT a form of discipline and will not be used in any subsequent disciplinary proceedings as evidence the employee previously allegedly violated the rules cited.

NOTE: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

NOTES:

UNION PACIFIC RAILROAD POLICY AND PROCEDURES FOR ENSURING RULES COMPLIANCE

Effective October 15, 1998
(Revised November 1, 2006)
PB-20861

EXHIBIT
tabbies
11

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- Discipline Calculation Worksheet ..... A
- Level 1 Coaching Form Formal ..... B
- Conferencing / Training Form C

INTRODUCTION

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, shareholder value is created, and the safety of the public and our employees is our top priority.

Compliance with company rules is required to meet the commitments of Union Pacific. The intent of this policy is to provide a uniform structure to address rule and policy violations in a consistent and fair manner. This policy serves as a tool to change behavior to ensure the safe and efficient operation of the railroad and for the protection of the public, our employees, our customers and our shareholders. Certain rule violations and/or patterns of behavior may be so serious, however, that dismissal is the only option. In all cases, the policy will be used to protect the safety of the public and our employees and otherwise meet the commitments of Union Pacific.

This policy is effective *November 1, 2006* and supersedes previous company discipline policies.

DISCIPLINE POLICY - UPGRADE

Policy Guidelines:

1. All collective bargaining agreements apply.

2. When practicable, incidents involving possible rule violations, except certain Level 5 violations, should be reviewed with the Employee to determine whether sufficient cause exists **prior** to proceeding to a formal hearing or waiver offer, as appropriate.

3. Employees must be allowed the opportunity to discuss waivers of formal hearing with Union Representatives when considering whether to waive or proceed with hearing. *Reduced retention periods, according to the table on page 3, will be offered to employees who choose to waive investigations.*

4. Managers are strongly encouraged to use informal coaching with Employees when appropriate.

5. All discipline is determined using the Discipline Assessment Table and Progressive Discipline Table following procedures described herein.

6. Current Discipline Status corresponds to the most recent level of discipline assessed, begins with the date of the incident prompting the disciplinary action, and remains the status for the retention period specified below. If there is no further disciplinary action within the retention period specified, the status reverts to Level 0 for future reference.

Retention Period Table (Months)		
Level	**Waiver**	**Hearing**
2	9	12
3	12	18
4	18	24
4C	24	24

Note 1: Employees who are assessed Level 4 by virtue of a single incident will have their status reduced to Level 3 after a 6-month period from the date of the incident if there is no further disciplinary action during that period. However, **if an employee commits two Level 4/4C infractions under this policy within a 24-month period, the discipline will be assessed at Level 5.**

7. Existing policy and procedures pertaining to Rule 1.5 violations shall continue to be followed and such cases shall be considered Level 5 violations. Employees returning to service through the Employee Assistance Program (EAP) after a first offense for Rule 1.5 will revert to the discipline status in effect prior to the Rule 1.5 dismissal.

8. Corrective Action Plans, when appropriate, are required for all Employees assessed discipline at Levels 2-4C.

9. FRA Engineer Certification Requirements, with regard to suspension of certificate for certain rules infractions, are not preempted by this policy.

10. The Regional Vice President, equivalent senior manager, or their designated representative will be consulted before an Employee is charged with a Level 5 offense, other than for Rule 1.5. Dismissal for Level 5 offenses, except for Rule 1.5, will be only with the concurrence of the Vice President or equivalent.

11. Except when totally exonerated, an employee returned to service from Level 5 dismissal (for other than Rule 1.5) as the result of an arbitration award, will be returned at the employee's previous status level or a status Level 3, whichever is greater. The retention period begins with the date of return to active service.

DISCIPLINE ALTERNATIVES

Conferencing, counseling, coaching and education are effective tools for rules compliance. Informal Coaching or Formal Conferencing may be used at the discretion of the manager. Managers will be accountable for the fair and consistent application of the Discipline Policy.

INFORMAL COACHING

Employees may be provided informal coaching without being formally charged with a rule violation. The intent of informal coaching is to assist an employee in changing behaviors that are not in compliance with company rules and/or policies. Informal coaching is not documented.

FORMAL COACHING (Level 1 Violations)

Employees charged with Level 1 infractions will be coached without being formally charged with a rule violation. Employees will be allowed up to two coaching sessions for Level 1 violations within a six month period. A third Level 1 violation within a six month period will result in violation of Rule 1.13, a Level 2 violation. The formal coaching session(s) will be documented and entered into the employee's record. No new discipline level is established for the first two violations within a six month period.

FORMAL CONFERENCING: (Level 2 Violations)

Employees charged with Level 2 infractions may be offered the opportunity to divert from the normal discipline process to a Corrective Action Plan consisting of formal conferencing, counseling, and/or education as outlined below. When formal conferencing is utilized, no new discipline level is established.

Guidelines for Formal Conferencing.

1. For formal conference, the employee may arrange for union representation and the supervisor will meet with the employee's union representative and the employee to discuss appropriate rules application and provide suitable assistance/education.

2. Formal conferencing will be conducted while the employee is under pay.

3. The formal conferencing session will be documented on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record the rule(s) discussed and the date of the incident. The formal conference agreement will also be noted in the Employee's electronic discipline record.

4. The formal conference will consist of the following:
   - Discussion of the reason for conference.
   - A review of related or associated rules/policies regarding incident.
   - Discussion on how the incident could have been prevented.
   - Q & A and discussion by conference participants.
   - Review and completion of the Conference Form – including signatures.

TRAINING / EDUCATION (Level 3 and 4 violations)

For Level 3 and 4 violations, employees may be offered education in lieu of discipline by the Superintendent (or equivalent) or his/her representative.

The agreement on a formal education session will be recorded on a form signed by the employee and a copy will be placed in the employee's personal record file. The form will record a date of occurrence and the corresponding discipline level for retention purposes only. The formal education agreement will also be noted in the employee's electronic discipline record.

Note: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

Training / Education for FRA De-Certifiable Events

For events that resulted in the revocation of their 49 CFR Part 240 certification for 30 days or less, employees may be offered the opportunity to receive remedial training and to qualify for a reduced certificate revocation period as permitted by 49 CFR part 240.117(h)(5). All train crew members charged with responsibility for a decertifiable event, as defined by 49 CFR Part 240, except rules identified as 4C such as failure to stop for a signal when required or occupying Main track without authority, will serve a minimum of a 15-day suspension.

DISCIPLINE MONITORING PROCESS

I. Labor or management may request a quarterly review of the discipline process at the Superintendent or Regional Vice president level.

II. To ensure that the discipline policy is meeting its stated goals and likewise being fairly administered, Senior Management will conduct semi-annual reviews of the administration and effectiveness of the discipline policy as part of the overall safety and rules compliance effort. Upon request, labor representatives from the labor / management Culture & Discipline committee may participate in this review. Measures reviewed will include the number of discipline cases, including conferencing and training in lieu of formal discipline, personal injuries, human-factor caused accidents, 4-C violations, and any other similar measures deemed to provide insight into policy effectiveness.

Discipline Assessment Table

Introduction — Use the chart below to determine the appropriate discipline level for any rule infraction, and to find the level of discipline called for.

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	**Level ***	**Discipline**
General Code of Operating Rules - Chapter 1.0 General Responsibilities - Chapter 3.0 Standard Time - Chapter 4.0 Timetables - Chapter 5.0 Signals & Their Use **UPRR Safety Rules (Ch. 70-83)**	1	**Employee coaching session. If more than two Level 1 violations occur in six month period, the employee will be charged with violation of Rule 1.13, a Level-2 rule.**
General Code of Operating Rules - Rule 1.1.4 Condition of Tools & Equipment - Rule 1.2.5 Reporting - Rule 1.6.1 M.V. Driving Records - Rule 1.6.2 - Notification of Felony Convictions - Rule 1.6.3 – Notification of Deteriorating Vision or Hearing - Rule 1.9 Respect of Railroad Co. - Rule 1.11 Sleeping - Rule 1.13 Comply with Instructions - Rule 1.15 Duty – Reporting or Absence (No Show) - Rule 1.33 Inspection of Freight Cars - Rule 5.4 – 5.5 Flags and Signs (Placement) - Rule 5.6 Unattended Fusee - Rule 5.9 – 5.9.5 Headlight Display - Rule 5.10 – 5.10.2 Markers - Chapter 2.0 Railroad Radio Rules - Chapter 6.0 Movement of Trains and Engines - Chapter 7.0 Switching - Chapter 8.0 Switches **Train Dispatcher Rules (Ch. 20-26)** **Air Brake and Train Handling Rules (Ch. 30-34)** **Hazardous Materials Instructions (Form 8620)** **Maintenance of Way Rules (Ch. 40-57)** - Rules 1.3.1 & 1.3.3 (Chief Engrs. Inst; Proc. Manual & Stnds.; Signal Dept. FRA Insp, & Mtce. Inst.; Book of Standards.) **Timetable and Special Instructions**	2	**Up to one day or one round trip alternative assignment with pay to develop a Corrective Action Plan to modify behavior.** **Pay will be in accordance with Employee Involvement Guidelines.**

See footnotes on page 10

Discipline Assessment Table		
	Results in.....	
Violation of these rules*	**Level ^**	**Discipline**
General Code of Operating Rules - Rule 1.47 Duties of Crew Members - Rule 2.13 (Radio) in Place of Hand Signals - Rule 2.6 Comm. Not Understood - Rule 5.3.3 Signal Disappearance - Rule 5.3.7 Radio Response - Rule 5.8.1 Ringing Engine Bell - Rule 5.8.2 Sounding Whistle - Rule 6.4 Reverse Movements - Rule 6.13 Yard Limits - Rule 6.14 Restricted Limits - Rule 6.16 Approaching Railroad Crossings - Rule 6.19 Flag Protection - Rule 6.23 Emergency Stop or Severe Slack Action - Rule 6.29 Inspecting Trains - Rule 7.1 Switching Safely and Efficiently - Rule 7.5 Testing Hand Brakes - Rule 7.6 Securing Cars or Engines - Rule 8.2 Position of Switches - Rule 8.3 Main Track Switches - Rule 8.12 Crossover Switches - Rule 8.15 Switches Run Through - Rule 8.20 Derail Location and Placement - Chapter 9.0 Block System Rules - Chapter 10.0 Rules App. Only in CTC - Chapter 11.0 Rules App. Only in ACS/ATS - Chapter 12.0 Rules App. Only in ATS - Chapter 13.0 Rules App. Only in ACS - Chapter 14.0 Rules App. Only within TWC - Chapter 15.0 Track Bulletin Rules - Chapter 16.0 Rules App. Only in DTC - Chapter 17.0 Rules App. Only in ATC **Air Brake and Train Handling Rules** - Rule 32.1 Securing Equipment **UPRR Safety Rules** - Rule 74.8 Seat Belts - Rule 78.8 Electrical Power Supply Turned Off - Rule 78.10 L.O.T.O. Electrical Power **Cardinal Safety Rules,** as designated by the employing department, will be Level 3 unless listed by specific rule number at a higher level. Employees are responsible for all Cardinal Safety Rules which may apply to the nature of the work being performed **Maintenance of Way Rules** - Chapter 42 On-Track Operations - Rule 56.1.2 Testing for Quality **Chief Engineer's Bulletins** - CE Bulletin 135.3.2 L.O.T.O. for Roadway Machines and Work Equipment - CE Bulletin 136 On-Track Safety **Engineering Track Mntce Field Handbook** - Chapter 4.5.1 through 4.5.6 Rail and Joints - Chapter 4.15.1 through 4.15.8 Rail and Joints - Chapter 6.3 through 6.3.11 R. of W and Other Facilities - Chaprer 7.5 through 7.8.7 Track Buckling Prevention Guidelines	3	**<u>Five days</u> off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table

Violation of these rules*	Results in.... Level ^	Discipline
F.R.A. Regulations (Part 213 Track Safety Standards) **System Special Instructions** - Item 8 Descending Grade Operations - Item 10B Remote Control Operations - Item 10K Main Track Switches in Non-Signaled Terr.	3	**Five days off work without pay or up to one day training without pay. A Corrective Action Plan must be developed upon return to work.**
General Code of Operating Rules - Rule 1.23.1 Tampering with Safety Devices - Rule 5.4-5.5 Flags & Signs (Speed & Stopping Requirements) - Rule 5.12 Protection of Occ. Outfit Cars - Rule 5.13 Blue Signal Protection of Workers - Rule 5.14 Signs Protecting Equipment - Rule 6.2 Initiating Movement - Rule 6.3 Main Track Authorization - Rule 6.5.1 Remote Control Movements - Rule 6.7 Remote Control Zone - Rule 6.25 Movement Against Curr. Of Traffic - Rule 6.27 Movement at Restricted Speed - Rule 6.28 Movement Other than Main Track (except Subrules 1, 2, 3) - Rule 6.31 Max. Authorized Speed (when exceeds auth speed by 10 mph or ½ auth. speed, whichever is less) - Rule 9.15 Track Permits - Rule 14.1 Authority to Enter TWC Territory - Rule 15.1 Track Bulletins - Rule 15.3 Auth. Movement Against Current of Traffic **Air Brake and Train Handling Rules** - Rule 30.10 Initial Terminal Brake Test - Rule 30.11 Transfer Train Movements Test - Rule 30.12 1000 Mile Test - Rule 30.15 Application and Release Test **Maintenance of Way Rules** - Rule 42.3 Main Track Authority - Rule 42.4 Track and Time - Rule 42.4.2 Using Track and Time Authority - Rule 42.5 Use of Yard Limits - Rule 42.7 RR Crossings at Grade - Rule 42.13 Lineups - Rule 42.15 Flag Protection - Rule 42.16 Foul Time - Rule 43.10 Protecting Against Passing Equip. - Rule 44.2 Excavation - Rule 56.1.3 Compromising Signal Safety **UPRR Safety Rules** - Rule 78.7 Boom Near Overhead Power Lines **Chief Engineer's Bulletins** - C.E. Bulletin 121 Protection for Gangs from Trains on Adjacent Tracks - C.E. Bulletin 122.3.1 Bridge Worker Safety - C.E. Bulletin 136.4 – 136.5 On Track Safety **Timetable and Special Instructions** - Rules 9.2.15, 9.2.18, 9.2.22 - Item 10-B.A.1 – Operators Manual and Equipment - Item 10-B.B.B.1 – Linked and Tested - Item 10-B.C.(1-4) – Operating the Equipment	4	**Level 4: Thirty days off work without pay or up to five days training without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed upon return to work.**

See footnotes on page 10

Discipline Assessment Table

Violation of these rules*	Results in..... Level ^	Discipline
General Code of Operating Rules - Rule 1.47 Failure to Maintain Conductors Log (Missing Multiple Entries) - Rule 6.3 Main Track Authorization (Resulting in FRA Decertification Event) - Rule 6.27 Restricted Speed (Resulting in FRA Decertification Event) - Rule 6.5 Handling Cars ahead of Engine (Unprotected Shove) - Rule 7.6 and 32.1, 32.1.1, 32.1.2, 32.1.3 Securing Cars or Engines (Resulting in Uncontrolled Movements) - Rule 8.3 Switch Left in Other than Normal Position in Non Signaled Territory - Rule 9.5 Where Stop Must be Made (except Rule 9.5.5) (Resulting in FRA Decertification Event) - Rule 15.2 Protection by Track Bulletin Form B.	4C	**<u>180 days</u> off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.** **If EQMS score is 950 or greater, <u>120 days</u> off work without pay and must pass necessary operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed which will include remedial training upon return to work.**
General Code of Operating Rules - Rule 1.5 Drugs and Alcohol (Rule "G") - Rule 1.12 Weapons - Rule 1.6 Conduct. Employees must not be: 1. Careless of Safety 2. Negligent 3. Insubordinate 4. Dishonest 5. Immoral 6. Quarrelsome (excludes 1.6.1) - Rule 1.7 Altercation - Felony Conviction; Fraud; or Theft - EEO Policy Infractions*** - Overstaying Leave of Absence Without Authority - Workplace Violence Policy Infractions^^	5	**Permanent dismissal**

* Where Chapter Numbers are shown, all Rules within Chapter(s) are Violation Level indicated EXCEPT FOR: Specific Rules which may be listed by rule number at a different level. Where rule numbers are shown, it includes Sub-Rules unless specified otherwise. Rules include any modification to rule through General Order, M of W General Order, SALERT, Timetable Special Instruction, or change of rule number.

^ Any rule violation which results in $150,000 property damage will receive the next higher level discipline except when a level 4 status results from a one time occurrence or for 4C rule violations.

*** A lesser Level of Discipline may be issued in some EEO cases when consistent with EEO Policy Application and when recommended be the Director-EEO

^^ A lessor Level of Discipline may be issued in some cases pursuant to review and recommendation of the Workplace Violence Committee.

GLOSSARY

The following definitions, while not all inclusive or absolute, are intended to guide the determination of whether various acts by employees meet necessary criteria to be considered a violation of applicable Level 5 Rules.

ALTERCATION: When an employee's actions cause or result in a vehement quarrel characterized by physical activity such as pushing, shoving or fighting.

CARELESS OF SAFETY: When an employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidenced by repeated safety rules infractions. When a specific rule(s) infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public.

DISHONEST: When an employee's actions or statements constitute lying, cheating or deception.

FELONY CONVICTION: The conduct of an employee leading to the conviction of a felony in state or federal court is prohibited. Guilty pleas, diversion programs, deferred decisions or adjudication, and other alternative sentencing or adjudication procedures, regardless of local nomenclature, are considered convictions under this policy.

FRAUD: When an employee's actions or statements are intentional misrepresentations of fact for the purpose of deceiving others so as to secure unfair or unlawful gain.

IMMORAL: When an employee's actions are contrary to commonly accepted moral principles.

INSUBORDINATION: When an employee's actions or statements indicate a refusal (as opposed to a failure for cause) to carry out the instructions of a supervisor which are work, safety or policy related and which conform to accepted Company and industry practice, or when an employee demonstrates gross disrespect towards a supervisor. NOTE: Any failure to comply with Union Pacific's Drug and Alcohol Policy will be considered insubordination.

NEGLIGENT: An employee demonstrates negligence when his or her behaviors/actions cause, or contribute to, the harm or risk of harm to the employee, other employees, the general public or company property.

QUARRELSOME: When an employee's continued behavior is inclined or disposed toward an angry verbal confrontation with others in the workplace.

THEFT: When an employee's action is intended to and/or results in the taking and/or removing of property or other items of value from the Company, its customers, or other employees without proper authority.

PROGRESSIVE DISCIPLINE TABLE

Introduction — Determining the correct level of discipline to be assessed for a current rules infraction requires use of the Progressive Discipline Table. Accurate use of the Progressive Discipline Table requires knowledge of the Current Discipline Level, the Level of the Infraction, and the Discipline Assessment Table.

Progressive Discipline Table

If the Alleged Violation Level is..	And	
1	If less than two Level-1 coaching sessions in the last six months, hold coaching session.	
	If two Level-1 coaching sessions have been held in the last six months, Rule 1.13 applies. (Go to Level-2 section of table.)	
If the Alleged Violation Level is..	And the Current Discipline Status is..	Then the Discipline Level to assess is..
2	0	2
	2	3
	3	4
	4	5*
	4C	5*
3	0	3
	2	3
	3	4
	4	5
	4C	5
4	0	4
	2	4
	3	4
	4	5
	4C	5
4C	0	4C
	2	4C
	3	4C
	4	5
	4C	5

* If the employee's discipline status is Level 4 or 4C due to a single violation and the current violation is Level 2, the discipline will again be assessed at Level 4 and will no longer be considered as being due to a single violation.

NOTE If an employee commits three repetitions of the same rule infraction during a 36 month period (excluding missed calls and tardiness) the discipline will be assessed at Level 5 – Permanent Dismissal.

GUIDE TO DETERMINING DISCIPLINE LEVEL

Step 1 – Determine the primary (highest level) alleged rule violation.

Step 2 – Complete the Discipline Calculation Worksheet as follows:

a. Specify the rule(s) violation(s) in Section One.

b. Check or list the applicable rule(s) or policy publications in Section One.

c. Determine the level of alleged rule infraction by reviewing the Discipline Assessment Table. Locate the Discipline Level corresponding to the primary rule and complete Section Two.

d. Obtain the Employee's current discipline status (level):

- For Level 2 through 4C violations, review the PeopleSoft Discipline History for the previous 24 months.

- Apply the Discipline Level Retention Periods from the Policy Guidelines found in the retention table (retention period changes if employee waived a hearing) to the most recent entry in the discipline record to determine whether the status reflected remains in effect for current consideration.

e. Utilizing the Progressive Discipline Table and the information from Sections Two and Three, complete Section Four-A.

f. Determine whether the infraction resulted in property damage greater than $150,000 requiring the next higher level of discipline. Complete Section Four-B. **This is the Level of Discipline required for the infraction.**

DISCIPLINE CALCULATION WORKSHEET

FORM 20063

DISCIPLINE CALCULATION WORKSHEET			TODAY'S DATE FILE NUMBER
Last Name	First Name / MI		Emp ID#
Job Title	Hire Date	Dept / Svc Unit	Work Location / Gang

SECTION ONE

EVENT DESCRIPTION, LOCATION AND DATE:

_____

_____

_____

Event described indicates possible violation of Rule(s)

_____

_____

_____

Found in the following Union Pacific Railroad publication(s):
Check the appropriate box:

- ☐ Union Pacific Rules
- ☐ Timetable
- ☐ Other: (specify)

SECTION TWO

Under the Discipline Assessment Table, violation of the rule(s) listed in Section One requires a minimum discipline of:
LEVEL

SECTION THREE

Disciplinary action within the past 24 months for which retention period has not expired (Rule and description)

RULE	DESCRIPTION OF VIOLATION	LEVEL	DATE

This equates to a Current Discipline Status of: LEVEL

SECTION FOUR

A. Using the Progressive Discipline Table, a current violation of the rule(s) cited in Section One plus the Current Discipline Status requires the assessment of: LEVEL_____

B. The incident ___ Did ___Did Not have results requiring assessment of the next higher level of discipline per the footnote to the Discipline Assessment Table. Therefore, **the required discipline is:** LEVEL_____.

LEVEL 1 COACHING SESSION FORM

FORM 20064

Date:_____ Employee Name:_____

Emp. ID:_____ Manager Name:_____

Manager Title:_____

Description of Event:_____

_____

_____

_____

_____

_____

Rules(s) Discussed:_____

_____

_____

_____

_____

Previous Level 1 coaching session(s) in last six months: _____

_____

Comments:_____

_____

_____

_____

NOTE: This form is to be used for Level 1 coaching events. The third level 1 violation in a six month period will result in a disciplinary charge of violating Rule 1.13 – Complying with Instructions.

FORMAL CONFERENCING / TRAINING

FORM 20065

Date:_____ Name:_____

Employee ID:_____ Check One:
__ Conference (L 2)
__ Training (L 3 / 4)

Mr. / Ms. _____

This is to confirm our conference on _____, 20_____, at _____ AM / PM at _____ in connection with
(location)
events described below:

Description of Event: _____

_____

_____

_____

Rule(s) Discussed: _____

_____

_____

___ I agree to have a conference. ___ I agree to Training.

___ I decline to have a conference. ___ I decline Training

_____ _____
Employee Signature Manager's Signature

_____
Title

Comments:_____

_____

_____

_____

NOTE: This letter is NOT a form of discipline and will not be used in any subsequent disciplinary proceedings as evidence the employee previously allegedly violated the rules cited.

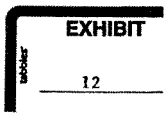
NOTE: The Discipline Policy will recognize a Level 4 disciplinary diversion event as a Level 4 violation for the purpose of assessing discipline in the event that the employee is determined to be responsible for committing a subsequent Level 4 violation within 24 months following the date of the first Level 4 occurrence.

NOTES:

1 IN THE DISTRICT COURT OF DOUGLAS
COUNTY, NEBRASKA
2

COPY

3 FRANK C. TANNER,)
4 Plaintiff,)
5 vs.) DOC. 1065 NO. 130
6 UNION PACIFIC RAILROAD)
COMPANY,)
7)
Defendant.)
8
9
10 Taken in Conference Room 101
Of the Hampton Inn
11 200 Platte Oasis Parkway
North Platte, Nebraska
12 April 3, 2007
8:05 o'clock a.m.
13
14
15
16 DEPOSITION OF CAMERON ALLAN SCOTT
17 TAKEN ON BEHALF OF THE PLAINTIFF
18
19
20
21
22 APPEARANCES:
23 PAGE 2
24
25



1

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

FRANK C. TANNER,)
)
Plaintiff,)
)
vs.) DOC. 1065 NO. 130
)
UNION PACIFIC RAILROAD)
COMPANY,))
)
Defendant.)

Taken in Conference Room 101
Of the Hampton Inn
200 Platte Oasis Parkway
North Platte, Nebraska
April 3, 2007
8:05 o'clock a.m.

DEPOSITION OF CAMERON ALLAN SCOTT

TAKEN ON BEHALF OF THE PLAINTIFF

APPEARANCES:

PAGE 2

2

APPEARANCES

LOUIS E. JUNGBAUER, ESQ., Yaeger, Jungbauer & Barczak, Attorneys at Law, 745 Kasota Avenue, Minneapolis Minnesota 55414, appearing for the Plaintiff.

DAVID J. SCHMITT, ESQ., Lamson, Dugan and Murray, Attorneys at Law, 10306 Regency Parkway Drive, Omaha, Nebraska 68114, appearing for the Defendant.

RAYMOND J. HASIAK, JR., ESQ., Attorney at Law, Union Pacific Corporation, 1400 Douglas, Suite 1580, Omaha, Nebraska 68179-1580, appearing for UNION PACIFIC RAILROAD.

MR. SORAN also appearing.

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STIPULATION

It is stipulated and agreed by and between the parties hereto by their respective counsel of record that the oral deposition of CAMERON ALLAN SCOTT may be taken commencing at 8:05 a.m. on April 3, 2007, in Conference Room 101 of the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska.

It is stipulated that all objections may be reserved until the time of trial, except objections relating to the form and foundation of the question.

It is stipulated and agreed that the deposition may be transcribed outside the presence of the witness.

5

1 (At 8:05 a.m. on April 3, 2007, in
2 Conference Room 101 of the Hampton Inn, 200
3 Platte Oasis Parkway, North Platte, Nebraska, the
4 following proceedings were had:)
5 CAMERON ALLAN SCOTT
6 Having been first duly sworn to tell the
truth, the whole truth, and nothing but
7 the truth, testified as follows:
8 DIRECT EXAMINATION
9 BY MR. JUNGBAUER:
10 Q. Good morning, Mr. Scott, again, I am Lou
11 Jungbauer, we had a chance briefly to say hello
12 already, I am one of the attorneys who is
13 representing Frank Tanner who is with us here
14 today. I also have Dan Soran, S-O-R-A-N, Dan is
15 a field representative with our firm out of
16 Cheyenne. I need to cover some background
17 information, Mr. Scott, and so please bear with
18 me.
19 Would you state your full name and spell
20 your last name, please?
21 A. Cameron Allan Scott, S-C-O-T-T.
22 Q. And have you given a deposition before?
23 A. Yes.
24 Q. How many times?
25 A. I can't remember.

6

1 Q. 5, 10, 20?
2 A. Probably pretty close to 10.
3 Q. And generally speaking, were those
4 depositions given in situations like this in
5 relationship to your working with the Union
6 Pacific?
7 A. Yes.
8 Q. Okay, and generally speaking, those would be
9 you, as a Manager, may have had some role or
10 oversight in relation to the case?
11 A. Yes.
12 Q. Okay, did you review any documents before
13 coming in today, either today or in the past?
14 A. Just the various letters of correspondence
15 that we sent to Mr. Tanner.
16 Q. Okay, and in addition to the correspondence,
17 anything else...
18 A. No.
19 Q. ...such as a copy of the transcript of the
20 formal investigation?
21 A. No.
22 Q. Okay, Mr. Scott, I will try to wait to ask
23 my next question before or I will try to wait
24 until you are done with your answer before I ask
25 my next question, it also helps Billy if you can

7

1 do the same.
2 Let's take a time-out, morning, Mary.
3 (A discussion off-the-record
4 was held.)
5 Q. (By Mr. Jungbauer) Let's go back on the
6 record then. And you have had a chance to visit
7 with Mr. Schmitt to prepare for today's
8 deposition?
9 A. Yes.
10 Q. Okay, do you know Mr. Tanner?
11 A. Yes.
12 Q. And would that be because he worked for you
13 here in North Platte?
14 A. Yes.
15 Q. Okay, that's good, it helps as opposed to
16 um-hum's and hum-um's.
17 Mr. Scott, I need to get some background
18 information again, I am not trying to be nasty,
19 what's your date of birth, please?
20 A. 1962, June 12.
21 Q. And where did you grow up?
22 A. Philadelphia, Pennsylvania, and Cleveland,
23 Ohio.
24 Q. Okay, how far did you get in school?
25 A. M.B.A. at the University of Texas.

8

1 Q. When was that?
2 A. 1990.
3 Q. Any other degrees, graduate degrees?
4 A. No.
5 Q. Okay, can you briefly summarize for me what
6 full-time employment you had before you hired out
7 with UP, please?
8 A. I worked for American Hospital Supply as a
9 sales representative, and Freightliner Trucking,
10 a corporation of Portland, Oregon, for about two
11 years.
12 Q. Okay, what did you do with Freightliner
13 company?
14 A. I was just a time inventory coordinator for
15 three different plants in Portland, Oregon.
16 Q. When did you hire out with Union Pacific?
17 A. 1991.
18 Q. A couple of embarrassing questions, I don't
19 mean it to be personal, have you ever been fired?
20 A. No.
21 Q. And have you ever been arrested?
22 A. No.
23 Q. Have you worked for any other railroads?
24 A. No.
25 Q. Trace for me from 1991, the past what, 16

9

1 years, what your professional career with UP has
2 been from when you started to now, this isn't a
3 test, I want to get a general overview of your
4 professional career, please?
5 A. Okay, from 1991 to 1992, two years in
6 Seattle, Washington, as an SYO Supervisor of Yard
7 Operations. 1993, Green River, Wyoming, as an
8 MYO. 1994 to 1995, MTO Salt Lake City. 1996,
9 1997, Corridor Manager at Harriman Center.
10 Q. And what would your territory have been that
11 you were Corridor Manager for?
12 A. Missouri Valley to Chicago.
13 Q. Okay, please continue?
14 A. 1998, Marketing Representative, intramural
15 marketing.
16 Q. Would that be based out of Omaha?
17 A. Um-hum.
18 Q. Okay, please say yes?
19 A. Yes.
20 Q. I am sorry, I do that all the time, please
21 continue?
22 A. What year did I stop?
23 Q. '98 marketing in Omaha?
24 A. 1999, Director of Operation Support for the
25 Northern Region.

10

1 Q. You just said a couple of sentences, what is
2 that, what did you do?
3 A. Just about everything that the RVP and the
4 AVP did not want to do.
5 Q. Fair enough, please continue?
6 A. 2000, DTS on the Denver service unit.
7 Q. And help me, what is DTS?
8 A. Director of Transportation Services.
9 Q. And what does the Director of Transportation
10 Services do?
11 A. I was the Assistant Superintendent.
12 Q. Okay.
13 A. Responsible for all of the transportation
14 plans on the division.
15 Q. Okay, we are at 2000 DTS, continue from
16 there, please?
17 A. 2001 through 2004, Superintendent Salt Lake
18 City.
19 Q. Okay.
20 A. About six months in continuous improvement,
21 General Director of Continuous Improvement in
22 Omaha.
23 Q. And what does that mean?
24 A. You are working on various projects for the
25 company, the one that I was assigned to involved

11

1 the Canadian Pacific.
2 Q. Okay, please continue?
3 A. In 2000, November of 2004, really 2005,
4 North Platte General Superintendent.
5 Q. You say General Superintendent, is there a
6 difference between superintendent and general
7 superintendent?
8 A. Basically every general superintendent has a
9 hump area.
10 Q. Okay, thank you. So in July of 2006, and
11 that's when this, Frank's incident happened, you
12 were the General Superintendent in North Platte?
13 A. Right.
14 Q. And a couple of questions occurred to me,
15 what are the duties of a general superintendent
16 here in North Platte?
17 A. Our service unit spans from Cheyenne to
18 Grand Island, and Gillette to Marysville, so all
19 activities in that area fall under the general
20 superintendent.
21 Q. And what would be the title of the person
22 that you reported to back in July of 2006?
23 A. RVP.
24 Q. Okay, and RVP is?
25 A. Regional vice-president.

12

1 MR. JUNGBAUER: Let's go off of the
2 record for a minute.
3 (A discussion off-the-record
4 was held.)
5 Q. (By Mr. Jungbauer) Let's go back on the
6 record.
7 Would it be fair to say, Mr. Scott, that in
8 your 16 year career you have not been – you have
9 not worked as either a switchman or an RCO or an
10 operator?
11 A. That is an accurate statement.
12 Q. Okay, I want to talk a little bit about
13 safety on the railroad, on this side of the
14 fence, Mr. Scott, I have been doing this quite a
15 while now, and I have often times heard that
16 safety is number 1 on the Union Pacific, would
17 you agree with that?
18 A. Yes.
19 Q. Would you agree that safety is more
20 important than profits?
21 A. We have a number of values inside our
22 company, and one of them is shareholder return,
23 and safety, and efficiency, so I don't know when
24 you are talking about the overall scope of the
25 company that either one is clearly a number 1,

13

1 they are all important. Although when you get
2 down to the local level and you get away from the
3 corporate environment, safety to us, no matter
4 how much profits you generate, if we end up
5 losing one of our fellow employees, it tends to
6 overshadow everything.
7 Q. And would you agree that the rules that
8 govern the day-to-day working of the, for
9 example, the switchman, they are essentially
10 based on common sense?
11 MR. SCHMITT: Object to the form,
12 but go ahead.
13 THE WITNESS: Not always.
14 Q. (By Mr. Jungbauer) I don't follow, give me
15 an example where a rule wouldn't be based on
16 common sense?
17 A. I don't know that I could point out a
18 specific example for you. But often our rules,
19 particularly with somebody coming from outside
20 this industry might defy some common sense, but
21 there is some good reasons why those rules exist.
22 Q. And this isn't a rules exam, and I am not
23 going to do any kind of a rules exam with you
24 today. Would you agree with me that if that
25 person on the outside gets involved though and

14

1 sits down and learns the reasons for those rules,
2 again it comes back to common sense to try to
3 help promote a safe environment?
4 A. We have a hard time in this part of the
5 country trying to acclimate, particularly new
6 hires coming to the railroad because they are
7 raised on what you just said, common sense, and a
8 can do spirit and attitude, let's get the job
9 done. I didn't realize how deeply embedded that
10 was until I started dealing with brothers,
11 fathers, uncles from the same family, and you
12 really get to know that family and they are
13 ranchers. They bring that outlook and common
14 sense and can do attitude and approach to the
15 railroad and they often struggle. You almost
16 have to shake some of that common sense and that
17 family upbringing out of them for them to be
18 successful on the railroad. Common sense does
19 not always play into a successful outcome on the
20 railroad.
21 Q. That's fascinating, are you able to give me
22 an example of a circumstance where -- that's a
23 bad question, I will start over.
24 I can understand where the can do, let's get
25 it done, and I will do it on my own, damn it, no

15

1 matter what attitude could be very dangerous for
2 a worker as well as the co-workers, is that the
3 type of point you are trying to make there?
4 A. I am not sure what type of point I am trying
5 to make except for in this part of the country
6 where North Platte exists there is a very
7 admirable upbringing with people, and when you
8 are a young person, young lady or man, it doesn't
9 matter, and you have spent your time, your life
10 with your folks at just getting the job done, and
11 doing whatever it takes to get the job done.
12 Q. I have got you.
13 A. When you bring that approach down to the
14 railroad, it often collides with the rule book.
15 So you take that common sense, can do spirit and
16 collide it up against the very thick and often
17 complicated rule book that we have, those people
18 tend to struggle at times, not all of them. But
19 we try to tell a lot of the new people that we
20 are bringing on board to really slow down and
21 think your way through things. Don't go to where
22 you have been raised, which is just get it done,
23 more than likely you will end up in a situation
24 that you will end up regretting.
25 Q. Okay, what's your rule as a General

16

1 Superintendent in helping to enforce the
2 railroad's rules?
3 A. We have about eight different directors that
4 really run the railroad, they all report up to
5 the general superintendent, and it is my rule to
6 hold them accountable to develop good dependable
7 safety programs and policies to make the railroad
8 run efficiently and safely. So in a general
9 sense, I hold all of the directors accountable
10 for their individual safety programs, and
11 they are all a little bit different.
12 Q. I want to turn my focus more to formal
13 investigations and your experience with them.
14 When I use the phrase "formal investigation", Mr.
15 Scott, I am referring to a situation such as in
16 Mr. Tanner's case where there is an investigation
17 held at the railroad, there is a railroad manager
18 that is the hearing officer, another manager will
19 be the charging officer, the worker being
20 examined or workers being examined have the righ
21 to have union representatives there with them, so
22 is that okay when I make reference to formal
23 investigation, that that's what I am referring
24 to, is that okay?
25 A. Yes.

17

1 Q. Tell me what your role is in formal
2 investigations, please, if any?
3 A. At the very end, at the very beginning and
4 at the very end is, typically where the
5 superintendent's role gets involved in
6 investigations. Everything that happens in the
7 middle we stay separated from, because at the end
8 of the day we have to read through the
9 transcripts and make a decision on the outcome
10 one way or the other.
11 Q. What is your role at the beginning?
12 A. Only if there is a very serious or traumatic
13 event do we get involved in something in the
14 initial phase to determine what type of
15 discipline could be assessed, what level of
16 discipline could be assessed. For your vast
17 majority of your accidents tend to be very small
18 or minor in nature. I really don't get involved
19 at all in those initial starts and determining
20 what level, that's pretty much determined right
21 out of the gate by the managers involved.
22 Q. Okay, if there is a personal injury claim
23 involved, by "claim", I mean if a worker turns in
24 an injury form, do you get involved as far as the
25 determination, should there be a formal

18

1 investigation and, if so, what should the rules
2 be that are being involved?
3 A. For the most part, not always, but a very
4 high percentage of the time if there is a
5 personal injury involved, there is an
6 investigation, that's just a standard policy, at
7 least in our division, and it really takes a lot
8 of the burden off of any of the directors or
9 myself to get involved in all of those scenarios.
10 The management teams knows what's expected and
11 they just go to the rule book and pick out the
12 appropriate rules for whatever the scenario is.
13 Q. I want to make sure I have got that clear.
14 Whenever there is an on-duty personal injury form
15 turned in by a worker, there most of the time
16 will be a formal investigation?
17 A. It is really dependent upon the scenario,
18 but I would say at least in the last three years
19 of being in North Platte, at least since we have
20 all been together, that probably at least 90
21 percent of the time that's an accurate statement.
22 Q. Okay, who is it and, again, if it's yourself
23 great, if it's a title, I am looking more for
24 title than names right now, but who is it that
25 established that generally speaking there will be

19

1 a formal investigation when a worker turns in an
2 accident report?
3 A. The directors on each department or district
4 really are the folks that will follow through to
5 make sure that an investigation is set. If it
6 involves a unique scenario, then they will call
7 me and ask for my opinion.
8 Q. So without using names, what do you mean by
9 unique scenario?
10 A. If you have a situation, I will just use an
11 example, a safety applies riding on the side of a
12 boxcar and safety applies.
13 Q. Sure?
14 A. An employee falls to the ground, I don't
15 know that there is anything that that particular
16 employee, transportation-wise could have done to
17 prevent that. An engineer goes back to check a
18 unit and struggles, in fact, he has been
19 instructed by Mr. Goodwrench to do so at the
20 Harriman Center, he goes back and opens up the
21 case and that particular moment the engine
22 fatally flaws, blows up, spraying the engineer
23 with hot oil, what could the engineer have done
24 to prevent that, very, very little. There are
25 some scenarios where you look at a circumstance

20

1 and say, you know, that particular engineer had
2 safety glasses, in fact, the safety glasses
3 probably saved his life.
4 Q. Sure, sure.
5 A. From burns, what was it that the engineer
6 could have done differently, probably nothing.
7 Q. But who is it that established the overall
8 policy though, if you are aware, here in your,
9 what is the service unit, is that the proper
10 term?
11 A. Yes.
12 Q. In your service unit, Mr. Scott, who is it
13 that determines that, the majority of the time,
14 unless it is a unique situation like you just
15 described that there will be a formal
16 investigation?
17 A. That overall policy is set by the
18 superintendent.
19 Q. Okay, and so that's your policy?
20 A. Yes.
21 Q. Okay, what's your -- what are the purposes
22 -- bad question.
23 What are your goals to have, as to why you
24 have a formal investigation the majority of the
25 time?

21

1 A. The overall idea of having a full formal
2 investigation is maybe you end up learning
3 something at the end of the day that needs to be
4 changed. Either our safety program, maybe a rule
5 that needs to be altered, that's the overriding
6 idea behind having an investigation.
7 Unfortunately it doesn't always turn out that
8 way, sometimes an investigation turns out to be a
9 pretty rough affair.
10 Q. Is one of the purposes of a formal
11 investigation to determine whether any railroad
12 employees did something or failed to do something
13 that could violate rules?
14 A. That is often an outcome as well.
15 Q. In the example you have used of a worker
16 hanging on the side of a boxcar, and say the
17 stirrup breaks or whatever, is the investigation
18 supposed to go into just the occurrence of the
19 grab iron not working properly or the like or
20 does the investigation then trigger a further
21 investigation such as, was the carman supposed to
22 have examined that grab iron and the like?
23 A. When we would have something, and I will
24 just go back to the engineer and the engine
25 blowing up. When we have that type of a scenario

22

1 and you have your initial conversation between
2 the manager and the employee, if everything was
3 done that the employee could possibly do, and
4 truly they just happen to be at the wrong place
5 at the wrong time.
6 Q. Sure.
7 A. Then there is literally no reason that I can
8 see to have an investigation with that particular
9 employee. A follow-up with the mechanical
10 department or maybe it was a signal malfunction
11 or whatever malfunction it is happens
12 automatically, but it may not take an
13 investigation type format.
14 Q. Okay, who would decide, when I say "who",
15 would it be a director or yourself that would
16 decide whether there should be a follow-up or
17 secondary investigation into, for example,
18 mechanical forces, signal forces or the like?
19 A. That would fall to myself.
20 Q. Okay.
21 A. With a carman, for example, we have a derail
22 and we have an employee coming into our run
23 through yard, and the employee gets one wheel
24 over the derail, should the employees have
25 stopped short of anything, perhaps if they are in

23

1 that type of track? The root cause is that
2 carman forgot to take that derail down that
3 caused the derailment. So we have had several
4 instances where you would have an investigation
5 on the train crew, and you would also look at the
6 car department.
7 Q. What type of training do you give your
8 managers to help prepare them to conduct an
9 investigation such as in this case, a Mr. Yetter,
10 Y-E-T-T-E-R, conducted the investigation in Mr.
11 Tanner's situation, what kind of training do they
12 get?
13 A. We have a training program that teaches
14 managers how to hold an investigation, and you
15 are not qualified to do so until you have been
16 through that class.
17 Q. Okay.
18 A. Often times it is done yearly if not
19 bi-yearly, so most managers have been through a
20 couple of different classes to try and prepare
21 for an investigation.
22 Q. Do you know if there is any manual or
23 booklet that they can take with them, the
24 managers, after the class and use as a guidebook
25 like we lawyers will use various rule books and

24

1 the like?
2 A. Um-hum.
3 Q. Do your managers have anything in writing
4 that they can take back to their office?
5 A. Not that I have seen, but when I went
6 through investigation training I kept the book
7 that we used during our scenarios that we put
8 together to learn how to hold investigations.
9 Q. Do you know what the title of the book is?
10 A. No, I don't.
11 Q. Okay, afterwards, Mr. Scott, I am going to
12 send a note to Dave and ask him to ask you to
13 look for it, if Dave asks you to look for that
14 book, would you do that?
15 A. Sure.
16 Q. Do you know if there is any legal training
17 such as how to recognize specific questions given
18 to the managers?
19 A. None that I am aware of.
20 Q. Okay, and I ask because in Mr. Tanner's
21 investigation I note where -- well first, let me
22 ask, you have had a chance to read the
23 investigation?
24 A. Yes.
25 Q. When would be the last time that you

25

1 actually had a chance to look at it?
2 A. I would have to check to see when we
3 actually sent a letter to Frank of the outcome of
4 the investigation.
5 MR. JUNGBAUER: Off of the record.
6 (A discussion off-the-record
7 was held.)
8 Q. (By Mr. Jungbauer) Back on the record.
9 While we were off the record, Frank
10 mentioned he believes it was August 10th, so with
11 that August 10th, when would you have looked
12 at the transcript last?
13 A. Prior to August 10th, the first week of
14 August.
15 Q. Okay. In the transcript I note where Mr.
16 Yetter objects to the hearing officer, objects to
17 a statement being made on the ground it is
18 hearsay, and a couple of other times he objects
19 because comments or questions call for
20 speculation, and I am curious as to whether the
21 managers are taught the basic rules of evidence
22 because a lot of lawyers with 25 years of
23 experience, and I am not looking in a mirror
24 right now, but I may not be up to date on what
25 is hearsay and what isn't. That comment being

26

1 made, what training, if any, does UP give its
2 managers to be able to rule on what is admissable
3 and what isn't?
4 A. None that I am aware of.
5 Q. Would you agree with me, Mr. Scott, that the
6 manager who is the hearing officer should be
7 trying to conduct a complete, thorough and fair
8 investigation?
9 A. Yes.
10 Q. What's your understanding as to whether the
11 hearing that the manager conducting the hearing,
12 is he or she supposed to be neutral in the sense
13 that there is no judgment having been made yet on
14 the guilt or innocence of the worker?
15 A. They should be neutral, and we also,
16 particularly in level 4, level 5 type scenarios,
17 the more potential heavy discipline, to bring
18 somebody in that may be outside of that
19 particular department.
20 Q. And why would that be?
21 A. Just to bring somebody in that's a little
22 bit outside of the emotions involved in the
23 particular incident.
24 Q. And what's Mr. Yetter's department?
25 A. He is on the road territory between North

27

1 Platte and Marysville and Omaha, so he is not
2 connected to terminal operations.
3 Q. As a general rule, would you agree that the
4 hearing officer shouldn't be testifying as to
5 facts in a hearing?
6 A. Yes.
7 Q. Let's talk briefly about the charging
8 officer, what role does the charging officer
9 play?
10 A. Are you referring to the individual that
11 actually sends the potential charges to -- I
12 would have to actually go through the documents
13 and refresh my memory as to who was actually the
14 charging officer.
15 Q. I believe it was a Mr. Walker?
16 A. Yeah.
17 Q. Yeah, it is Mr. Walker.
18 A. Tim Walker would be the person literally
19 going through the rule book and picking out the
20 associated rules that could have impacted the
21 potential accident.
22 Q. Okay, one of the concerns, and I am going to
23 try to -- some of the comments I make, Mr. Scott,
24 I am going to try to give you a little bit of
25 background, I don't want to waste your time today

28

1 going through this in any more detail than I have
2 to, so I am going to give you a little bit of
3 background, my spin or interpretation of what it
4 is. But in this particular case one of the
5 issues was and this, again, is my understanding,
6 no specific rule was ever identified to either
7 Mr. Tanner or Mr. Barkley as to what specifically
8 they did or didn't do that was wrong, do you
9 recall there not being any specific rule charged
10 prior to the investigation?
11 MR. SCHMITT: I object to the form,
12 foundation, I think it mischaracterizes the
13 evidence. Also I think that the scope of Mr.
14 Scott's deposition here today was to be
15 questioning him about his involvement with the
16 investigation and his, you know, personal
17 knowledge rather than going beyond and talking
18 about all sorts of general principles and
19 theories, etcetera. I mean it has been going on
20 for a while, I allowed it to continue, but I
21 believe that we are beyond the scope of why we
22 agreed to produce Mr. Scott here today
23 voluntarily. Again, it is my understanding we
24 were going to simply be talking about his
25 involvement, etcetera. I think that the

29

1 characterization of charges, what the evidence
2 was or was not is beyond the scope of what our
3 agreement was here today, so I guess I would ask
4 what your intent is at this point?
5 MR. JUNGBAUER: Sure.
6 MR. SCHMITT: And where you are
7 intending to go with this?
8 MR. JUNGBAUER: That's fair, I
9 respectfully disagree, and what I am trying to
10 do, Dave, is summarize and get through it much
11 quicker rather than go through it step by step, I
12 don't want to waste all of the folks who are here
13 time.
14 Do you recall reading in the transcript that
15 at least Mr. Tanner's representative was saying
16 there aren't any rules, but what I am hoping to
17 do is to tell Cameron, I don't remember seeing
18 that there was any specific charge done. And
19 secondly, as far as the scope of the deposition,
20 I think I am still clearly within the grounds of
21 trying to get admissible evidence.
22 Let's go off of the record for a just
23 second.
24 MR. SCHMITT: Sure.
25 (A discussion off-the-record

30

1 was held.)
2 Q. (By Mr. Jungbauer) Back on the record, Mr.
3 Scott, do you recall there being any specific
4 rules charged prior to the investigation?
5 A. Honestly I can't remember if there was or
6 there was not, but I can say that at some point
7 in the last couple of years labor relations has
8 visited with us about being more nondescript in
9 the exact charges, and for myself that has been a
10 little bit of a change, and I don't know what
11 year that that policy actually changed, it has
12 migrated over the last several years. In Utah, I
13 was there 2000, 2001, 2002, it was very useful
14 sending out exact rules, potential rule charges,
15 and that somewhere along the line has changed.
16 Q. Okay, do you know the agreement between the
17 various brotherhood unions and the UP, is UP
18 required to specifically list the rules that the
19 worker is being charged are investigated on?
20 MR. SCHMITT: I will object on form
21 and foundation. Also I think that the question
22 is mischaracterizing the evidence. I think if
23 Mr. Scott was provided with the documents they
24 reflect that rules were, in fact, identified as
25 to the specific violation, so I will request that

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1 we put the documents in front of Mr. Scott rather
2 than having him --
3 Q. (By Mr. Jungbauer) No, Dave, go ahead, I
4 will represent to you that I have not seen any
5 document that includes a specific rule violation,
6 a number of the rule anywhere in the transcript
7 until during the formal investigation, and what
8 I am trying to get to, is that unusual for you,
9 Mr. Scott, do you ever remember there being an
10 investigation here in North Platte where there
11 wasn't a specific rule identified?
12 MR. SCHMITT: Object to the form, I
13 think it mischaracterizes the evidence.
14 MR. JUNGBAUER: If I am wrong,
15 Dave, I am wrong.
16 MR. SCHMITT: Well, do you want me
17 to place in front of Mr. Scott documents which
18 identify rules of which he was convicted of
19 violating?
20 MR. JUNGBAUER: Sure, sure, I will
21 move to strike the convicted.
22 MR. SCHMITT: Charged, sorry.
23 MR. JUNGBAUER: Off of the record.
24 (A discussion off-the-record
25 was held.)

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1 Q. (By Mr. Jungbauer) Back on the record.
2 While we were off of the record we were
3 sorting some documents back and forth, Dave
4 handed Cameron a couple of the letters from after
5 the investigation, I believe Exhibit 1 in the
6 investigation itself, which Mr. Scott is looking
7 at now, is the initial letter?
8 A. Okay.
9 Q. Okay, Mr. Scott, while we were, in the last
10 couple of moments, have you had an opportunity to
11 review Exhibit 1 from the formal investigation,
12 have you had a chance to look at that?
13 A. Yes.
14 Q. Okay, and what's the date of that letter?
15 A. July 13th.
16 Q. Okay, and what does that letter say as far
17 as any specific rules?
18 A. It does not mention any specific rule
19 numbers. The wording would point you toward a
20 number of potential rule violations, but there
21 are no specific rule numbers associated within
22 the investigation notice.
23 Q. And can you tell me, are there
24 investigations taking place in North Platte that
25 you are aware of where there are no specific

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1 rules mentioned in the letter advising the worker
2 that he is going to be investigated?
3 MR. SCHMITT: Well, let me object
4 to the form, also I think, again it
5 mischaracterizes the evidence, also on relevance,
6 but as far as what other investigations may be
7 occurring. The issue is what is occurring in
8 this case.
9 MR. JUNGBAUER: Sure.
10 MR. SCHMITT: I think Mr. Scott has
11 already given his answer as to the content of the
12 July 13, 2006 letter.
13 Q. (By Mr. Jungbauer) But what my question is,
14 Mr. Scott, has there ever been an investigation
15 that you are aware of in North Platte while you
16 were here, where the worker wasn't at least told
17 the specific rules that he is being charged with?
18 MR. SCHMITT: I will object to the
19 form.
20 Q. (By Mr. Jungbauer) Go ahead you can answer.
21 A. Okay, at some point, I don't know what year
22 our investigations, I would say almost all of
23 them have come out in this format, where the
24 words point to potential violations that you
25 could loosely associate if you were an employee

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1 reading the letter, and we have gone away from
2 specifically identifying rules in the
3 investigation notice.
4 Q. Why?
5 A. I don't know. As I mentioned to you before
6 for the three and a half years that I was in
7 Utah, it was a very specific investigation notice
8 and listed rules. At some point in 2004, maybe
9 the beginning of 2005, those investigation
10 notices have changed to be more broadly scoped in
11 wording rather than specific rule numbers.
12 Q. And the last question on that, Dave. Do you
13 know, Mr. Scott, whether the contract between the
14 railroad, and in this case the United
15 Transportation Union requires that this letter
16 that comes to the worker and his local chair
17 person does include the specific charge or not, I
18 mean?
19 A. I am not aware of any agreement that
20 requires that.
21 Q. The charging officer at a hearing such as
22 this, goes through the rule book, gathers up
23 evidence, arranges for witnesses to attend, what
24 else does the charging officer do?
25 A. They may or may not be involved in

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1 identifying, the hearing officer, there is a lot
2 of schedules that have to be looked at.
3 Q. Sure?
4 A. And either that charging officer or somebody
5 else, in this case within the terminal would look
6 at folks that might be available to hold a
7 hearing such as this.
8 Q. What's your understanding as to what the
9 charging officer's, and that's an apostrophe,
10 attitude or opinion should be as to the guilt or
11 innocence of the worker? In other words, is the
12 charging officer similar to the prosecutor in a
13 criminal case where their job is to come in and
14 prove the guy violated it or is the charging
15 officer supposed to just coordinate the gathering
16 of information, the witnesses and help to see
17 that there is a hearing officer, etcetera?
18 A. All of the above that you mentioned.
19 Q. Okay, what's your -- what do you tell your
20 charging officers as far as whether one of their
21 roles is to get a conviction, so to speak, in
22 other words, gather up the information to prove
23 the guy violated the rule or whether the charging
24 officer is supposed to be neutral?
25 A. The charging officer needs to be somewhat

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1 accurate in what potential rules that we are
2 looking at. There has to be a fairness in those
3 rule assessments. If you don't have some
4 semblance of fairness, a charging officer could
5 just throw the entire rule book at a potential
6 employee for something relatively minor.
7 Q. Sure.
8 A. So you have to make sure that that doesn't
9 happen, and so for the most part the local
10 chairmen act as my personal check and balance for
11 that, because I can't possibly keep track of
12 every investigation that comes to my office, and
13 they do a good job of saying this rule seems a
14 little heavy handed, Cameron, can we look at it
15 prior to the investigation?
16 Q. Do you know, was that done at all, that a
17 local chairman came and tried to ask to see what
18 could be done in Mr. Tanner's case?
19 A. After the case.
20 Q. Okay, before the case, and I realize it has
21 been almost a year and you have had a whole bunch
22 of things going on, so if you don't remember,
23 that's fine. But do you remember Mr. Ebmeier
24 coming and asking for a postponement of the
25 hearing?

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1 A. No, I don't remember that.
2 Q. Do you know who it is that determined what
3 the general rules were or the general allegations
4 against Mr. Tanner were, whether that would be
5 Mr. Walker or anyone else? And I will represent
6 to you that Mr. Tanner was also involved, and
7 there was one other manager, and Mr. Kempke,
8 K-E-M-P-K-E, I believe, both of these gentlemen
9 were involved, I think, I know they were involved
10 somewhat in the download and the interpretation
11 of the download information.
12 Back to my initial question, who decided
13 what the charges would be?
14 A. Usually that's done more by not a committee
15 of people, there is no such committee, what I
16 mean by that is, it is much more of an informal
17 discussion. When something significant happens,
18 such as with this accident, then the director of
19 terminal operations will often gather a number of
20 folks that have been involved either formally or
21 loosely and determine what potential rules are
22 involved, so it is not just a single person like
23 Tim Walker, usually there is a number of folks
24 involved.
25 Q. Do you know who those folks were in this

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1 case?
2 A. No, I don't.
3 Q. Were you involved in the decision as to what
4 to charge in Mr. Tanner's case?
5 A. The proposed level 5 has to always involve
6 the superintendent.
7 Q. Right.
8 A. There is no authority anywhere in the
9 service unit to issue this letter unless it
10 directly involves me.
11 Q. What involvement do you recall having in Mr.
12 Tanner's case deciding to proceed with a level 5
13 charge?
14 A. It came through me.
15 Q. Right.
16 A. I mean I was ultimately involved in deciding
17 to issue a level 5.
18 Q. And what do you remember about that, about
19 the discussions you had, where you ultimately
20 conclude this was a possible level 5 violation,
21 let's go forward?
22 A. I believe I was actually out of town when
23 this incident happened; I don't think I was there
24 at that particular time, so I received a call
25 from Jay Penner and got some general scope of the

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1 -- of what had happened, and because of some
2 overall company policies and potential on blind
3 shows and protecting the point, we had some
4 hazardous materials involved, it sounded like
5 there could be some potential injuries involved,
6 when you conclude, not conclude, but include all
7 of those factors, then it begins to raise its
8 potential to a level 5.
9 Q. Okay, and in Mr. Tanner's particular case,
10 as opposed to Mr. Barkley, is it your
11 understanding that Mr. Tanner was in the front
12 two units, and it was Mr. Tanner's unit that was
13 rear ended by Mr. Barkley's unit?
14 A. Initially I didn't know who was on which
15 unit, I just knew we had a collision between two
16 locomotive units.
17 Q. Okay.
18 A. Afterwards I clearly understood that.
19 Q. What facts are you aware of that would --
20 did justify a level 5 investigation involving Mr.
21 Tanner?
22 A. It is my personal feeling, I am not saying
23 this exists on every service unit, but if you and
24 I are working on a job together, then you and I
25 are responsible for the outcome of that job,

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1 whether it's excellent or whether it's
2 disastrous. So to a very large degree unless
3 there is something unusual happening, most of our
4 investigations whether a level 2 or a level 5
5 involve both crew members. So I did not know
6 when we actually published this letter who was
7 more at fault than others, it was both crew
8 members being suspect.
9 Q. Right, and after the investigation you had a
10 chance to read the transcript, is that fair?
11 A. Right.
12 Q. And during your review of that transcript,
13 did you then have an opportunity to learn of Mr.
14 Tanner's role?
15 A. Yes.
16 Q. And after having reviewed and read the
17 transcript, do you still feel that Mr. Tanner is
18 guilty of rule violations that would justify a
19 level 5?
20 A. No, I don't.
21 MR. SCHMITT: Let me interrupt, is
22 anybody cold?
23 (A discussion off-the-record
24 was held.)
25 Q. (By Mr. Jungbauer) Mr. Scott, at what point

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1 did you come to the conclusion that Mr. Tanner
2 did not deserve a level 5?
3 A. Often in our level 5 investigations when you
4 get done reading the transcript, particularly on
5 a rather large level 5 investigation, both
6 employees involved in that incident will receive
7 a level 5, and there is a discussion held between
8 the superintendent and the local chairman as to
9 whether this is going to be a death sentence, I
10 don't meant it that way, but is the employee
11 finished with his employment. As superintendent
12 telling the chairman to take this all the way to
13 a board, it may be several years before a board
14 looks at it, or is there a potential for
15 leniency, and in both Mr. Barkley's case and Mr.
16 Tanner's, it was my opinion after reading that
17 investigation that neither employee needed to
18 serve a potential death sentence for employment.
19 Q. And excuse me, why were they fired then, why
20 were they given a level 5?
21 A. Again it goes back to the issue of
22 protecting the point, which is increasingly more
23 of a rule that is likely to be Federalized by the
24 FRA.
25 Q. Okay.

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1 A. So you have a collision with failure to
2 protect the point, a HAZMAT material spill,
3 injury and a significant amount of damage to
4 locomotives. This was not a small incident, this
5 was a fairly large incident that had the
6 potential of much greater harm.
7 Q. Sure.
8 A. More to the employees than to the
9 locomotives.
10 Q. Sure, did you talk with anyone above you or
11 regional vice-president or anyone else before you
12 decided that this should be a level 5?
13 A. I have no authority on my own to issue a
14 level 5.
15 Q. Okay.
16 A. That policy has been in place, I do believe
17 I remember that in the year 2000, every
18 superintendent across the entire system must
19 confer with their regional vice-president and no
20 one else as to whether to proceed with a level 5.
21 Q. Tell me who was the regional vice-president
22 that you did talk with concerning Mr. Tanner's
23 termination?
24 A. Randy Blackburn.
25 Q. B-L-A-C-K-B-U-R-N?

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1 A. Yes.
2 Q. And is Mr. Blackburn based out of Omaha?
3 A. Yes, he is.
4 Q. And tell us, as best you can recall, what
5 you remember about any discussions you and Mr.
6 Blackburn had concerning Mr. Tanner?
7 A. Not Mr. Tanner directly, those discussions
8 are more broad based with what we know at that
9 particular time. When we have this significant
10 event, particularly when there is HAZMAT
11 involved, we have to call RMCC, which is our
12 emergency police response group in Omaha, they
13 will immediately go down the list and check off
14 county notifications, city notifications, State
15 notifications that we have HAZMAT on the ground,
16 and particularly in a hazardous event, that
17 requires me immediately to find my RVP, and so he
18 knew about the initial accident as soon as I
19 found out about it. His standard response always
20 is to gather more information about it in general
21 and then call him back with further updates.
22 Q. Was any of this in writing, do you remember?
23 A. No.
24 Q. Do you send any Lotus notes or anything at
25 all like that?

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1 A. No.
2 Q. All just verbal?
3 A. All just verbal.
4 Q. Okay, please continue.
5 A. So that initial notification was done, and I
6 call Jay Penner back to receive a little bit more
7 information, and it often takes us a long time to
8 get the tape downloads ant the speed, but in
9 general with what we saw on the locomotives
10 dumping various fluids, and some other things,
11 that we had a pretty significant impact,
12 something greater than two or three or four miles
13 an hour, and we also had a potential injury, if
14 not two injuries. So when I called Randy back, I
15 told him what I thought I knew that we had some
16 type of high speed collision between employees of
17 the same crew operating different sets of RCL
18 units with, probably with what looks in excess of
19 10 to 15 to $20,000 worth of damage, the best
20 estimate we could put forth, plus HAZMAT and
21 injuries, and that we had a protective point type
22 issue, and that that would certainly raise it to
23 a potential level 5, but that I am not doing
24 anything until I have concurrence from you to
25 proceed in that direction.

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1 Q. And what did he say then?
2 A. He said that it sounds as if you have a
3 potential level 5, go ahead and proceed in that
4 direction.
5 Q. Okay, were there any more discussions ever
6 with Mr. Blackburn?
7 A. No.
8 Q. You don't have to report back?
9 A. That particular day, no.
10 Q. Okay, ever again concerning Mr. Tanner's
11 situation?
12 A. No, he, at some point in the week, he called
13 back and wanted an update on the employees, not
14 the HAZMAT clean-up, not the locomotive damage,
15 just the employee's and how they were doing.
16 Q. Okay, and what did you tell him?
17 A. I had not talked to either Frank or to Mr.
18 Barkley, so to the best of my knowledge, Mr.
19 Barkley was okay, had some, maybe some bruises
20 and cuts, but that Frank potentially had some
21 issues with back or neck or, you know, other
22 related type issues.
23 Q. And what did Mr. Barkley suggest at that
24 point, if anything, go forward with the
25 investigation?

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1 A. Mr. Blackburn you mean?
2 Q. I apologize, I am sorry.
3 A. An investigation at that point was already
4 set.
5 Q. Okay?
6 A. I believe we were pretty close to already
7 having set it.
8 Q. You mentioned that while you talked with Mr.
9 Blackburn the first time that there was a
10 potential for protecting the point issue to be
11 raised?
12 A. Um-hum.
13 Q. What's your understanding of the facts that
14 would suggest Mr. Tanner either did something or
15 failed to do something as far as protecting the
16 point?
17 A. At that particular point I had no idea who
18 was protecting the point and actually how the
19 accident occurred.
20 Q. Okay, as we sit here today, are you aware of
21 any facts that would suggest that Mr. Tanner
22 either did something or failed to do something
23 related to protecting the point?
24 A. I think he was doing everything he should
25 have done as far as protecting the point.

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1 Q. What is it, what facts are you aware of that
2 go into your conclusion back in August of '06,
3 that Mr. Tanner should be fired on a level 5, the
4 death sentence?
5 A. Well, at the time that we issued the level 5
6 discipline, not that particular day, but shortly
7 after that, either John Charbonneau or Ben
8 Ebmeier or both, because I don't know who was
9 representing who, they had selected their own
10 representation there.
11 Q. John was with Frank and Ben was with Mr.
12 Barkley, I believe?
13 A. Right, and at that point we had had some
14 initial overtures that this was not a permanent
15 dismissal, never to return as an employee. So we
16 didn't really, at that point, both of us came to
17 an agreement, you have to understand how that
18 works, both of us came to an agreement, an
19 understanding this is not going to be a level 5
20 progressing to a law board, that we would have an
21 opportunity for leniency.
22 Q. Okay, any other discussions with Mr.
23 Blackburn after the -- his call to you later that
24 week to learn of the condition of Barkley and
25 Tanner?

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1 A. Only that at some point, and this was prior
2 to the investigation, depending on the outcome,
3 Mr. Blackburn made it clear to me that if I
4 thought some type of leniency was in order that I
5 could clearly proceed that way. Which is --
6 which is pretty much standard operating procedure
7 for any RVP in any class of system.
8 Q. Do you have to get explicit, meaning either
9 verbal or in writing verbal authority from Mr.
10 Blackburn to send out the level 5 letter whenever
11 that was went out?
12 A. No, just the initial investigation you have
13 to have regional authority.
14 Q. So the actual termination, the level 5
15 termination was your decision?
16 A. Correct.
17 Q. Has -- bad question.
18 What level, if any, do you think, based now
19 after having had a chance to review the
20 investigation, what level, if any, should Mr.
21 Tanner have?
22 A. Well, Mr. Tanner and I have talked several
23 times about that.
24 Q. Right, I am aware of that?
25 A. And I don't think we will ever come to a

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1 conclusion as far as levels of responsibility.
2 That's just a difference of opinion, I think
3 between Frank and I, and that's okay, there is a
4 lot of areas that we agree to disagree.
5 Q. Would it be fair for me to state that Mr.
6 Tanner could never come back to the Union Pacific
7 unless he accepts responsibility for doing
8 something or failing to do something that
9 contributed to this accident, unless he wins in
10 the law court, and hopefully we don't have to go
11 to that?
12 A. If it continues towards a law board, that
13 will be Frank's opportunity to come back, if the
14 law board rules in his favor. The offers that we
15 have extended to him will stay in place, it's not
16 something that has a time limit. If I were to
17 leave as the Superintendent that might create,
18 you know, some type of an issue because another
19 superintendent may read the transcript and say,
20 well, I am not offering leniency. But as long as
21 I am here, and we have had several discussions
22 about potential leniency, those offers will
23 remain on the table.
24 MR. JUNGBAUER: Can we mark this as
25 Exhibit No. 4?

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1 (Exhibit No. 4 was marked
2 for identification.)
3 Q. (By Mr. Jungbauer) Mr. Scott, I am showing
4 you what we have marked as Exhibit No. 4, I will
5 represent to you that this is a copy of the
6 certified letter of November 15th of last year
7 from you to Mr. Tanner, feel free to take a
8 moment or two and read it to yourself.
9 I am going to run to the restroom real
10 quick, excuse me.
11 (A short recess was held.)
12 Q. (By Mr. Jungbauer) Back on the record.
13 Mr. Scott, have you had a chance to look at
14 Exhibit 4?
15 A. Yes.
16 Q. And just in a sentence or two, what is
17 Exhibit 4?
18 A. It is a leniency offer for Mr. Tanner to
19 come back to work.
20 Q. And in a sentence or two -- in a sentence or
21 two, what's the offer, that he could come back
22 with a level 1 with full back pay and then a
23 number of specific --
24 A. With compensation for lost time, that's
25 correct, return with a level 1 with compensation

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1 for lost time.
2 Q. Would it be your understanding that Mr.
3 Tanner would have to agree that he is guilty of a
4 level 1 violation to come back?
5 A. Correct.
6 Q. Would you agree with Mr. Tanner that if he
7 in his heart and soul doesn't believe he did
8 anything wrong, that he shouldn't sign it?
9 MR. SCHMITT: Objection, form, go
10 ahead.
11 THE WITNESS: That goes back to my
12 previous statement that Mr. Tanner and I won't
13 ever agree to that.
14 Q. Okay.
15 A. We just have different opinions on that.
16 Q. I understand, what facts are you aware of
17 that suggest to you that Frank did anything or
18 failed to do anything that rises to a level 1?
19 A. A level 1, first this leniency offer is as
20 good as they possibly come.
21 Q. What do you mean by that?
22 A. He is being offered full compensation for
23 all lost time, which goes all the way back to the
24 date of the incident, and a level 1 under our
25 current rule structure is really no more than a

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1 relatively light slap on the hand, there is no
2 lost time. It is recognition that you were
3 involved in something, but that your role in that
4 something was relatively minor.
5 Q. Okay, and I appreciate your candor, Mr.
6 Scott, but my question is, what facts, what did
7 Frank do or did he fail to do that requires him
8 to sign a form saying I am taking a slap on the
9 wrist even though I don't know what I did wrong
10 -- that's a bad question.
11 What facts are you aware of that Frank
12 either did or didn't do that would rise to a
13 level 1 offense, and take into account, I realize
14 what you are saying, that level 1 is as lenient
15 is it comes, and this is as good an offer as you
16 could possible make to him other than wiping out
17 all charges, but what did he do wrong?
18 A. Again, it goes back to my belief that any
19 time you have an accident, particularly a serious
20 accident, I mean it's a very, very rare
21 circumstance when you have a two person crew
22 operating a job that you have absolutely zero
23 responsibility for the outcome, it is a very,
24 very rare set of circumstances.
25 Q. Where either of them or both of them?

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1 A. Where a person, if you and I are working on
2 a crew, it' a very, very rare set of
3 circumstances where I would be 100 percent the
4 only person responsible for the accident, it does
5 happen, but it's very, very, very rare.
6 Q. I understand that, but let's stick with this
7 particular situation, what did Frank do or not do
8 that you think has violated any rule?
9 A. If we opened up the rule book and looked at
10 all of the potential level 1 charges, there would
11 probably be nothing in there that would make much
12 sense. When you often look at making a leniency
13 offer, there is an acknowledgment between an
14 employee and the labor representatives that we
15 are going towards a level 1 and we will pick out
16 a rule and it may not make sense, but that's just
17 part of the leniency package. I don't think
18 there is anything in this level 1 arena that
19 would probably make much sense to Frank.
20 Q. Then why not just wipe out all of the
21 charges, other than because he was there?
22 A. Well, I believe that both employees, maybe
23 at different levels, contributed to the accident.
24 Q. Fair enough, what did Frank do or not do
25 that contributed to it?

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1 A. The very beginning of the incident itself
2 where various decisions were made to operate two
3 different sets of locomotives with two different
4 operators, eventually making your way across the
5 entire yard, is a questionable decision at best.
6 Q. It doesn't violate any rules though, does
7 it?
8 A. I don't disagree with you at all there.
9 Q. And if Mr. Tanner's Foreman, Mr. Barkley
10 decides to take the engines from one spot to
11 another spot in pairs rather than as a foursome,
12 is that Mr. Barkley's decision to make as a
13 foreman as opposed to Tanner being a helper?
14 A. They are a team.
15 Q. Right.
16 A. Their decision making as a team should
17 encompass a little bit of questioning of what we
18 are doing and why, and if somebody doesn't agree
19 that that's maybe not the best thing to do, then
20 that discussion should be made.
21 Q. Do you know whether that discussion was had?
22 A. I would have to read that section of the
23 investigation again, but I believe some
24 discussion was made between Barkley and Tanner in
25 that regard.

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1 Q. Okay, and when a helper is told by a foreman
2 after that discussion is had, assuming there is a
3 discussion, doesn't the helper have to do what
4 the foreman says?
5 A. No.
6 Q. The helper could say, no, I don't want to do
7 that?
8 A. Absolutely.
9 Q. And then call the yard master and say I
10 disagree with the way my immediate supervisor is
11 telling me?
12 A. Absolutely.
13 Q. Okay.
14 A. There isn't a blind following of any
15 instruction from any level in this organization.
16 Q. Okay, so if you can clarify or boil it down,
17 what, if anything, you think Mr. Tanner did or
18 didn't do as far as the taking the engines as a
19 pair rather than as a one set?
20 A. Clearly the safest course would have been
21 taking them all together.
22 Q. Why do you say "clearly", what do you base
23 that on?
24 A. Any time you are operating or following
25 another RCL operator in what I will call a bumper

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1 car type fashion, the potential for something to
2 happen is much greater than if you are operating
3 together on sets that are coupled together. The
4 risk factor has just gone up.
5 Q. So is that the point that you feel that Mr.
6 Tanner either did or didn't do, is that he should
7 have overridden his foreman's decision to take
8 the engines in pairs and gone over his head,
9 Tanner should have gone over Barkley's head and
10 gone to Mr. Grachek, and said I disagree with
11 this?
12 A. Given Mr. Tanner's experience, I think that
13 would have been appropriate.
14 Q. And is that what justifies a level 1, in
15 your opinion?
16 A. We couldn't find a level 1 that's going to
17 match up with that, but yes, in my opinion.
18 Q. Anything else that you can think of that Mr.
19 Tanner either did or didn't do that rises to the
20 level of a rule violation?
21 A. Well, I think once -- this was not just a
22 straightforward move going down one track and
23 putting the engines away, we are going across a
24 big yard, clearly the yard master made an error
25 in sending them down that track to start with

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because there was no way to get out of the track, there was a red flag and something wrong with that particular track.
Q. Was the yard master ever investigated as far as you know, to see if he made a --
A. I don't think Grachek was investigated.
Q. Okay, what facts are you aware of that suggest to you that Mr. Grachek knew that the track was blocked at the west end by the maintenance of way?
A. I don't know that for a fact.
Q. Okay, in the transcript, I will represent to you that Mr. Grachek says he wasn't notified that the maintenance of way was there, do you know whether anyone with UP ever checked with maintenance of way to see, did they, in fact, notify Grachek or not?
A. I don't know.
Q. On a level 5 investigation, is that something that either Mr. -- that Mr. Walker should have done or Mr. Yetter should have asked, where is the maintenance of way people to tell us whether Grachek knew or not?
A. Well, often times those engineering scenarios can develop rather quickly.

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Q. Sure.
A. Somebody complains of a rough track or some scenario.
Q. Sure.
A. That an engineering person will come over and either put an immediate slow order on or put a red flag in that track. Now, they should at that point notify the various yard masters and others that could potentially route traffic in that direction.
Q. Sure.
A. Now, whether Mr. Grachek was properly notified of that, I don't know.
Q. What's your understanding of what, if any, additional work needs to be done before a pair of engines is connected to another pair of engines so now you have got four engines?
A. Um-hum.
Q. Does a carman have to come out, is there any additional work that needs to be done, brake testing, anything at all by other people in addition to Mr. Tanner and Mr. Barkley?
A. There is, I believe a consist air test would have to be done if you are going to put those two sets of powers together.

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Q. And just in general, that requires Tanner or Barkley to call the car department and have someone from there to come out and do the air test, is that fair?
A. Not necessarily, they could do it themselves, but if they had issues or problems, they could ask for mechanical assistance.
Q. Do you know how long it takes to conduct the air test, if they had hooked those cars up or the four engines together?
A. I have never done it myself, but I would say 20 to 40 minutes usually.
Q. It could have been long, again, depending on if there was a problem?
A. If there was a problem with the locomotive, it certainly could turn into something longer.
Q. Just so I have it clear, and I appreciate your patience with me. Mr. Tanner, if he did anything wrong or failed to do anything that's wrong it's not telling Grachek that we should couple up these or insisting that the two pair of engines be coupled up?
MR. SCHMITT: I will object to the form, I think it mischaracterizes 15 minutes of testimony, he said what he said, Lou.

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Q. (By Mr. Jungbauer) And that's fair because I want to move on to something differently unless I am mistaken here: Other than Tanner's alleged failure to insist that the four engines be coupled up together, did Frank do anything or fail to do anything that you think contributed to the accident?
A. Well, first, both of them as they are operating separate units down this track did, I don't want you to think they did everything wrong, they had an unexpected red flag in front of them that was caught by them, and they both successfully stopped for that, that doesn't always happen, so that was done correctly. At that point, again this is just my opinion, there is no rule that requires at that point once you realize you are blocked from that route and you are involved in a bumper car type scenario, and you know you are going to have to go all the way back and figure out another route, you are starting to get into something that's even more complicated, it's time to re-job brief.
Q. Sure.
A. And say, you know what, let's give up this scenario where I am operating one set and you are

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1 operating another set, let's put these together
2 and go on back there, talk to the yard master
3 again and figure out what other route we can
4 take.
5 Q. Do you know whether Mr. Tanner and Mr.
6 Barkley had a re-briefing to discuss that issue?
7 A. I can't recall.
8 Q. Okay, so that would be a second thing that
9 Tanner may have done wrong is, he didn't insist
10 that the four engines be coupled together at the
11 outset, and then when they get down to the area
12 of the west end of the yard and they found out
13 they can't get out of there, they should have --
14 that was the second opportunity for Frank to have
15 insisted that the four engines be put together,
16 is that fair?
17 A. One more time with that question?
18 Q. Sure, Frank has now twice not insisted that
19 the four engines be put together because he
20 didn't do it at the re-briefing, is that fair?
21 A. Correct.
22 Q. Okay, anything else that Frank did from that
23 point on that you take exception with?
24 A. When they started making the reverse move,
25 they have come up on the red flag, and they are

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1 headed back, and this was not really clear in the
2 investigation itself, something happened that
3 caused Frank's unit to stop, what that something
4 is, I don't -- I truly don't know, so I don't
5 really know if we had operator error there or if
6 it happened by mistake or whatever the case might
7 be. That's really not Frank's error, it might
8 have been a human error type scenario. It's
9 really Mr. Barkley's job to make sure he is
10 prepared to stop short of everything.
11 Q. So we are not going to blame Frank for that,
12 is that fair, for Mr. Barkley not being able to
13 stop in time?
14 A. There may be something there in the stopping
15 of that locomotive, although that was never, I
16 don't think really was clearly brought out in the
17 investigation.
18 Q. Or in any of the aftermath of the
19 investigation, meaning if any downloads or
20 anything else, any other information -- bad
21 question.
22 You haven't received any other information
23 since the investigation that would suggest that
24 Frank did anything wrong, would that be fair as
25 far as the stopping the engine?

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1 A. The locomotive stopped.
2 Q. Yeah.
3 A. Something caused the locomotive to stop.
4 Q. Yeah.
5 A. And I don't think that was brought out
6 clearly in the investigation as to what caused
7 that locomotive to stop.
8 Q. Okay.
9 A. Whether it was a mechanical situation, we
10 can't find anything, we can't find anything with
11 the box, we can't find anything with the
12 locomotive. Whether something was bumped in the
13 transition of moving from the side of the
14 locomotive or not, can that scenario happen, sure
15 it can, but again, we are not blaming, you know,
16 assessing the entire accident around Frank and
17 the locomotive stopping for some reason.
18 Q. Actually you are not assessing any level to
19 Frank because the engine stopped, are you?
20 A. Again, there is something that happened
21 there, what exactly -- anybody can stop a
22 locomotive at any time for any reason. If
23 you have that unfortunate scenario where you have
24 decided to operate two locomotives, you have got
25 to trust the person behind you that they are

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1 paying attention or going to stop short of you if
2 you stop for some reason.
3 Q. I agree with you completely on that, but
4 what I am trying to figure out, and I apologize
5 that I am not asking the questions well, Mr.
6 Scott. Frank didn't do anything wrong, that you
7 are aware of, that any facts have developed that
8 he somehow screwed up in having that engine come
9 to a stop?
10 MR. SCHMITT: Objection, asked and
11 answered, one more time.
12 THE WITNESS: Something happened
13 there.
14 Q. (By Mr. Jungbauer) Sure.
15 A. It is not clear, it is either a mechanical
16 failure either by the box or the locomotive.
17 Q. Right, but we don't --
18 A. I don't think Frank even knows to this day
19 why that locomotive stopped. I think something
20 could have happened by mistake there, but
21 there is no clear evidence one way or the other.
22 Q. Okay, so there is no clear evidence one way
23 or the other that Frank did anything wrong in
24 that engine coming to a stop, would that be fair?
25 MR. SCHMITT: To his knowledge as

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1 of today?
2 Q. (By Mr. Jungbauer) To his knowledge as of
3 today?
4 A. Yes, that would be fair.
5 Q. In an incident that we all agree was
6 serious, that I believe Mr. Walker testified in
7 the investigation it could have been fatal, could
8 have produced fatalities?
9 A. Yes.
10 Q. Do you know whether Union Pacific has as of
11 nine months after the accident determined why the
12 engine stopped, why Frank's engine stopped?
13 A. We have not found any defects with the box
14 or the locomotive, so what caused the locomotive
15 to stop points more to potential operator error,
16 but we don't know that for a fact.
17 Q. Do you know whether the box, the box Frank
18 was using was taken out of service, inspected and
19 the like either by UP or by CANAC, that's
20 C-A-N-A-C representatives?
21 A. I don't know that.
22 Q. Do you know whether the engine Frank was on
23 and I will represent to you it was 3113, whether
24 that engine was ever inspected as far as its
25 brakes, as far as all of its components to see

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1 whether there was a possible defect in his
2 engine?
3 A. I believe both sets of locomotives went to
4 the shop for a complete overhaul with the damages
5 involved.
6 Q. Okay, and assuming they did go to the shop
7 to be inspected and the like, would you assume
8 that there would be records that would indicate
9 what the results of that inspection were?
10 A. Sure.
11 Q. The behavior modification plan that was
12 raised in the formal investigation, real briefly
13 what's that?
14 A. It's a discipline diversion program that was
15 being piloted on the North Platte Service Unit,
16 not just on the North Platte Service Unit, but on
17 the northern region.
18 Q. Okay. Did that -- withdraw that.
19 When determining whether to terminate on a
20 level 5 a particular employee, is that employee's
21 personnel record taken into account at all?
22 A. It almost happens naturally because an
23 employee that has been involved in numerous
24 accidents, and Mr. Barkley may have been part of
25 this, it will naturally accumulate towards a

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1 level 5. I cannot remember for sure about Mr.
2 Barkley's current discipline level, but I think
3 he had been involved in a couple of different
4 scenarios that when you layer in to protect a
5 point, I think was going to push him towards a
6 level 5 automatically, I believe that was the
7 case, but I can't remember for sure, so yes it
8 does, their background as it relates to their
9 current discipline level can play into it.
10 Q. Okay, how about with Mr. Tanner, did -- what
11 about Frank's background either militated against
12 him or in his favor as to whether he should have
13 a level 5 or not, and when I say "his
14 background", I mean Mr. Tanner's service records?
15 A. As a normal course I don't pull up anybody's
16 history and background when trying to decide on
17 any type of discipline.
18 Q. Sure.
19 A. So to this day I couldn't tell you what
20 Frank's background is.
21 Q. Okay, does anyone, do the managers take a
22 look and see, he hires out in '78, he has
23 actually got a pretty good record. He has had a
24 number of commendations, etcetera, do you know
25 whether that was considered at all in Mr. Tanner

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1 being assessed a level 5?
2 A. When a leniency offer is put together or
3 even if you are looking for authority from the
4 region, you can go back and pull up an employee's
5 entire record because if you have somebody that
6 has reached a level 5, and they have a history of
7 really severe, traumatic accidents, you may not
8 want to bring that employee back unless it's
9 going to happen through the process of law.
10 Q. Sure, sure.
11 A. I don't recall Mr. Tanner's or Mr. Barkley's
12 record being so bad that we had an issue with
13 that.
14 Q. Okay, now that you have mentioned that, how
15 about a 28 year employee or whatever the number
16 was at the time, assume it's 28 years, if an
17 employee has a really good record, would that
18 militate in favor of not giving him a level 5?
19 A. In this particular scenario, it would
20 definitely help out on the leniency type issue.
21 Q. The concern I have about the leniency type
22 basis though, Mr. Scott, is that for an employee
23 to come back on a leniency basis, doesn't the
24 employee -- is the employee required to accept
25 responsibility in a situation where he or she

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1 feels they didn't do anything wrong?
2 A. Yes.
3 Q. Why is that?
4 A. That's just the way that we operate when we
5 look at leniency type offers.
6 MR. JUNGBAUER: Off the record.
7 (A discussion off-the-record
8 was held.)
9 Q. (By Mr. Jungbauer) Back on the record, do
10 you need a break?
11 A. No, I am doing fine.
12 Q. Okay, Mr. Scott, do any of your managers
13 ultimate end of the year pay, is their pay
14 affected at all by the number of personal injury
15 accidents that occur in his or her region?
16 MR. SCHMITT: I am going to object
17 to the form and instruct the witness not to
18 answer the question. This is clearly beyond the
19 scope of our agreement to bring Mr. Scott
20 voluntarily for his deposition here today. It
21 has nothing to do with Mr. Tanner's investigation
22 and Mr. Scott's involvement with the same, and
23 does not lead or is not reasonably calculated to
24 lead to the discovery of admissable evidence.
25 MR. JUNGBAUER: And for the record

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1 I respectfully disagree, we have the option of
2 amending our complaint to include the charge of
3 unlawful termination. We are of the view that,
4 and I have been led to believe from discussions
5 with union officers that Mr. Tanner is being made
6 an example here, in part through Mr. Blackburn's
7 involvement and in part through being punished
8 because he has.
9 MR. HASIAK: Is this an
10 off-the-record discussion?
11 MR. JUNGBAUER: No, I am stating
12 this for the record for when we go to the judge
13 to ask to reopen the deposition. I am trying to
14 explain to the court specifically how it will
15 lead to admissable, may lead to admissable
16 evidence. It clearly has a role when one takes a
17 look at the way the formal investigation was held
18 with both the charging officer and the hearing
19 officer himself testifying to facts in the case,
20 that it shows that this was literally a kangaroo
21 court.
22 MR. HASIAK: Lou, let's go talk
23 outside in the hall right now.
24 MR. JUNGBAUER: I will withdraw the
25 kangaroo court, but I think it clearly does and

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1 we will leave it at that.
2 MR. SCHMITT: For the record, we
3 are here today on the pleadings that have
4 actually been filed with the court, I mean it's
5 well known, I mean you are an officer of the
6 court, that we are here to conduct discovery on
7 the issues that are in the litigation. Your long
8 narrative discussion about what you believe did
9 or did not occur, first of all, we don't
10 acknowledge that any of that is, in fact,
11 accurate, we strongly disagree with that. Second
12 of all, none of that is relevant to any of the
13 issues in this litigation. We are here defending
14 the case on the issues that are properly plead
15 and that are before the court. Every attorney
16 obviously is bound by the rules of discovery to
17 file pleadings that are not frivolous, that
18 comply with all of the rules, etcetera, and we
19 are here, again, to simply conduct discovery on
20 those issues which are properly within this
21 litigation and it is on that basis, and the
22 reasons that I previously stated that we are not
23 going to permit Mr. Scott to be subjected to that
24 line of questioning and interrogation.
25 Q. (By Mr. Jungbauer) That's fine, Dave.

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1 Mr. Scott, are you going to follow your
2 attorney's advice not to answer questions
3 concerning whether the manager's pay is affected
4 at all by the frequency of accidents in a
5 jurisdiction?
6 MR. SCHMITT: He is.
7 MR. JUNGBAUER: I would like to get
8 Mr. Scott to say so.
9 MR. SCHMITT: We have instructed
10 Mr. Scott not to answer those questions.
11 MR. JUNGBAUER: Okay.
12 MR. SCHMITT: So you can accept
13 that as a truth for the record.
14 Q. (By Mr. Jungbauer) I will, thank you.
15 Do you know, Mr. Scott, if employees are
16 punished for turning in personal injury forms?
17 MR. SCHMITT: You know, again, Lou,
18 the same objection, I mean if you want to ask the
19 witness whether or not Mr. Tanner was punished
20 for turning in a personal injury, that's fine,
21 that's relevant to this litigation, but again
22 your question is along the line of your earlier
23 question, and we are not going to permit, what
24 I am going to term a fishing expedition, to try
25 to create some sort of theory for you in this or

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1 other cases. So if you want to ask him about
2 this case in particular we will allow him to
3 answer that question.
4 MR. JUNGBAUER: Dave, I think I
5 have to get into the foundation questions, is it
6 a policy on the UP either to punish, or is there
7 a policy not to punish people for turning in
8 report forms. I am not using this for other
9 cases, so I think I should be allowed to ask
10 about that.
11 MR. SCHMITT: And you can ask him
12 about Mr. Tanner, whether or not he was punished.
13 Q. (By Mr. Jungbauer) Okay, let me ask my
14 question and then you can instruct him not to
15 answer if you choose.
16 What's your understanding, Mr. Scott, back
17 in July of '06, in your service district, was
18 there any type of policy written or verbal that
19 the manager's were told to either threaten or
20 otherwise intimidate employees from turning in
21 personal injury forms?
22 MR. SCHMITT: Again the same
23 objection, the same response. Should we take a
24 break, I am not sure how much more you have, Lou?
25 MR. JUNGBAUER: Can we just finish

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1 this part up and I want to get on the record that
2 you instruct him not to answer?
3 MR. SCHMITT: Well, along the
4 parameters that I have already discussed, you are
5 entitled to question him whether any claims,
6 policies or practice or procedures played any
7 role with Mr. Tanner and that's what is relevant
8 to this case. And so again, the record speaks
9 for itself on those areas of questioning that
10 we are going to permit. Mr. Scott is here, he is
11 available to answer those questions relevant to
12 this litigation, but beyond that, we are not
13 going to permit him to be subjected to this type
14 of interrogation and harassment.
15 Q. (By Mr. Jungbauer) Mr. Scott, do you think
16 I am harassing you?
17 MR. SCHMITT: Well, again, I have
18 made my statements for the record, that's an
19 improper question.
20 MR. JUNGBAUER: Well, I disagree
21 that I am harassing him. But Dave, I believe
22 it's clearly relevant because --
23 MR. HASIAK: Name the issue, Lou.
24 MR. JUNGBAUER: That Mr. Tanner is
25 not going to be allowed to continue to work

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1 for the railroad any longer unless what, as Mr.
2 --
3 MR. HASIAK: Then all you have to
4 do is ask him about Mr. Tanner, you are asking a
5 general policy question.
6 MR. JUNGBAUER: Sure I am.
7 MR. HASIAK: That doesn't have
8 anything to do with Mr. Tanner, ask him about Mr.
9 Tanner.
10 MR. JUNGBAUER: And back on the
11 record, well, I guess we are on the record.
12 Dave, what I believe took place in both, in
13 the formal investigation and as far as the
14 leniency and the turning in the report, is that
15 UP did not follow its own policy in these
16 instances. That's why I think I have to be able
17 to ask what was the policy in Mr. Scott's service
18 district back then. And I am going to prove that
19 the actual people down in -- I hope to prove that
20 the managers down in the trenches didn't follow
21 Mr. Scott's own policy, and that's why we are
22 here. I also think that what we contend is an
23 unlawful termination personally goes to Mr.
24 Tanner's anxiety, as we talked about yesterday,
25 it's an element of damages.

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1 MR. HASIAK: You haven't plead an
2 unlawful termination.
3 MR. JUNGBAUER: Not yet.
4 MR. HASIAK: Then you know what he
5 can answer when you plead an unlawful
6 termination, you can't ask it now. Secondly, you
7 are talking about policy considerations in
8 general, and you are speculating about a theory
9 here that has got nothing to do with this
10 particular case. This man has been offered
11 reinstatement with back pay. Lou, he has had a
12 paid vacation, he is offered a paid vacation.
13 What kind of heart ache and discrimination is
14 that causing that's causing all kinds of anxiety.
15 Do you get paid for not working? That's the
16 offer that's on the table here.
17 MR. JUNGBAUER: And, Ray, to this
18 point I haven't objected to UP having two
19 different lawyers here, I am not going to do
20 that, okay? But whether Mr. Tanner should take
21 an offer of leniency where he has to admit that
22 he did something wrong, even though he doesn't
23 believe he did, whether he should or shouldn't
24 isn't what we are here for. What I am here for
25 is to find out if the damages that Mr. Tanner

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1 suffered, which includes after 28 years being
2 fired for essentially being rear ended, what
3 anguish, emotional anguish has that caused him,
4 and I am not raising psychological issues, and
5 I am not suggesting that he needs to go to a
6 psychiatrist and the like for that. He did
7 testify yesterday, Ray, that he has to take
8 anxiety medication. He has been taking
9 medication for anxiety. If it turns out that --
10 MR. HASIAK: Let's go back to the
11 question you asked, what does some policy that
12 you are asking Mr. Scott about have to do with
13 your client having anxiety, if you want to ask
14 questions about your client and his interactions
15 with the Union Pacific Railroad, that's why we
16 came here with Mr. Scott, and you told us this
17 was going to be an hour and a half deposition, we
18 are now close to two hours, and you are wandering
19 around asking about investigations and
20 investigating officers. And clearly we came here
21 to talk about what was the end result, what was
22 the basis for Mr. Scott's decision. Lou, you are
23 way, way, way far away from this case and the
24 discovery in this case.
25 MR. JUNGBAUER: Ray, that's your

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1 opinion, and you are entitled to that, and I am
2 objecting to you giving that. I totally
3 disagree, I think it clearly goes to the
4 underlying, not only to the wage loss, future
5 wage loss, loss of earning capacity claim --
6 MR. HASIAK: He has been offered
7 his back wages.
8 MR. JUNGBAUER: What has he been
9 offered for the mental anguish of being --
10 MR. HASIAK: We haven't discussed
11 about settlement of the case, we have talked
12 about reinstating him and giving him his back
13 pay, so where is the wage loss, Lou?
14 MR. JUNGBAUER: You are asking
15 MR. HASIAK: Where is the wage
16 loss?
17 MR. JUNGBAUER: You are asking the
18 man to sign a form admitting responsibility when
19 there are no facts to suggest, in our opinion,
20 there are no facts to suggest he did anything
21 wrong.
22 MR. HASIAK: And we have been over
23 that with Mr. Scott and we disagree.
24 MR. JUNGBAUER: Okay.
25 MR. HASIAK: Let's move on to the

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1 next subject then.
2 MR. JUNGBAUER: Well, we have each
3 stated our positions. Do you know in this
4 particular -- well, Dave let me make it clear,
5 for the record, are you instructing Mr. Scott not
6 to answer any questions about the policy in his
7 service district in July of '06, pertaining to
8 potential harassment of workers for turning in
9 personal injury forms?
10 MR. SCHMITT: I have already
11 answered the question that Mr. Scott is here to
12 fully answer all questions posed to him about Mr.
13 Tanner, whatever decision making went in, the
14 same topics we have been talking about for the
15 last almost two hours. Anything you want to ask
16 him about Mr. Tanner is fine, so again, he is
17 here, he is available to answer those questions.
18 I think our position is already accurately stated
19 on the record.
20 MR. JUNGBAUER: That you won't
21 allow him to testify concerning the policy?
22 MR. SCHMITT: It's what I have
23 already stated.
24 Q. (By Mr. Jungbauer) Okay, my understanding,
25 for the record is, that you won't allow Mr. Scott

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1 to answer questions about his policy, I think it
2 is clearly not only foundation and would be
3 required at trial, but I think it is clearly
4 relevant and will lead to discoverable evidence,
5 but we will take it up with the judge.
6 Would it be fair for me to conclude, Mr.
7 Scott, that as far as you are aware, no one with
8 UP ever checked to determine whether the lights
9 on the box, the remote control unit box were
10 defective or not?
11 MR. SCHMITT: Objection to form, go
12 ahead and answer to your own personal knowledge
13 THE WITNESS: I am not aware that
14 that was done.
15 Q. (By Mr. Jungbauer) Do you know whether
16 Union Pacific filed any required forms with the
17 FRA pertaining to the HAZMAT spill?
18 A. I would have to ask Kim Keeling our manager
19 of HAZMAT, but any type of HAZMAT spill that
20 happens in the yard, the State, County folks are
21 automatically notified by RMCC.
22 Q. Who at UP in North Platte is, or who are the
23 people that actually fill out any forms that are
24 required to go to the FRA, if you know?
25 A. In regards to?

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1 Q. For example, in this case there is casualty
2 records, I will show you on a form that we
3 obtained from the FRA, and I am not going to ask
4 you about the specifics of that form, Mr. Scott,
5 unless you tell me you are familiar with this
6 particular form and the content?
7 A. I am not.
8 Q. Okay, but do you know who it is in North
9 Platte that we can talk with that would have
10 filled out that form or provided the information
11 for that form, if you know?
12 MR. SCHMITT: Object to foundation,
13 the witness has already testified he is not
14 familiar with this form.
15 Q. (By Mr. Jungbauer) Right, but he may well
16 know who, under his supervision or under the
17 department anyway that puts in the information?
18 A. The information on all accidents, rail,
19 public accident, injuries, HAZMAT spill, whatever
20 that might be would go through Cam Clark and her
21 administrative staff.
22 MR. JUNGBAUER: Okay, thank you.
23 MR. SCHMITT: I think for the
24 record we should probably mark this, given the
25 fact that the witness was asked to review it and

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1 questioned about it, so let's mark that as
2 Exhibit 5.
3 MR. JUNGBAUER: Sure, if you want,
4 that's fine.
5 (Exhibit No. 5 was marked
6 for identification.)
7 Q. (By Mr. Jungbauer) Mr. Scott, I have got
8 another form, a three page form from the FRA that
9 talks about -- that gives information about
10 derailments in the Nebraska Region, and it
11 indicates that there were five derailments in the
12 North Platte Service District in July of '06, and
13 what I am wondering about is, do you know whether
14 any of the workers involved in any of those five
15 derailments were given a level 5 or not?
16 MR. SCHMITT: Object on foundation,
17 go ahead.
18 THE WITNESS: I don't know if any
19 of these employers were issued level 5.
20 Q. (By Mr. Jungbauer) Who would know that?
21 A. I would have to look at our records, Cam
22 Clark again would be a good source of information
23 on potential discipline for these accidents.
24 Q. There were a number of rules that were
25 brought up at the formal investigation, brought

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1 into the formal investigation, Mr. Scott -- off
2 the record.
3 (A discussion off-the-record
4 was held.)
5 Q. (By Mr. Jungbauer) We have covered quite a
6 bit today, Mr. Scott, and I am just scanning
7 over, I want to make sure that I have covered
8 everything I need to and then we will take a
9 quick break and step out in the hall with Mr.
10 Tanner, and we will be finished after we get back
11 in. Unless he has got a question or two he wants
12 me to ask.
13 Do you know, Mr. Scott, whether there were
14 any audio signals or information given to Mr.
15 Tanner that there was a problem with his engine
16 consist?
17 A. I would have to read the investigation to
18 re-familiarize myself, but I do believe that
19 somewhere in that investigation notice there was
20 some audio warning that was given.
21 Q. Right, would it be fair that you are not
22 aware one way or the other whether Mr. Tanner or
23 Mr. Barkley actually heard that warning?
24 A. Right.
25 MR. SCHMITT: Well, without

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1 reviewing the transcript and refreshing his
2 recollection as he has testified.
3 Q. (By Mr. Jungbauer) Would you agree with me
4 that the fact Mr. Tanner turned in a personal
5 injury report form, that does not play any part
6 at all with his ultimately being charged and
7 assessed a level 5?
8 A. The two are completely separate.
9 Q. Do you know why, do you know that Mr.
10 Tanner, after he turned in his doctor report slip
11 with restrictions on it, are you aware of whether
12 he was then pulled out of service after that took
13 place?
14 A. I can't remember the date we actually, I
15 would have to review his personal record to see
16 when he was placed into investigation pending
17 status, I don't know exactly when that occurred.
18 Q. But it is your position that it's separate
19 from his having turned in a personal injury form?
20 A. That's correct, none of the charges and the
21 investigation had anything to do with the
22 personal injury.
23 MR. JUNGBAUER: I am going to take
24 just a minute and step outside with Mr. Tanner,
25 I will be back in just a minute or two.

(A short recess was held.)
MR. JUNGBAUER: Mr. Scott, I am finished, that's all of the questions I have.
MR. SCHMITT: We have no questions for Mr. Scott at this time, and we would like to read and sign. Why don't you just tell Billy where he should mail the transcript, just give him the address.
THE WITNESS: 4601 West Front Street, North Platte, Nebraska 69101.
MR. JUNGBAUER: We are done and we are off of the record.
(Witness excused.)
(Deposition concluded.)

Deposition of CAMERON ALLAN SCOTT.

Signature of witness

STATE OF NEBRASKA)
) ss.
COUNTY OF LINCOLN)

Subscribed and sworn to before me this day of 2007.

GENERAL NOTARY PUBLIC

CERTIFICATE

STATE OF NEBRASKA)
) ss.
COUNTY OF CHEYENNE)

I, Billy B. Hughes, General Notary Public in and for the State of Nebraska, do hereby certify that CAMERON ALLAN SCOTT was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition as above set forth is a true and correct transcription of the testimony given by the witness.

That the foregoing deposition was taken by me at the time and place herein specified and in accordance with the stipulation.

That I am not counsel, attorney, or related to any party or their counsel, or otherwise interested in the event of this suit.

IN WITNESS WHEREOF, I have placed my hand and seal this 7th day of April, 2007.

Billy B. Hughes- Notary

My commission expires:

LAW OFFICES OF
YAEGER JUNGBAUER & BARCZAK, PLC

November 21, 2007

James L. Oberstar, Chairman
U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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Dear Chairman Oberstar,

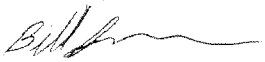
Pursuant to your November 7, 2007 letter, enclosed, please find the following documents: 1) Responses to Questions from Chairman James L. Oberstar; and 2) Responses to Questions from Congressman Henry E. Brown.

Thank you for the opportunity to testify in front of Congress on the important issue of "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads".

If you have any questions please do not hesitate to call.

Very truly yours,

YAEGER, JUNGBAUER & BARCZAK, PLC



William G. Jungbauer

WGJ:kjf

Enclosures (2)

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Minneapolis,
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Questions from Chairman James L. Oberstar
"The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety Of America's Railroads"
October 25, 2007

1. Could you please elaborate on why you believe railroads systematically under report accident and injury statistics?

ANSWER:

At the outset I would like to thank Chairman Oberstar for taking time to further delve into facts and circumstances relating to the issues discussed in the October 25 hearing in asking very germane and important additional questions.

I believe that railroads systematically under report accident and injury statistics primarily for financial reasons. Railroads know that accident and injury statistics are the basis for government regulation of the railroad industry. If railroads can convince Congress that accident statistics are improving, railroads can argue that there is no need for additional laws or regulation of the rail industry. New laws and/or regulations usually mean that the industry will have to invest in better equipment, additional workers and other costs to correct bad practices or policies that railroads use unfairly in their treatment of injured employees. Finally, the compensation, bonus and advancement systems in many if not most railroads for supervisors is often tied to whether or not goals are met in reducing accident and injury statistics. The financial incentives and/or disincentives to management based on accident and injury statistics is a major problem, that I believe causes, good people to do bad things. Since these programs are usually system wide, accident and injury statistics are systematically under reported.

2. Why was the rail industry so adamant about overturning Illinois and Minnesota state statutes directed at preventing rail management harassment and intimidation of employees?

ANSWER:

I believe that the rail industry was adamant about overturning the Illinois and Minnesota state statutes directed at preventing rail management harassment and intimidation of employees because these states would have enforced the statutes, causing railroads to stop the harassment and intimidation of their injured employees. The FRA is a friend of big railroads. Many top FRA officials either came from rail management or are friendly with rail management. The Minnesota and Illinois statutes would have allowed action to be taken against railroads without the FRA and/or courts blocking such action on a preemption theory. The state statutes would have allowed action to be taken personally against the offending railroad management official(s) without relying on FRA. Prosecution of just one railroad official would have sent a strong message to all middle

managers of railroads: obey the law or you will be prosecuted. Railroad companies could no longer entice their management employees with financial incentives or disincentives into harassing and intimidating injured employees if the management employees believe that serious repercussions could result from their actions.

3. Do you believe that H.R. 2095, which passed the House by a wide margin last week will completely address what those Illinois and Minnesota statutes were seeking to codify?

ANSWER:

While I strongly compliment Chairman Oberstar, Chairwoman Brown, the Transportation Committee and the House on the passage of H.R. 2095, unfortunately, I do not believe that H.R. 2095, which passed the House will completely address the issues that the states of Minnesota and Illinois were seeking to codify. Minnesota had two concerns: 1) preventing harassment and intimidation of injured workers similar to the subject matter of section 301 of the House bill that was eliminated from final passage; and 2) a section like the Illinois provision prohibiting railroads from preventing or delaying access to medical treatment. I believe that section 606 of the H.R. 2095 will help achieve the goals of states such as Minnesota and Illinois in dealing with prevention or denial of medical treatment to injured individuals. I only wish that somehow section 301 could be added back to the final legislation.

4. You stated in your written testimony that injuries coded due to "human factors" was a code word for blaming the employee. Can you elaborate?

ANSWER:

In my experience, railroads avoid identifying equipment, training, lack of sufficient employees and/or lack of supervision as a cause of accidents because then action could be taken to eliminate future accidents, actions that could cost them money. Thus, railroads code accidents, where possible, as "human factor" accidents so when statistics are analyzed they can claim that no new laws, regulation, additions of manpower, changes in training, expenses on new equipment or elimination of old hazards need be done.

5. You also referred to a "glitch" in the reporting rules meaning railroads do not need to notify injured employees if the railroad claims the injury was caused by the "human factor" of the injured person. Can you please elaborate?

ANSWER:

In my opinion the purpose of 49 CFR 225.12 and in particular the notification requirement embodied in form FRA F6180.78 should be to let injured employees know that they are being personally blamed for an accident with sufficient time for them to advise the FRA and/or gather and protect evidence for their own case.

However, the FRA has severely watered down and taken the teeth out of this section. Railroads only need to notify a blamed employee when reporting a rail equipment accident/incident and it lists as a cause a code under "Train Operation" - Human Factors, as listed in Appendix C to the FRA Guide For Preparing Accident/Incident Reports. See FRA Guide for Preparing Accident/Incident Reports, Appendix H, Form FRA F 6180.81, Frequently Asked Questions.

A rail equipment accident/incident only needs to be reported under the following circumstances:

> Collisions, derailments, fires, explosions, acts of God, or other events involving the operation of railroad on-track equipment (standing or moving) and causing reportable damages greater than the reporting threshold for the year in which the accident/incident occurred must be reported using Form FRA F 6180.54. The reporting threshold for calendar year 2003 is $6,700.

FRA Guide for Preparing Accident/Incident Reports, Ch. 7, p.1.

Therefore, this notification is only required for a limited subsection of injuries/incidents that occur on the railroad - a specific type of incident and a specific amount of damage.

When I ask railroads whether or not they notified an injured employee with form FRA F6180.78 they routinely reply that they do not need to notify the injured if the physical damage to property threshold is not met in the accident. The "glitch" is that even in an amputation case the railroad can claim they do not have to notify an injured employee if the property damage is not sufficient!

A good example of such a situation is the case of Hillyard v. BNSF. Mr. Hillyard lost his right leg in a railroad accident. The BNSF sent a vice president, Ray Stevens, to meet with Mr. Hillyard and his family in the hospital. Mr. Stevens told Mr. Hillyard that BNSF would "take care of him". At that very moment BNSF was taking the coupler from a foreign rail car, hid it for three years, and then claimed that there was nothing wrong with the rail car. BNSF also changed yard lighting and later claimed that lighting had not been changed. The BNSF claim agent told the family not to hire a lawyer. While BNSF had decided shortly after the accident that the amputation accident was caused by "human factors," BNSF did not tell Mr. Hillyard of this decision in hope that he would not hire a lawyer. He did, and all of this became exposed on the record. A copy of the BNSF filing to the FRA on the Hillyard case showing that BNSF listed "human factor" for the accident is attached as exhibit 1.

It is important to recognize that the FRA has a "human factor" cause code for all types of accidents/incidents, not only for the above-described rail equipment accident/incident. FRA Guide for Preparing Accident/Incident Reports, Appendix F, p.10. Railroads can and do assign "human factor" as a cause of accidents/incidents to the FRA. However, the FRA does not require and the railroads do not notify the injured employee of this

accusation and the employee has no opportunity to rebut this accusation. If the railroad is not accurately reporting this information the FRA data will surely be inaccurate.

6. How extensive do you believe the under reporting problem is?

ANSWER:

There are two types of under reporting: misreporting, such as incorrectly characterizing an accident as "human factor"; i.e. caused by the injured person (when bad equipment or unsafe practices are actually the cause), and non-reporting, where the carrier simply does not report an accident to the FRA. While it is difficult to "prove a negative", I had my office do an analysis of our cases prior to testifying in Washington. We found that of the 108 most recent cases, that 38 cases or 35% were either misreported or not reported to FRA. I believe that it would be possible for this Committee to ask Class I railroads to provide information on all amputation cases in the past ten years to determine in how instances railroads claimed such accidents were "human factor," i.e., the injured employee, how many cases the railroad notified the injured employee of the human factor claim, and whether the injured employee disputes any claim that they were the cause of the accident and were not given the chance to contest the claim. Since amputation cases are rare but very serious, we would assume railroads would want to be accurate in the reporting of such cases. The cases are public record and claims by railroads could easily be cross checked by ARLA or AAJ.

7. Can you provide examples of where railroad points systems for rating the "riskiness" of an employee have caused employees to not report injuries?

ANSWER:

The best example that I can think of is contained in materials that already are exhibits in my prior testimony in the transcript of Mr. Justin Cloud, the CSX employee who was told by his CSX supervisor that "things would happen" if he reported the injury. (See Jungbauer testimony, Ex.4). In that case the employee was continually told that he could "get in trouble" if the accident was reported. The accident was not timely reported. Once the employee needed to report the accident to get medical attention it finally was reported. See also the Deposition of Cameron Scott that is an example in my earlier testimony. Jungbauer testimony, Ex. 12. See further the attached exhibit to my testimony from Brotherhood of Signalman official John McArthur. Jungbauer testimony, Ex. 8.

Our office has had numerous experiences wherein injured employees tell us they are afraid to report an accident because they believe they would be fired or disciplined. I cannot divulge information of such persons without their express permission as such would violate attorney client privilege. Such injured people are afraid of what the railroad will do to them in the future. I even had a former client who was prepared to testify about the risk ratings and how they affect injured employees such as himself at the October 25th hearing. This individual backed out because he was afraid the railroad

would "get" him at a later date merely for testifying. His union was also afraid that he could be targeted for testifying at the October 25th hearing. He asked that I not disclose his name, so I must decline to do so as such is privileged information. If even a union does not believe that an employee-member who testifies in Congress can be protected from harassment and intimidation by rail carriers, the scope of the problem can start to be understood. Even though I believe that testimony before a Congressional Committee is protected speech I could not guarantee to the former client that I could prevent his railroad from future harassment if he testified at the October 25th hearing.

8. You stated in your testimony that you believe the intimidation problems has become worse in the past decade after enactment of new policies by the FRA requiring all railroad to have Internal Control Plans (ICP's). Why do you believe the problem has gotten worse?

ANSWER:

I believe that the Internal Control Plans (ICP) are used by rail carriers as a defense to FRA and/or Congressional oversight into their intimidation programs or policies. FRA does little or nothing to stop harassment and intimidation–Mr. Boardman testified as to the very limited role that FRA sees for itself in these matters. I believe that the financial pressures identified in my answer to question 1 are the true cause of the harassment and intimidation of injured employees. I believe that railroads have been emboldened to expand the scope and extent of harassment of injured employees since the FRA does so little to protect injured employees. ICP are the "get out of jail free card" for offending railroads – all they need do to avoid court oversight is to claim that they have an ICP program and that all other actions of any court, legislature or private person are preempted by Congressional action (or inaction). Thus, things have gotten worse rather than better in recent years with ICP.

9. Please explain the issue of computer programming of call records that will not allow an injured employee to "mark off" for previous injuries.

ANSWER:

A good example of this problem is an analysis of the BNSF policies in this regard. Railroads are supposed to update information given to the FRA such as the numbers of days missed due to the reportable accident and other required information. Many injured BNSF employees have reported to us that when they call into BNSF to lay off due to an old injury (reportable to FRA) that the computer will not accept laying off "old injury" as a category. Most employees give up and list "personal reasons" or "sick" or some other category that the computer will accept to lay off due to old injury. In these cases, FRA data is inaccurate as the railroad cannot report additional lost work days due to an old injury if it has no data on such additional lost work days. An additional problem that exists not only at BNSF, but at many other railroads are "Availability Policies" which deny injured employees the ability to miss more than some specified number of days from

work even if such lost days are the result of an on-duty injury. Policies that force employees to use FMLA time for lost work days may also affect computer statistics reported to FRA, as could "light duty" work time. If the railroad data is not accurate in its own computer the FRA data will surely be inaccurate.

Respectfully submitted

William G. Jungbauer
YAEGER, JUNGBAUER & BARCZAK
745 Kasota Ave.
Minneapolis, MN 55414

FROM FORM FRA F 6180.55A

CASUALTY RECORD

RAILROAD:	BNSF Rwy Co. [BNSF]	**INCIDENT NUMBER:**	WA1200004
DATE:	12 /18 /2000	**TIME:**	3:15PM
STATE:	Washington	**COUNTY:**	STEVENS
TYPE PERSON:	Worker on duty - employee	**AGE:**	33
EMPLOYEE JOB:	Road freight conductors (local and way freight)		
INJURY:	Amputation, foot (general)		
DAYS ABSENT:	125	**DAYS RESTRICTED:**	0

EMPLOYEES TESTED FOR ALCOHOL USE:	NONE REPORTED
NUMBER OF POSITIVE TESTS:	
EMPLOYEES TESTED FOR DRUG USE:	NONE REPORTED
NUMBER OF POSITIVE TESTS:	
EMPLOYEE TERMINATION/PERMANENT TRANSFER:	NO
EXPOSURE TO HAZARDOUS MATERIAL:	UNK/NA
FRA FORM 6180-54 FILED:	NO
FRA FORM 6180-57 FILED:	NO

CIRCUMSTANCES

PHYSICAL ACT:	Pulling pin lifter/operating uncoupling
EVENT:	Slipped, fell, stumbled, etc. due to climatic condition
RESULT:	Ground
CAUSE:	Human factor

LOCATION

SITE:	Main/branch
ON TRK EQP:	Freight car(s) - moving
WHERE:	Between cars/locomotives

NARRATIVE

QUESTIONS FROM CONGRESSMAN HENRY E. BROWN
AND ANSWERS BY WILLIAM G. JUNGBAUER

1. Mr. Jungbauer, hasn't the situation changed from the turn of last century when the Supreme court wrote: "In 1888 the odds against a railroad brakeman dying a natural death were almost four to one; the average life expectancy of a switchman in 1893 was seven years."?

ANSWER:

Congressman Brown: Thank you for this question regarding railroad worker life expectancy and how things have changed in the past century. I agree that the situation has changed and that the average life expectancy of a switchman has increased dramatically in the past century since the FELA was enacted by Congress. I believe that the passage and strengthening of the FELA is the primary reason for the dramatic improvement in life expectancy of switchmen and other railroad workers. I know of employees who have worked 30 and even 40 years on the railroad as conductors, trainmen and/or engineers. FELA is a financial incentive causing railroads to provide a safer place to work for their workers. I strongly believe that without the FELA some of the life saving technology and equipment changes that helped increase the life expectancy of railroad workers would not have occurred or would have been delayed even longer. Bottom line economics dictate that if it is cheaper to be safe than not be safe that big corporations including railroads will chose to be safe.

Mr. Jungbauer, I have several questions for you in connection with the criminal prosecution of Charles Little and Byron Boyd, both former presidents of the UTU.

As you are aware, Mr. Little and Mr. Boyd were convicted of accepting bribes from lawyers who were UTU Designated Legal Counsel. I understand that your firm was once a UTU Designated Legal Counsel - but ceased to be so at some time after Mr. Boyd's prosecution. So here are my questions:

1. Did you or any member of your firm have any involvement in the case against Mr. Boyd or Mr. Little?
   a. If so, please describe the involvement.

ANSWER:

Congressman Brown: I appreciate the opportunity to help clarify any misconceptions about the Little and Boyd matter. I realize that there are some interests that would rather take "a shot" at union lawyers than discuss the actions of rail carriers in the mistreatment of their own injured workers. However, I trust that you as a Congressman are truly interested in stopping harassment and intimidation of injured railroad workers and that your questions are asked to dispel any doubts about injured railroad workers and those

who fight for the rights of injured railroad workers against railroads.

I have never been designated by the UTU or any predecessor organization as a legal counsel, and I did not have any involvement in the criminal prosecution of Mr. Boyd and Mr. Little. As noted in my original remarks, I am personally designated by the Brotherhood of Locomotive Engineers and Trainmen. Our firm has represented many UTU members in our firm's over 75 years of service and maintains a great admiration for the UTU and its members. A partner in my firm was a designated legal counsel (DLC) of the UTU. Upon information and belief, I believe all or almost all of the UTU designated legal counsel were subpoened to the grand jury, as was that partner of mine.

2. Were you or was any member of your firm given immunity from prosecution in return for testimony against Mr. Boyd, Mr. Little or any other UTU official? If so, please identify the person or persons granted immunity.

ANSWER:

I was not given immunity. As I understand the proceedings, upon information and belief the subpoenaed lawyers were all given immunity by the government to testify before the grand jury.

3. Did you or any member of your firm ever give money or any other thing of value, or make any contribution to Mr. Boyd, Mr. Little or any other person in return for being appointed as UTU Designated Legal Counsel?
If so, please state:
   a. The persons to whom payments were made and
   b. The total dollar amount paid

ANSWER:

I have never given money or anything of value to obtain a designation from a union. Upon information and belief the same is true for all members of my firm. Like all law firms we do market our services including making expenditures to develop and maintain goodwill and for educational purposes.

4. After Mr. Boyd's prosecution, the UTU asked its Designated Legal Counsels to sign affidavits that they had no involvement in the Boyd case. Is it true that your firm was sent such an affidavit but did not sign it?

ANSWER:

As I was not the UTU designated legal counsel, I did not respond to the letter sent by the

UTU to its designated counsel. Upon information and belief the document asked that lawyers who had testified, under oath state that they had never given any money to Mr. Little or Mr. Boyd. It is my understanding that any payment for any purpose would have disqualified an individual from signing the document even if the payment was for proper and legal purposes and that based upon the wording of the affidavit, my partner did not sign.

5. Let us leave the UTU aside for a moment
   1. Have you or any member of your firm ever paid money, given anything of value, or made any contribution to an official of any other union in return for being appointed Designated Legal Counsel, or in return for access to potential legal clients?
      2. If so, please state:
         1. The persons to whom payments were made;
         2. The total dollar amount paid.

ANSWER:

As mentioned in Question 3 above, I believe that no one in our firm has ever paid for a union designation. Also, our firm does not permit referral sums nor fee splitting to be done with any union officer or any other person in violation of codes of ethics of state bar associations and lawyer organizations

Our firm has represented clients on a nationwide basis and we market our services, generate goodwill, entertain union members and officers, make educational presentations to union members and officers and support union causes. For example, we take individuals golfing, fishing and to shows and buy dinners, drinks, pizzas, wine and/or beers for purposes identified above.

Our law firm in general and myself in particular have sought to be a nationwide leader among all Designated Legal Counsel of any union in advocating compliance with reporting requirements of the Department of Labor via LM-10 and LM-30 by lawyers and union officers. These reporting requirements seek disclosure of payments to unions and union officials. For the last several years, we have filed the LM-10 Report for our firm. Such information is public record and available online. We have encouraged lawyers with other law firms to file the LM-10 report and union officers to file the LM-30 report. We have held compliance seminars in our firm to teach everyone of the obligation and importance of accurate reporting to the Department of Labor of expenses made regarding unions and union officials. I have personally taught seminars to the top officers of the Brotherhood of Locomotive Engineers and Trainmen regarding LM-10 and LM-30 reporting; I assisted the BLE in adopting a compliance program for its designated legal counsel; I have served as national chairman of the BLET Designated Legal Counsel

Ethics and Compliance Committee; and I have assisted in bringing in speakers to teach to the BLET Designated Legal Counsel. I have also met with the Department of Labor in Washington, D.C. to ensure our accurate approach to the law and reporting requirements.

We are proud of our work because we believe that these reporting requirements are the best way to comply with the law and to insure that Boyd-Little type scandals do not occur again. In our meetings with the Department of Labor we were encouraged to continue our efforts to secure lawyer compliance with reporting requirements. The DOL representatives appeared to appreciate our efforts.

Very truly yours,

William G. Jungbauer

United States General Accounting Office

GAO

Report to the Chairwoman, Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives

August 1996

FEDERAL EMPLOYERS' LIABILITY ACT

Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated

GAO/RCED-96-199

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-261963

August 15, 1996

The Honorable Susan Molinari
Chairwoman, Subcommittee on
Railroads
Committee on Transportation and
Infrastructure
House of Representatives

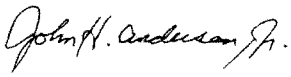
Dear Madam Chairwoman:

In response to your request, this report examines the issues associated with changing how railroad workers are compensated for their work-related injuries. In particular, we identify the potential implications for railroad costs and railroad workers of (1) replacing the Federal Employers' Liability Act (FELA) with a no-fault compensation system or (2) modifying FELA. We also discuss FELA's effects on small railroads and the availability and affordability of insurance to protect small railroads against large FELA payouts.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary of Transportation, the Secretary of Labor, and the Director, Office of Management and Budget. We will also make copies available to others upon request.

Please call me at (202) 512-2834 if you or your staff have any questions. Major contributors to this report are listed in appendix V.

Sincerely yours,



John H. Anderson, Jr.
Director, Transportation and
Telecommunication Issues

Executive Summary

Purpose

Unlike most American workers, railroad workers are not covered by state no-fault workers' compensation insurance systems when they are injured on the job. Instead, railroad workers must recover their losses under the provisions of the Federal Employers' Liability Act (FELA). Under FELA, an injured worker negotiates a settlement with the railroad. If the negotiations fail, the worker may file a lawsuit alleging negligence by the employer to recover losses. No-fault systems do not require that the parties demonstrate negligence. The Chairwoman, Subcommittee on Railroads, House Committee on Transportation and Infrastructure, asked GAO to identify the implications for railroad costs and railroad workers of (1) replacing FELA with a no-fault compensation system or (2) modifying FELA. GAO was also asked to assess how FELA particularly affects small railroads (those with annual revenues of less than $250 million) and determine the availability and affordability of insurance to protect small railroads against large FELA payouts.

Background

FELA was enacted in 1908, a time when the railroads were the nation's largest employer and rail work was especially hazardous. At that time, injured railroad workers had difficulty getting compensated under the common law that governed injury compensation. Railroads often avoided paying compensation for on-the-job injuries by arguing, for example, that a coworker's negligence had caused an injury or that workers assumed the risk of injury at the time they accepted employment. In an effort to better protect workers against financial loss and to make the railroads more accountable and responsible for work-related injuries, FELA limited the railroads' defenses against liability for compensating injured workers. Such limitations provided railroad workers with more protection than other employer liability laws of the time, but workers were still required to establish negligence. At about the same time, the individual states were enacting no-fault workers' compensation systems. Today, most workers in other industries are covered under state workers' compensation systems, but railroad workers continue to be covered under FELA. FELA allows workers to seek recovery for economic damages (such as lost wages) and noneconomic damages (such as pain and suffering), while workers' compensation systems typically limit recovery to economic losses.

Many in railroad management believe that FELA should be replaced or changed. In general, railroad management is dissatisfied with FELA because, among other things, the need to demonstrate negligence creates an adversarial relationship between management and labor. Management also believes that the system is excessively litigious, that FELA lawsuits are

often filed in court jurisdictions that have historically been favorable to plaintiffs, and that the system is unnecessarily costly. Railroad labor officials, on the other hand, believe that FELA is working well and should not be replaced or changed. In labor's view, FELA provides workers with the opportunity to fully recover their losses from on-the-job injuries and provides railroads with an incentive to operate safely. Railroad labor believes the problem is not that FELA provides workers with excessive compensation but that no-fault compensation systems provide too little compensation.

Results in Brief

Whether replacing FELA with a no-fault compensation system would reduce railroad costs depends to a large extent on the number of workers who are permanently disabled by on-the-job injuries. If many of the railroad workers who currently leave a railroad after receiving a FELA settlement are physically capable of returning to work, then total injury compensation costs for the railroads could be less under a no-fault system. On the other hand, if about two-thirds or more of these workers were permanently and totally disabled and unable to return to any work, the costs of a no-fault compensation system could be the same as or higher than under FELA. Railroad management believes that some railroad workers who leave a railroad after taking their FELA settlement are physically capable of returning to work and, therefore, would not receive long-term benefits under a no-fault system. However, little information is available on how many railroad workers who leave a railroad after taking a FELA settlement are physically capable of returning to work. For those workers who can return to work at their preinjury wages, the railroads' compensation costs would be less under a no-fault system because it does not provide compensation for noneconomic losses.

Modifying FELA could reduce the railroads' costs. For example, placing caps on awards for noneconomic damages or on plaintiffs' attorneys' fees might reduce injury compensation costs, depending on what proportion of FELA awards are represented by noneconomic damages and how attorneys' fees relate to settlement amounts. On the other hand, such modifications could adversely affect railroad workers by reducing the compensation they receive and limiting the availability or quality of their legal counsel.

Small railroads' 1994 FELA costs per employee-hour worked were less than those of larger railroads. In part, this is because small railroads had, on average, fewer lost workdays per injury than the large railroads and a lower percentage of injuries that resulted in lost work time. GAO also found

that the small railroads rely heavily on insurance to protect against large payouts under FELA. It appears that at the current time, liability insurance that includes FELA coverage is both available and affordable.

Principal Findings

Cost Impact of Replacing FELA With a No-Fault Compensation System Depends on Many Factors

The cost of replacing FELA with a nationwide no-fault injury compensation system depends on a number of factors. One of the most important is the number of injured railroad workers who are permanently disabled by their injuries and unable to return to work at their preinjury wages. Under FELA, some workers leave their railroad after receiving a lump-sum FELA settlement. Little information is available on how many of these workers are able to work. GAO estimates that if about two-thirds or fewer of the injured workers at four large railroads had been permanently and totally disabled, then the costs under a no-fault compensation system could have been the same as or lower than those under FELA.

To produce this estimate of the potential benefits of replacing FELA with a no-fault system, GAO used a cost analysis model developed for the Association of American Railroads. The model used information on claims under FELA that were closed in 1994 for four railroads that employ about 60 percent of the workers at large railroads. To calculate the costs under a no-fault alternative, GAO used the benefit provisions of the two nationwide systems covering civilian federal workers and maritime workers—the systems under the Federal Employees' Compensation Act (FECA) and the Longshore and Harbor Workers' Compensation Act (LHWCA), respectively. Using the model, GAO found that overall injury compensation costs would have been less under a no-fault system if fewer than 65 or 70 percent (depending on whether FECA- or LHWCA-level benefits are used) of the injured rail workers at these railroads who accepted FELA settlements and left the railroad had been less than permanently and totally disabled and were able to return to work. GAO also estimates that for the group of injured workers who continued to work at their railroad after a settlement, the railroads might have saved about $100 million in compensation costs.

Replacing FELA with a no-fault compensation system would likely reduce the railroads' administrative costs. With the elimination of the need to investigate negligence and assess noneconomic damages, the costs of processing injury claims would be lower than they are under FELA.

Although rehabilitation costs can be compensated under FELA, rehabilitation plays a larger role in no-fault compensation programs, and railroads might incur higher costs for these services.

Modifying FELA Would Likely Reduce Railroads' Costs but Could Also Adversely Affect Workers

In lieu of replacing FELA, the Congress could modify it. GAO found that some modifications have the potential to reduce the railroads' injury compensation costs. For example, placing a cap on compensation for noneconomic losses could reduce costs. Because the data that GAO received from the railroads did not identify the proportion of each FELA award represented by noneconomic damages, a precise estimate of the savings from capping them could not be made. However, on the basis of an examination of the FELA claims that were closed at four large railroads in 1994, GAO found that under a range of assumptions about these proportions and using $250,000 as a cap (an amount considered in recently proposed legislation on the National Railroad Passenger Corporation), the railroads might have saved between $7 million and $48 million of the $479 million they paid out in 1994. Placing a cap on plaintiffs' attorneys' fees is also a way to reduce costs. However, any savings would depend on the relationship between these fees and settlement amounts. Rail labor organizations told GAO that attorneys currently receive no more than 25 percent of a FELA award.

Although these options might reduce the railroads' FELA costs, they could adversely affect injured railroad workers. For example, a cap on noneconomic damages could reduce the compensation that such workers receive. Similarly, placing a cap on plaintiffs' attorneys' fees might affect the availability or the quality of the workers' legal counsel. On the other hand, capping plaintiffs' attorneys' fees might, in some cases, increase the amount of the settlement that goes to the injured worker. The position of current railroad workers could be protected by continuing to cover them under FELA and its present provisions (known as "grandfathering"). This solution, however, could increase the railroads' costs to administer injury compensation cases and could create a situation in which employees with similar injuries have access to different types and amounts of compensation.

Small Railroads Have Lower FELA Costs and Rely on Insurance to Protect Against Large Payouts

Small railroads' experience with FELA has differed somewhat from that of the large railroads. In a survey of 560 small railroads, GAO found that, in general, the small railroads' injury compensation costs under FELA were less than those of the large railroads. In 1994, the small railroads paid about $42 million in FELA costs, or about $0.96 per employee-hour worked. In contrast, the large railroads paid about $2.26 per employee-hour worked. Some of this cost difference may be attributable to the fact that the small railroads had, on average, fewer lost workdays per injury than the large railroads—30 days compared with 77 days—and lower average wages. In addition, in 1994, only 54 percent of the injuries on the small railroads resulted in lost workdays, compared with 67 percent on the large railroads. GAO also found that the small railroads rely heavily on insurance to protect themselves against large FELA payouts. GAO's survey found that about 88 percent of the small railroads are covered by insurance that includes FELA coverage. Most of the large railroads have high deductibles and are generally considered self-insured for FELA purposes. GAO found that for the small railroads, liability insurance covering FELA is currently readily available and appears to be affordable.

Recommendations

GAO is making no recommendations in this report.

Agency Comments

GAO provided officials of the Departments of Transportation and Labor with copies of a draft of this report. GAO met with officials from these agencies, including the Chief of the Industry Finance Staff at the Department of Transportation's Federal Railroad Administration, and the Deputy Director, Division of Federal Employees' Compensation and the Director, Division of Longshore and Harbor Workers' Compensation at the Department of Labor. The Department of Transportation officials said they had no reason to disagree with the reports' contents and had no comments. The Department of Labor officials provided GAO with technical comments on the FECA and LHWCA programs, which GAO incorporated where appropriate.

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Abbreviations

AAR	Association of American Railroads
AMTRAK	National Railroad Passenger Corporation
FECA	Federal Employees' Compensation Act
FELA	Federal Employers' Liability Act
GAO	General Accounting Office
LHWCA	Longshore and Harbor Workers' Compensation Act

Chapter 1

Introduction

Unlike most American workers, when railroad workers are injured on the job, they are not covered by state no-fault workers' compensation insurance systems. Instead, they must seek to recover their losses from the railroads under the provisions of the Federal Employers' Liability Act (FELA). Under FELA, injured workers must either negotiate a settlement with the railroad or file a lawsuit against the railroad to recover their losses. FELA allows injured workers to recover noneconomic damages, such as pain and suffering, in addition to economic damages, such as medical expenses and lost wages. In contrast, the benefits paid under no-fault workers' compensation systems are largely limited to medical expenses and lost wages. Under FELA, if a lawsuit is filed, workers must show negligence on the part of the employer; under no-fault systems, issues of negligence are not a factor.

Railroad management's and labor's opinions differ over how well FELA is working. Management, which favors replacing FELA, believes that FELA creates an adversarial environment between the railroads and their employees and is unnecessarily costly. On the other hand, railroad labor believes that FELA is working well and allows injured employees to receive better compensation for their injuries than they would under no-fault alternatives. Labor also believes that FELA provides railroads with an extra incentive to operate safely.

Railroads' Injury Compensation Differs From That of Other Industries

Compensating railroad workers injured on the job is governed by the provisions of FELA. If negotiations between an injured worker and a railroad fail to result in a settlement, then the worker can sue to recover both economic damages and noneconomic damages. In contrast, most American workers are covered by state workers' compensation systems that are essentially no-fault insurance systems. Although compensation under these systems varies from state to state, the benefits are largely limited to economic damages—lost wages, medical expenses, and rehabilitation costs. There are also two federally administered no-fault workers' compensation systems. Civilian federal employees are covered by the Federal Employees' Compensation Act, and employees in the maritime industry are covered by the Longshore and Harbor Workers' Compensation Act.[1]

[1]For more information about how FELA operates and how it compares with no-fault compensation systems, see Compensating Injured Railroad Workers Under the Federal Employers' Liability Act, Special Report 241, National Research Council, Transportation Research Board (Washington, D.C.: National Academy Press, 1994).

FELA Governs Railroads' Injury Compensation

FELA was enacted in 1908, at a time when railroads were the largest employer in the United States and rail work was particularly hazardous. Prior to the act's passage, injured railroad workers had difficulty recovering losses resulting from workplace injuries. Under the common-law doctrine of negligence, railroads often avoided paying compensation for on-the-job injuries by arguing, for example, that employees assumed the risk of injury at the time they accepted employment or that an injury had been caused by a fellow employee. At about the same time, efforts were underway in various states and at the federal level to enact employers' liability legislation that would limit these defenses and increase employers' liability for workplace injuries. In an effort to better protect workers against financial loss and to make the railroads more accountable and responsible for work-related injuries, FELA limited the railroads' defenses against liability for compensating injured workers. As such, it provided railroad workers with more protection than other employer liability laws of the time.

FELA covers virtually all railroads operating in interstate service, including the freight railroads, the National Railroad Passenger Corporation (Amtrak), and most commuter railroads.[2] Under the act, injured workers can seek recovery of all their losses, including economic losses, such as actual and future wage losses, and noneconomic losses, such as pain and suffering. If negotiations between a railroad and an employee do not produce a settlement, employees can seek recovery of their losses in a state or federal court. Should a lawsuit be filed, an employee must show that the railroad was negligent in order to recover damages. However, an employee's recovery for losses might be reduced to the extent that the employee's own negligence caused an injury, and in some instances, the employee could receive nothing. As a result, injured workers may not recover all of their losses, and some workers might not recover any. In addition to compensation under FELA, injured employees may also be eligible for retirement benefits, sickness benefits, and disability annuities from the Railroad Retirement Board.[3]

In 1994, the railroads paid about $1.2 billion in FELA costs, and nearly 75 percent of all FELA injury claims for the large railroads (excluding the

[2]FELA also covers maritime employees who are governed by the Jones Act but does not cover the Alaska Railroad or railroads operating solely within a company-owned plant.

[3]The Railroad Retirement Board is a federal agency that administers the Railroad Retirement and Railroad Unemployment Insurance acts. Any sickness benefits paid must later be paid back to the Railroad Retirement Board from a subsequent settlement under FELA. Between July 1994 and June 1995, a total of $55.1 million in sickness benefits was paid, and $29.9 million was recovered. Recoveries do not necessarily occur in the same year that the benefits are paid.

occupational illnesses of hearing loss and asbestosis) were settled between the railroads and the injured employees without a lawsuit.[4] While the total number of injury claims has declined since 1990, the number of lawsuits has remained relatively stable at about 3,100 cases per year. (See table 1.1.) Over the same period, railroad employment declined from 296,000 to 267,000. The average payout per negotiated claim increased from about $24,000 in 1990 to about $34,000 in 1994, while the average payout per lawsuit remained relatively stable at about $160,000. (See table 1.2.)

Table 1.1: Number of FELA Injury Claims and Suits Settled by Large Freight Railroads and Amtrak, 1990-94

Year	Railroad employment	Negotiated claims	Claims with lawsuits	Total claims
1990	296,000	14,269	3,129	**17,398**
1991	285,000	12,204	3,120	**15,324**
1992	276,000	11,053	3,178	**14,231**
1993	271,000	9,613	3,109	**12,722**
1994	267,000	8,815	3,210	**12,025**

Note: Excludes the occupational illnesses of hearing loss and asbestosis and those cases where no payments were made.

Source: Association of American Railroads.

Table 1.2: Average Payout Per Settled FELA Injury Claim and Lawsuit for Large Freight Railroads and Amtrak, 1990-94

Dollars in constant 1994 dollars

Year	Negotiated claims	Claims with lawsuits	Average for all claims
1990	$24,414	$159,356	$48,683
1991	29,163	146,369	53,026
1992	29,536	160,159	58,706
1993	32,713	166,500	65,408
1994	33,919	165,421	69,023

Note: Excludes the occupational illnesses of hearing loss and asbestosis and those cases where no payments were made.

Source: Association of American Railroads.

[4]In this report, "large" railroads refer to Class I railroads. Class I is a designation used by the former Interstate Commerce Commission. In 1994, railroads with annual revenues of at least $255.9 million were designated as Class I. Class II railroads had annual revenues of from $20.5 million to $255.8 million, and Class III railroads had annual revenues of less than $20.5 million. We use the term "small railroads" to include all freight railroads other than Class I railroads. A more detailed description of the types of railroads included under this term can be found in chapter 4.

Most Workers in Other Industries Are Covered Under No-Fault Injury Compensation Systems

In contrast to railroad workers, workers in most other industries are covered by state no-fault compensation systems. Workers' compensation legislation was initially enacted by most state legislatures in the early 20th Century.[5] One of the principal goals of this legislation was to provide injured workers with adequate benefits while limiting employers' liability to compensating workers only for their lost wages and medical costs. Payments were to be prompt and predetermined to relieve employees and employers of uncertainty and eliminate the need to litigate the claims.

The benefits available under no-fault compensation programs depend on the nature and extent of an injury. For less serious injuries, only medical benefits might be paid. For more serious injuries or illnesses, in addition to medical benefits, an employee might receive wage-loss benefits, vocational rehabilitation, or "scheduled" benefits—for injuries resulting in permanent impairments, such as the loss of a limb or a bodily function. Each state sets its own benefit levels, and benefits vary considerably from state to state.

Two groups of employees are covered by federally administered no-fault systems. The Federal Employees' Compensation Act (FECA) covers federal civilian employees, and the Longshore and Harbor Workers' Compensation Act (LHWCA) covers those in the maritime industry. Enacted in 1916, FECA covers more than 3 million federal civilian employees and authorizes the federal government to compensate employees when they are temporarily or permanently disabled as a result of an injury or illness sustained while performing their duties.[6] The Department of Labor's Office of Workers' Compensation Programs administers this program. Disputes may be handled in one of the Labor Department's district offices or by the Branch of Hearings and Review. Appeals can also be made to the Department's Employees' Compensation Appeals Board. FECA cases cannot be appealed to a court. Enacted in 1927, LHWCA covers about 500,000 longshore workers for disability due to a job-related injury or occupational disease occurring on the navigable waters of the United States or in adjoining shore areas.[7] The Department of Labor also administers this program. Disputes are handled informally in one of the Labor Department's district offices or before the Department's Office of Administrative Law Judges or the

[5]For more information on workers' compensation programs, see our recent report Workers' Compensation: Selected Comparisons of Federal and State Laws (GAO/GGD-96-76, Apr. 3, 1996).

[6]FECA also covers some nonfederal employees, such as some state and local law enforcement personnel and employees in the Civil Air Patrol.

[7]LHWCA also covers certain other workers, such as some employees on military, air, or naval bases.

Benefits Review Board. Unlike FECA cases, LHWCA cases may be appealed to a federal appeals court.

There are important differences between FELA and no-fault compensation systems. First, both state and federal workers' compensation systems cover an employee's work-related injury regardless of negligence on the part of the employer or employee by imposing strict liability on an employer for compensating most economic damages suffered by injured workers. However, they do not allow compensation for noneconomic damages. Second, benefits under no-fault systems are generally paid as losses occur, rather than in a lump sum as they are under FELA. While some states permit lump-sum payments, at least one state—Texas—has essentially banned them. Under FECA and LHWCA, compensation continues as long as a disability continues. Both FECA and LHWCA authorize higher benefit levels than most state workers' compensation systems.

While many no-fault claims are handled directly between employees and their employers or insurance companies, no-fault systems are not free from dispute or litigation. As the National Research Council reported in 1994, disputes may arise over issues such as eligibility for benefits, the level of benefits, and the readiness of workers to return to work.[8] Disputes may also arise over the permanency of injuries. For the most part, adjudicative bodies within a state (or the Labor Department, in the case of FECA and LHWCA) and the judicial system handle the resolution of these disputes. In recent years, litigiousness has tended to increase in no-fault compensation systems. Some states have also been concerned about increasing medical costs in workers' compensation claims, and some (such as California and Texas) have made efforts to control these costs.

Railroad Management and Labor Differ Over Continued Need for FELA

Railroad management and labor disagree over how well FELA is working and whether it should be replaced or changed. Although the railroad industry has undergone substantial change over the years, including technological improvements designed to improve safety, the nearly 90-year old system for compensating injured railroad workers has changed little. In general, railroad management is dissatisfied with FELA and believes it should be replaced or substantially changed. In particular, management believes that because FELA involves issues of negligence, it creates an adversarial environment between railroads and their employees. Management also believes that FELA is unnecessarily costly. In addition, management sees little reason why railroads should be treated differently

[8]National Research Council, Transportation Research Board, 1994.

from other industries in terms of workers' compensation. Railroad labor, on the other hand, believes that FELA is working well and should not be replaced or changed. In labor's view, FELA is a model system that fairly compensates injured workers and provides an incentive for railroads to operate safely. Labor believes the problem is not that FELA provides workers with excessive compensation but that no-fault compensation systems generally provide too little.

Railroad Management Believes FELA Is Flawed and Should Be Replaced

FELA has remained relatively unchanged in its nearly 90-year history despite substantial changes in the industry. Enhancements in braking and signaling, for example, have improved the safety of train operations. The Association of American Railroads (AAR), the trade association of the major railroads, issued a report criticizing FELA and claiming that it has adversely affected the railroad industry.[9] That report included data showing that, as railroad employment has declined and the number of injuries has fallen since 1981, FELA payouts have increased. In 1994, railroads paid about $4,200 per employee in FELA costs, up from about $2,250 per employee in 1985.[10] AAR believes that FELA needs to be replaced.

Many in railroad management believe that FELA is no longer appropriate to the modern railroad operating environment. Among the problems with FELA cited by railroad management are (1) the adversarial environment created between employers and employees because FELA requires the parties to establish fault, (2) the high degree of involvement by attorneys in FELA cases, (3) the unpredictability of FELA costs, (4) the practice of filing FELA lawsuits in court jurisdictions that have historically rendered judgments favorable to the plaintiffs, and (5) the high administrative costs. In general, railroad management questions why the rail industry must be treated differently from other industries regarding injury compensation.

The National Association of Railroad Trial Counsel, an organization of 1,200 lawyers who provide legal services to railroads, believes that because both the right to recover and the amount of the recovery depend on assigning fault, FELA not only inhibits good employer-employee relations but also frustrates attempts to determine the causes of accidents.

[9]Tort Abuse and the Rail Industry: The Facts About FELA, Association of American Railroads, Washington, D.C. (undated).

[10]In constant 1994 dollars.

Railroad Labor Believes That FELA Is Working Well and Should Not Be Replaced or Changed

In contrast to management's view, railroad labor believes that FELA is effective and should not be replaced or modified. Railroad labor believes that FELA offers the railroads incentives to operate safely and gives workers the opportunity to recover full compensation for their injuries. Railroad labor does not believe that FELA should be replaced with a no-fault compensation system like state workers' compensation because, in labor's view, injured workers would not be adequately compensated under a no-fault system.

Railroad labor also takes issue with the criticisms of FELA voiced by railroad officials. For example, railroad labor points out that FELA is not a particularly litigious system because over 75 percent of the FELA cases are settled without any third-party intervention. Moreover, in labor's view, FELA provides the railroads with an incentive to operate safely and if they do so, they could lower their injury compensation costs. Attorneys representing railroad labor also took issue with railroad management's belief that FELA lawsuits are filed in jurisdictions favorable to plaintiffs. In their view, the practice of selecting court venues favorable to the plaintiffs to try FELA cases is no longer an issue because most states have acted to limit where suits can be filed.

Objectives, Scope, and Methodology

Concerned about the cost of FELA, the Chairwoman, Subcommittee on Railroads, House Committee on Transportation and Infrastructure, asked us to identify the implications for railroads' costs and railroad workers of (1) replacing FELA with a no-fault compensation system or (2) modifying FELA. We were also asked to assess how FELA particularly affects the small railroads and determine the availability and affordability of insurance to protect against large FELA payouts. As agreed with the requester's office, we focused our analysis on comparisons between FELA, FECA, and LHWCA. This approach was taken to avoid duplicating work previously reported by the National Research Council that compared FELA with state workers' compensation programs.

To identify the cost and other effects of replacing FELA with a no-fault system with FECA- and LHWCA-level benefits, we used a computerized cost model developed by Mercer Management, Inc., for AAR. This model and the assumptions we used in performing our cost analysis are described in appendix I. As input for our analysis, we obtained information on all of the FELA claims closed in 1994 by four large railroads—Burlington Northern, CSX, Norfolk Southern, and Union Pacific. These railroads employed about 60 percent of all employees at large railroads in 1994 and also had

previously participated in a 1991 unpublished study of FELA by AAR. To examine how the administrative and dispute resolution mechanisms of no-fault compensation systems compare with those of FELA, we reviewed data from the Department of Labor on the FECA and LHWCA programs. We reviewed similar information on the California, Illinois, Nebraska, Pennsylvania, and Texas workers' compensation systems. We selected these states because they had the largest number of freight railroad employees as of March 1995. Finally, we analyzed information from the Federal Railroad Administration to determine the number of lost workdays resulting from on-the-job injuries by the type of railroad.

To evaluate the cost and other impacts of modifying FELA, we examined a number of proposals selected on the basis of discussions with officials at AAR and with the requester's office. We used data on claims closed under FELA in 1994 provided by the four railroads mentioned in the above paragraph to evaluate the financial impact of capping noneconomic damages under FELA. This information identified the number of claims that could have been affected by a cap and the dollar value of these claims. To analyze the impact of placing a cap on plaintiffs' attorneys' fees under FELA, we interviewed officials at selected railroads and obtained the views of railroad labor organizations. We also reviewed reports prepared by the Workers' Compensation Research Institute—a nonpartisan, not-for-profit organization that conducts research on workers' compensation issues. To assess the use of arbitration, we interviewed officials from selected railroads and obtained information from the Federal Judicial Center on the use of arbitration in FELA cases in federal courts. The National Center for State Courts provided us with information on the use of arbitration in state courts. To evaluate the proposal to limit the jurisdictions where FELA cases might be tried, we reviewed state venue provisions in the 10 states with the most railroad employees in 1995, interviewed officials at selected railroads and attorneys who handle FELA cases, and obtained written comments from railroad labor organizations.

To assess how FELA affects the small railroads compared with the large railroads, we designed a questionnaire to obtain cost and other information from the small railroads. After pretesting the questionnaire with officials from seven railroads, we surveyed 560 small railroads operating in the United States and asked them about their experience with FELA in 1994. To determine the universe, we used AAR's Profiles of U.S. Railroads, 1994 Edition and Supplement, a compilation of information on all railroads offering freight service in 1993, and the July 1995 membership list of the American Short Line Railroad Association. We received 437

responses, for a response rate of 78 percent.[11] The employee hours of the respondents to our survey represented 93 percent of the employee hours worked on the small railroads in 1994. The results of our survey of the small freight railroads are presented in appendix II. We also requested information on 1994 FELA claims and costs from 16 railroads identified by the American Public Transit Association as offering commuter service as well as from Amtrak. We received data from 12 commuter railroads and Amtrak.[12] Information on these railroads' FELA settlements and costs can be found in appendix III.

The organizations we contacted in the course of our review are listed in appendix IV. In addition, we received assistance from a consultant, Mark Dayton, who was the Study Director for the National Research Council's 1994 study of FELA.

Our work was conducted from June 1995 through July 1996 in accordance with generally accepted government auditing standards.

Agency Comments

We provided the Departments of Transportation and Labor with copies of a draft of this report. We met with officials from these agencies, including the Chief of the Industry Finance Staff at the Department of Transportation's Federal Railroad Administration, and the Deputy Director, Division of Federal Employees' Compensation and the Director, Division of Longshore and Harbor Workers' Compensation at the Department of Labor. The Department of Transportation officials said they had no reason to disagree with the contents of the report and made no comments. The Department of Labor officials provided us with technical comments on the FECA and LHWCA programs, which we have incorporated where appropriate.

[11]Of the 437 responses we received, 398 were usable. Two responses were submitted too late to be included in the analysis, and 37 responses were from railroads that were not operating, employed no workers directly, were operated by other railroads, or submitted blank questionnaires.

[12]One commuter railroad, the Southeastern Pennsylvania Transportation Authority did not respond; the Tri-County Commuter Rail Authority did not have FELA data because it was under state workers' compensation; and 2 of the 16 commuter railroads (Dallas Area Rapid Transit and San Diego Northern Railway) had not yet begun operations in 1994.

Cost Savings From Replacing FELA With a Nationwide No-Fault Compensation System Depend on Many Factors

Railroad management advocates replacing FELA with a no-fault compensation system, in part because of a belief that a no-fault system would be less costly. Whether replacing FELA with a nationwide no-fault system with FECA- or LHWCA-level benefits would reduce railroads' injury compensation costs depends on many factors.[1] Prime among these is the number of railroad workers who are permanently disabled and are unable to return to work at their preinjury wages. Some injured railroad workers leave the railroad after receiving their FELA settlement, but railroad management believes that some of these workers are capable of returning to work and, therefore, would not receive permanent disability payments under a no-fault compensation system. However, the number of such workers is not known. The higher the proportion of this group of injured workers that can return to work at their preinjury wages, the higher the probability that railroads' injury compensation costs would be reduced under a no-fault system. A no-fault system could reduce railroads' administrative costs by eliminating the need to investigate negligence and to assess noneconomic damages. However, the time it takes to resolve claims that are contested under no-fault systems might not differ much from what it is under FELA.

Impact of No-Fault System on Injury Compensation Costs Depends on Severity of Injuries

One of the most important factors in determining the cost differences between FELA and a no-fault compensation system is the number of railroad workers who are permanently disabled by on-the-job injuries. On the basis of our analysis of FELA claims at four large railroads, the lower this number is, the greater the likelihood that the railroads' compensation costs would be reduced under a no-fault compensation system. Under no-fault compensation systems, when injured workers recover and return to work at their preinjury pay level, their wage compensation benefits cease. In addition, under a no-fault compensation system, those workers who return to work would likely receive less than they would have under FELA because they would be compensated only for economic damages and not for noneconomic damages as they could have been under FELA. Finally, while it is difficult to estimate precisely the impact on death benefits of replacing FELA with a no-fault system, the cost difference would likely be small because death benefits are a relatively small portion of the total compensation outlays.

[1]The discussion of injury compensation presented here excludes compensation of medical expenses. We assumed that employees would continue to be provided with such expenses under the railroads' health insurance plans regardless of the compensation system. (See app. I for more information.)

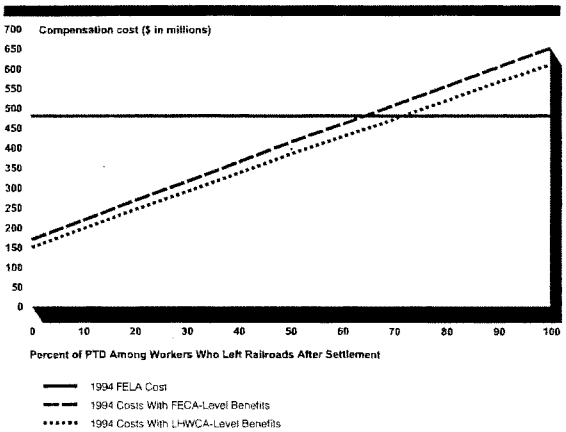
Potential Changes in Railroads' Injury Compensation Costs Are Directly Related to Levels of Permanent Disability

Replacing FELA with a no-fault system with FECA- or LHWCA-level benefits would reduce the railroads' injury compensation costs only if many of the workers who currently leave a railroad after receiving their FELA settlement are physically capable of returning to work. Under a no-fault compensation system, benefits end or are reduced once an injured worker returns to work or takes another job. If those injured railroad workers who did not return to work under FELA were so severely injured that they could not return to any work, then under the no-fault alternative, they would receive permanent total disability payments as long as their total disability continued. The present value of this amount could be considerably greater than the lump-sum payment that a worker actually accepted under FELA. Officials from several railroads told us that once a settlement is made and an employee leaves a railroad, they do not keep information on any subsequent employment of these individuals. However, officials from several railroads believe that at least some of the workers who accept a FELA settlement and leave a railroad are physically able to return to the workforce.

For the four large railroads in our analysis, we estimate that if all of the workers injured on the job who left the railroad after taking a FELA settlement were able to return to work, the railroads' overall injury compensation costs in 1994 under either FECA- or LHWCA-level benefits would have been about one-third what they were under FELA. (See fig. 2.1.)[2] Under FECA, we estimate that injury compensation costs would have been $168 million and that under LHWCA, they would have been $149 million, instead of the $479 million actually paid. But if all of these workers were permanently and totally disabled, we estimate that these railroads' injury compensation costs would have been about one-third higher than they were under FELA—$650 million under FECA and $609 million under LHWCA. As the number of injured railroad workers who are permanently disabled declines, the estimated total compensation costs decline. Conversely, as the number of railroad workers who are permanently disabled increases, estimated compensation costs increase under the no-fault alternatives.

[2]Our compensation cost estimates are the value of the current and future compensation costs for actual and future wage loss, scheduled benefits, rehabilitation expenses, and death benefits that would be payable under a no-fault system for the injury claims closed in 1994 in then-year dollars. We used a 10-percent discount rate to calculate the present value of future FECA and LHWCA benefits payments. (See app. I for our results using different discount rates.) The cost of future health insurance premiums is included for permanent total disability claims.

Figure 2.1: Potential Injury Compensation Costs in 1994 for Four Large Railroads Under FELA and No-Fault Systems With FECA- and LHWCA-Level Benefits, Given Various Rates of Permanent Total Disability



Legend

PTD = permanent total disability

Note: A 10-percent discount rate is used to calculate the compensation costs. The four railroads are Burlington Northern, CSX, Norfolk Southern, and Union Pacific.

As figure 2.1 shows, the estimated compensation costs with FECA-level benefits would have been the same as they were under FELA if 65 percent of the workers who left the railroad after their FELA settlement were actually permanently and totally disabled. This break-even point would be 70 percent with LHWCA-level benefits because of the different benefit levels of FECA and LHWCA.[3]

[3]The degree of permanent disability among workers who leave the railroad likely ranges from low levels of partial disability to total disability, but the actual distribution of permanent disability is unknown. Various percentages of permanent total disability (100 percent disability) are used in figure 2.1 to illustrate the cost differences and break-even points between FELA, FECA, and LHWCA. The compensation costs for these percentages are the same as the costs for other possible permanent disability distributions; e.g., the cost for 50 percent of the workers who are 100-percent disabled approximates the cost for 100 percent of the workers who are 50-percent disabled. (See app. I for more details.)

No-Fault Compensation Systems Would Cost Less for Less Severely Injured Workers

According to our analysis, the four large railroads would have paid less for less severely injured workers under a no-fault system than they did under FELA. For those workers who did not leave the railroad but returned to work after their settlement, these four railroads paid $147 million under FELA. In contrast, we estimate they would have paid $50 million and $42 million under the provisions of FECA and LHWCA, respectively—about a $100 million difference. The benefits paid under both FECA and LHWCA would be limited to lost wages and possibly some scheduled benefits (for the loss of, or the loss of the use of, a body part), which are usually calculated as some number of weeks' wages. Because most economic losses were probably also compensated in the FELA settlement, the difference can likely be attributed to payments for noneconomic damages. Therefore, for those workers who return to work, moving to a no-fault system that does not include noneconomic damages would have saved these railroads about 20 percent of their total compensation costs.

Changes in the Overall Cost of Death Claims Are Difficult to Project but Are Probably Small

Changes in the cost of death claims as a result of replacing FELA with a no-fault system with FECA- or LHWCA-level benefits would likely be small. In 1994, the four large railroads in our analysis paid about $10 million in death benefits. Using the simulation model with a 10-percent discount rate, we estimate that these railroads would have paid about $11 million and $12 million, respectively, under a no-fault system with FECA- or LHWCA-level benefits.

Estimating the change in costs for death benefits is uncertain for two reasons. First, the railroads' data files we examined for our analysis did not identify clearly whether or not some death claims were work-related. Some of the death claims closed in 1994 for the four railroads involved heart attacks and resulted in no payment under FELA. Given this information, it is likely that these deaths were not work-related. However, so as not to underestimate the cost of death claims under the no-fault alternatives, we assumed that all of the death cases reported, whether compensated under FELA or not, were work-related, and we included their costs in our analysis. Second, all federal and state workers' compensation statutes authorize death benefits to the surviving spouse and dependents of an employee whose death results from a job-related injury or illness. Because the railroads do not necessarily need to record information on spouses and dependents for FELA settlements, we do not know the extent to which this missing information affected the estimates of the FECA and LHWCA death benefits. As a result, death benefits could also be underestimated in our analysis, especially for employees with relatively

young surviving spouses and/or dependents. Nevertheless, because death benefits are a relatively small portion of the total FELA costs, it is unlikely that the net effect of any over- or underestimates would significantly affect our estimate of total compensation payments.

Administrative Costs Under a No-Fault System Might Be Less Than Under FELA, but Costs for Rehabilitation Could Be Higher

Replacing FELA with a nationwide no-fault compensation system could reduce the railroads' administrative costs for handling claims. Currently, the large railroads generally handle all of the administrative tasks of negotiating and settling FELA injury claims, including processing claims, investigating injury claims, negotiating settlements, litigating claims, and making payments. Claims for medical benefits are processed within the railroads' overall employee health insurance programs. AAR estimates that railroads paid about $169 million in 1994 in administrative costs under FELA. Under the no-fault alternatives, administrative costs would likely be less because claims administration would be simplified. Railroad claims staff would be primarily concerned with determining how extensive and severe the injury is, whether the injury was job-related, and whether continuing impairment exists. They would not be involved in investigating negligence or negotiating the value of noneconomic losses. As a result, the administrative time and cost required per claim would likely be less than they are under FELA.

However, the costs for employee rehabilitation programs might increase under a no-fault system. Rehabilitation does not appear to receive much emphasis under FELA. Although rehabilitation expenses can be compensated under FELA, it appears that not many employees elect to undergo rehabilitation. According to an official from one railroad, most railroads offer rehabilitation programs to injured employees. However, he said that few employees take advantage of such programs, in part because doing so could jeopardize their FELA settlements. Rehabilitation plays a much larger role in no-fault compensation systems. As we recently reported, both federal and state workers' compensation programs emphasize returning employees to work with their original employer.[4] Under FECA, federal employees who refuse to cooperate in vocational rehabilitation programs or to make a good faith effort to be reemployed could potentially lose benefits. The impact on railroad costs of changing to a no-fault system that emphasizes rehabilitation is difficult to forecast. While the outlays for rehabilitation itself might be higher, overall compensation costs could be less if rehabilitation allows workers to return to work sooner.

[4]See GAO/GGD-96-76, p. 29.

Resolving Disputed Claims May Still Be Time-Consuming

In 1994, the average time from the date of an accident to the date of a settlement for three large railroads from which we obtained data on this issue—Conrail, Norfolk Southern, and Burlington Northern—ranged from about 7 to 10 months for direct settlements, 19 to 25 months for cases in which the claimant was represented by an attorney but there was no lawsuit, and 36 to 46 months for cases in which lawsuits were filed. The time it takes to process cases under FELA may not be that different from what it is under FECA and LHWCA when the claimant is represented by an attorney. Contested cases that went through all appeal levels averaged about 26 months to be decided under FECA and about 30 months under LHWCA. These periods do not include any additional time that might elapse between the time of the injury and the filing of an appeal or any additional time that might elapse if LHWCA cases go to court. Even if this additional time is short, the overall time taken to process contested FECA and LHWCA cases can be lengthy. The resolution of contested cases under state workers' compensation may also take a long time.

Resolution of Contested Cases Under FECA and LHWCA Might Be Similar to Resolution Under FELA

No-fault compensation systems were developed in part to provide injured workers with benefits in a timely manner. However, resolving contested cases under these systems can be lengthy. Although the Department of Labor noted that most FECA claims are approved for payment the first time they are presented—about 92 percent of all claims received in fiscal year 1994—claims can later be appealed.[5] On average, in fiscal year 1995, holding a hearing took about 10 months and obtaining an appeals board decision took about 16 months. Therefore, it could take, on average, about 26 months to resolve a FECA case that requires both a hearing and an appeals board decision. This period does not include any additional time that might elapse between the time of an injury and the time a case is contested or the time it takes to prepare an appeal. The time it takes to receive a decision from the Employees' Compensation Appeals Board has increased substantially over the last 6 years—from about 3 months in 1990 to almost 16 months in 1995. The Labor Department attributed this rise to an increase in the number of appeals and to loss of staff to process the appeals.

Resolving contested LHWCA cases can also take a long time. In fiscal year 1995, it took about 12 months, on average, to process an LHWCA case before an administrative law judge and about 18 months to process a case before

[5]According to a Labor Department official, FECA cases are appealed for a number of reasons, including dissatisfaction with the amount of benefits awarded and disputes over the degree of disability (e.g., permanent or temporary; partial or total).

the Benefits Review Board.[6] Therefore, it could take, on average, about 30 months to process an LHWCA case that is heard by both an administrative law judge and the Benefits Review Board. The time between when the injury occurs and when the case is contested is additional as is the time between the appeal processes. Over the past 5 years, the time taken to process cases at the Benefits Review Board has ranged from 15 months to 27 months; in fiscal year 1995, it averaged about 18 months.

Resolving Contested State Workers' Compensation Cases Can Be Slow

Resolving contested cases under state workers' compensation sometimes can be even slower than it is under FELA. For example, in 1994 in Illinois—a state with a large number of freight railroad workers—a contested case took, on average, about 45 months to be processed through the various levels of appeal at the Illinois Industrial Commission. Cases could then be appealed further to the state court system. According to data from the California Workers' Compensation Institute, a trade organization that collects data on California workers' compensation, in 1994 the percentage of litigated insurance claims open for at least 28 months had increased from 27 percent in 1993 to 38 percent in 1994.[7] However, not all states take a long time to resolve contested claims. For example, in 1994 contested cases took, on average, about 14 months to process in Nebraska.

Conclusions

From a financial perspective, railroads might or might not see their injury compensation costs reduced if FELA were replaced by a no-fault compensation system with FECA- or LHWCA-level benefits. The outcome would depend to a great degree on how many employees who leave the railroads after receiving their settlements would be physically able to resume working. However, without better information on these workers, it is difficult to conclude that the railroads would be better off financially under a no-fault system paying FECA- or LHWCA-level benefits. In evaluating any proposals for replacing the current FELA system, it will be important to obtain a better sense of the likely number of injured railroad workers who are physically able to return to work and those who would be permanently disabled.

[6] LHWCA cases may also be appealed to a U.S. Court of Appeals. We did not obtain information on how long this process may take.

[7] California Workers' Compensation Institute Bulletin, No. 95-3 (Mar. 14, 1995).

Modifying FELA Might Reduce Railroads' Costs but Could Adversely Affect Workers

As an alternative to replacing FELA with a no-fault compensation system, the Congress could modify FELA by adding certain restrictions. Such restrictions could include capping awards for noneconomic losses, limiting the fees received by plaintiffs' attorneys, requiring the use of arbitration to resolve disputes, or restricting where FELA suits can be filed. The Congress could also permit railroads and their employees to opt out of FELA into some other compensation arrangement.

While some of these modifications might reduce the railroads' FELA costs, they could also adversely affect some injured railroad workers by reducing the compensation they receive in a settlement or limiting the availability or the quality of their legal counsel. The Congress could allow workers to continue under the current FELA provisions through "grandfathering" and subject only newly hired employees to any or all modifications. However, the workers would then be under different rules or different systems, and workers with similar injuries would thus have different compensation benefits. In addition, permitting railroads and their employees to opt out of FELA might make disputes about collectively bargained injury compensation subject to the provisions of the Railway Labor Act, possibly leading to federal intervention to resolve these disputes.

Capping the Noneconomic Portion of FELA Awards Could Reduce Costs but Decrease Workers' Benefits

Over the past several years, the Congress has proposed capping awards for noneconomic damages in product liability litigation. Recently, the Congress has considered placing a $250,000 cap on noneconomic damages awarded in personal injury suits arising from accidents involving Amtrak.[1] A similar cap could be placed on the noneconomic portion of FELA awards. Because the railroads do not specifically identify the proportions of FELA awards that are for economic and noneconomic damages, we could not estimate precisely the impact of such a cap on FELA costs. However, using assumptions about the proportion of FELA awards that might be for noneconomic damages, we developed hypothetical estimates of the potential impact of a $250,000 cap on four large railroads' 1994 FELA costs. On the basis of the hypothetical distributions shown in table 3.1, the potential reduction in costs associated with these claims ranged from about $7 million to about $48 million.

[1]See Amtrak and Local Rail Revitalization Act of 1995 (S. 1318). As of June 1996, this bill had not been enacted.

Table 3.1: Potential Effect of $250,000 Cap on Noneconomic Damages for Claims Closed by Four Large Railroads in 1994

Dollars in millions

Percentage of payout for noneconomic damages	Number of claims potentially affected by cap	Hypothetical reduction in FELA costs associated with the cap
30	32	$ 6.7
40	68	13.2
50	107	22.0
60	179	33.4
70	255	48.1

Source: GAO's analysis of FELA claims data.

Although FELA could be modified to cap awards for noneconomic damages, such an action could reduce the benefits received by injured workers. Under the hypothetical distributions shown in table 3.1, the compensation received by an injured worker would be reduced dollar for dollar for any amounts over $250,000 that the worker would have received for noneconomic damages. The railroad labor organizations we contacted uniformly opposed a cap on noneconomic damages, believing it would adversely and unfairly affect their members. Several railroad labor organizations and plaintiff attorneys said a cap would allow railroads to avoid paying the full cost of injuries.

Limits Placed on Plaintiffs' Attorneys' Fees Could Benefit Railroads, but Impact on Workers Is Uncertain

In an effort to reduce FELA's costs, the Congress could place a cap on the amounts payable to plaintiffs' attorneys. Railroad labor organizations told us that attorneys representing injured workers generally receive no more than 25 percent of a FELA award. AAR estimates that in 1994, attorneys representing injured workers at large railroads received between $182 million and $240 million in fees.[2] Whether the railroads' FELA costs would decline as the result of a cap depends to a large extent on what cap was established and the relationship between a cap and a FELA settlement. The railroads' FELA costs could decline if a cap was set at less than the 25 percent that the plaintiffs' attorneys receive from a FELA award, assuming that a lower attorneys' fee would lead to a lower settlement amount. On the other hand, a cap on plaintiffs' attorneys' fees might have little impact on FELA costs if settlement amounts stay the same or increase as attorneys push for higher settlements to compensate for the lower percentage allocated to legal fees. A cap on what the plaintiffs' counsel

[2]This represents 25 to 33 percent of the total FELA payouts in 1994 in cases in which the worker was represented by an attorney ($727.8 million).

could receive might also benefit injured workers to the extent that lower legal fees might allow workers to keep a larger share of a settlement. Railroad officials with whom we spoke were split on the possible effects of a cap on costs, and some suggested that a sliding scale could be a better way to control legal fees. Under a sliding scale, the percentage of an award payable as attorneys' fees would either decline as the size of the award increases or increase if a case is settled quickly.

Other workers' compensation systems limit attorneys' fees. While FECA and LHWCA do not necessarily limit the amount of an attorney's fee, they do require that such a fee be approved before being paid and that the fee be reasonable. In particular, FECA requires that approval of attorneys' fees be based on the actual necessary work performed. In making this determination, such factors as the complexity of a claim and the amount of time spent actually developing and presenting the claim are assessed. State workers' compensation systems also limit attorneys' fees. In four of the five state workers' compensation systems we reviewed—in the states that employed the most railroad workers in 1995—attorneys' fees are in some way limited.[3] In general, attorneys' fees in these four states are limited to between 9 and 25 percent of a worker's compensation award. In Texas, attorneys' fees are limited to no more than $150 per hour, and guidelines are used to determine how many hours can be billed and for what types of services. The total fees are not to exceed 25 percent of a benefit award.

Although limits on the fees received by the plaintiffs' counsel might have financial benefits to railroads and injured workers, such limits could affect the availability and/or quality of the workers' legal representation. This appears to have happened in some state workers' compensation systems. For example, Texas revamped its state workers' compensation program in 1991 and set limits on attorneys' fees. In April 1995, the Workers' Compensation Research Institute reported that initial indications were that the limits placed by Texas on the fees for plaintiffs' attorneys had caused a number of attorneys who previously had practiced workers' compensation law to leave the field.[4] The institute's report concluded that at a minimum, it was more difficult for claimants with low-value claims to find attorneys to handle their cases. The institute noted similar problems in California, reporting in December 1992 that California's typical 9- to

[3]Attorneys' fees are in some way limited in California, Illinois, Pennsylvania, and Texas. In general, Nebraska does not limit attorneys' fees.

[4]P. Barth and S. Eccleston, Revisiting Workers' Compensation in Texas, Administrative Inventory, Workers' Compensation Research Institute, WC-95-1 (Apr. 1995).

12-percent limit on attorneys' fees may have contributed to the devolution of work to paralegals and to the refusal by some attorneys of cases that were more complicated and time-consuming.[5]

Arbitration Offers Time and Cost Benefits but May Be Difficult to Adapt to FELA

Arbitration is a mechanism typically used in contract and other commercial disputes to resolve issues quickly and at low cost.[6] The Congress could modify FELA to require that compensation disputes be arbitrated before being tried in a court of law. As we reported in July 1995,[7] arbitration and other approaches to resolve disputes are being used to avoid the time and cost of litigation and to minimize the adversarial relationship between employers and employees resulting from disputes. The court system has also looked to arbitration and other approaches to resolve disputes quickly and to reduce backlogs in court dockets.

The use of arbitration to resolve workplace injury cases has varied. It does not appear to be widely used in the rail industry. Information from the Federal Judicial Center indicates that for 1990-95, of the approximately 6,600 cases identified as FELA cases in the 18 federal district courts with mandatory or voluntary arbitration programs, about 11 percent (710 cases) were successfully closed as a result of arbitration.[8] The remaining cases either went on to trial or were resolved in some other manner. In all of the courts, arbitration was nonbinding, and a trial could be requested following an arbitration decision. In October 1993, the National Center for State Courts reported that over half of the states had experimented with arbitration programs associated with courts since they were introduced in 1952.[9] However, no information was available on the arbitration of FELA cases at the state level. According to the center, the characteristics of state arbitration programs varied, but typically, arbitration was based on the amount of money at stake—frequently $50,000 or less. Finally, three of the

[5]P. Barth and C. Telles, Workers' Compensation in California, Administrative Inventory, Workers' Compensation Research Institute, WC-92-8 (Dec. 1992).

[6]In arbitration, a third party receives and reviews evidence, hears arguments, and renders a decision, which may, upon prior agreement, be binding.

[7]Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 5, 1995).

[8]Not all of the 6,600 cases may have been FELA cases. According to the Federal Judicial Center, the code used to identify FELA cases may also have included some workers' compensation cases and some other types of cases. An additional 266 FELA cases in the 18 federal district courts were not arbitrated because they met the requirements for exemption from the program.

[9]For information on the use of arbitration in state courts, see National Symposium on Court-Connected Dispute Resolution Research, A Report on Current Research Findings—Implications for Courts and Future Research Needs, National Center for State Courts and State Justice Institute (1994).

five state workers' compensation programs we reviewed—in California, Illinois, and Texas—had arbitration programs. The success of these programs appears to be limited. For example, in 1994 over 50 percent of Illinois' arbitration decisions were appealed, and in Texas no arbitration hearings were held.

Although arbitration has the potential for saving time and costs, it may be difficult to adapt to a system like FELA. Railroad officials and their attorneys agreed that so far, arbitration has not been very effective in resolving FELA cases. One railroad official told us that arbitration is not useful when a serious disagreement exists between the parties, such as a dispute about negligence. The National Association of Railroad Trial Counsel commented that without fundamental change to FELA itself, arbitration would merely transfer FELA's negative aspects to an arbitration setting. Some attorneys representing injured workers also do not support arbitration in FELA cases. In their view, for arbitration to be successful, the parties must be able to agree on liability. The larger the gap between the two sides on this and other issues, the more likely it is that a case will proceed to trial and a jury verdict.

The Congress Could Limit Where FELA Suits Can Be Filed, but Effects Are Uncertain

FELA gives plaintiffs the right to bring cases in either a federal or state court. Railroad management frequently complains that FELA permits injured workers and their attorneys to file suit in localities where judges and juries are favorable to plaintiffs. According to the railroads, these jurisdictions are often far from the scene of an accident where the injury occurred.[10] The Congress could modify FELA to limit the places where lawsuits can be filed. The monetary impact of changing the venue rules is hard to forecast because we do not have data comparing awards in similar FELA cases in different jurisdictions. Any potential benefit to the railroads must be weighed against taking away injured workers' right to choose a state court that they believe is the best place for the case to be heard as well as the states' overriding decisions about who can bring cases in their courts.

Jurisdictional Rules Provide Plaintiffs With Choice of Venue

Although FELA gives plaintiffs the right to bring a suit in either a state or a federal court, plaintiffs are still limited to bringing cases in courts that have jurisdiction to hear the case. Jurisdiction over a defendant in state court is limited by the Fourteenth Amendment to the Constitution to those

[10]This discussion focuses on state venue rules, since we heard few complaints of the practice of seeking a favorable venue at the federal level.

instances in which the defendant has at least "minimal contacts with the state." This restriction protects defendants from being sued in a state with which they have no relationship. The rule for determining whether states have jurisdiction is broad and flexible.[11] Suits may generally be brought against companies where they regularly do business.

In addition to the constitutional restrictions, venue laws in the 10 states whose venue statutes we reviewed generally restricted suits to the jurisdiction where the claim arose, where the defendant does business, or where the plaintiff resides.[12] While these laws do not leave plaintiffs free to file in any court they wish, plaintiffs generally have the latitude to choose a locality that they believe will provide them with the best outcome.

Finally, bringing suit in a court with jurisdiction to hear the case does not necessarily obligate the court to hear the case. Many states have adopted the doctrine of forum non conveniens, which permits courts to dismiss a case when it "is a seriously inconvenient forum for the trial of the action provided a more appropriate forum is available to the plaintiff."[13] Such a dismissal is left to the trial judge's discretion and will only be overturned on appeal for abuse of that discretion.

The Congress Could Restrict State Venue, but Cost Impact Is Uncertain

The Congress could restrict the venue in which FELA cases can be heard within a state. Proponents of such a change believe that doing so would reduce the railroads' FELA costs and alleviate inconveniences caused by cases being filed far from where the injury occurred. Opponents believe that restricting where suits can be filed would hinder railroad workers' access to adequate compensation and could be inconvenient for workers who travel for their jobs and are injured away from home.

The cost impact of restricting venue at the state level is uncertain. We did not analyze individual FELA cases, so we are unable to estimate the potential cost savings, if any, of restricting venue. In addition, venue alone does not determine the size of FELA awards. Other factors also play a role,

[11]International Shoe v. Washington, 326 U.S. 310 (1945).

[12]We reviewed the venue rules in 10 states: California, Georgia, Illinois, Kansas, Missouri, Nebraska, Ohio, Pennsylvania, Texas, and Virginia. Freight railroad employment in these states represents about 51 percent of total rail employment (95,474 employees out of 187,945 employees).

[13]Restatement (Second) of Conflict of Laws, Sec. 84 (1971). Only Georgia and Texas do not apply the doctrine of forum non conveniens; the latter does not apply the doctrine for FELA cases only.

such as the comparative negligence of injured workers and the merit of the arguments in individual cases.

Opting Out of FELA May Have Unintended Consequences for Railroads and Labor

Another modification that the Congress could make is to permit railroads and their employees to elect to opt out of FELA. That is, the Congress could allow the railroads and their employees to decide for themselves, through collective bargaining, what workers' compensation arrangement they prefer. FELA would have to be amended to allow for such agreements. While the option to opt out would give both parties more freedom in arriving at a mutually advantageous solution, making injury compensation part of the overall collective bargaining agreement may have the added consequence of bringing disputes over injury compensation under the Railway Labor Act. Also, for railroads without unions, as is typical with many small railroads, the possibility arises that workers at some railroads could be covered by different compensation systems, increasing the railroads' administrative costs and giving employees with similar injuries different compensation opportunities. This situation could negatively affect employees' morale. Finally, opting out would require changes in either federal or state laws to ensure that injured rail workers are covered by a workers' compensation program in the absence of FELA.

Collectively Bargained Injury Compensation Might Increase Federal Involvement in Resolving Disputes

If FELA is made a matter for collective bargaining, federal involvement in the railroad industry might increase. In particular, disputes about the selection of an injury compensation system during contract negotiations could come under the Railway Labor Act. This act governs labor-management relations in the railroad industry and is designed to reduce the likelihood of strikes. The Railway Labor Act does so by mandating a lengthy contract negotiation process and by using federal agencies, such as the National Mediation Board, when necessary, to mediate disputes.[14] If a dispute is not resolved, the President may convene an emergency board to propose recommendations. If a dispute threatens interstate commerce, the Congress may impose emergency board recommendations or other conditions on both railroads and unions. Unless disputes about injury compensation are specifically excluded from the Railway Labor Act, such mechanisms could be triggered, and the federal government could be directly involved with any subsequent settlement of such disputes.

[14]For more information on the Railway Labor Act, see Railroad Competitiveness: Federal Laws and Policies Affect Railroad Competitiveness (GAO/RCED-92-16, Nov. 5, 1991).

Allowing Opting Out Might Cause Problems at Nonunion Railroads

Allowing railroads to opt out in a nonunion environment could also raise the issue of injury compensation coverage. There are two aspects to this issue. One is partial coverage of a workforce. Some state workers' compensation programs do not allow partial coverage of a workforce. Instead, all privately employed individuals must be covered unless certain numerical thresholds are met, employees fall into an excepted group, or a waiver is granted.[15] The second issue is potential exemption from coverage. In January 1995, the Department of Labor reported that 15 states allowed exemptions from their workers' compensation programs if employers had fewer than a threshold number of workers or met other conditions.[16] While the requirements varied, in general, exemptions could be granted for employers with less than three to five employees.[17] Our survey of the small railroads found that 116 railroads (about 30 percent of the 398 respondents) employed five or fewer employees.[18]

Allowing Railroads to Opt Out Would Require Changes in Federal and State Laws

The opting-out alternative would necessitate changes in federal law. Not only would FELA have to be amended, but legislation might be required to provide for alternative coverage. For example, FECA and LHWCA could be modified to cover all railroad workers currently subject to FELA. FECA currently covers employees of the Alaska Railroad who incurred any injuries or illnesses before the railroad was transferred to the state of Alaska in 1985. FECA also covers those railroad workers who are federal civilian employees. LHWCA also covers those workers who work for a railroad but who are engaged in maritime activities, such as loading and unloading vessels. In assessing this option, the Congress would need to consider the extent to which the federal government would be responsible for handling and/or adjudicating railroad workers' claims for benefits and the potential impact on federal agencies' budgets and operations from assuming these responsibilities.

Allowing railroads to opt out of FELA might also require changes in state law. FELA currently preempts state law in the coverage of work-related injury compensation of railroad workers. However, in our review of state workers' compensation law in the 10 states with the most railroad

[15]Some state workers' compensation programs exempt railroad workers, some farm and casual workers, and/or state and local government employees.

[16]State Workers' Compensation Laws, U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs (Jan. 1995).

[17]Some states also allowed exemptions if certain financial or payroll conditions were met.

[18]It should be noted that if an employer elects not to be covered, then the employer may be subject to lawsuits by employees under the states' general employer liability laws.

workers, we found that some railroad workers might not be covered if the railroads opt out of FELA and changes are not made in state law. For example, in 3 of the 10 states—Georgia, Nebraska, and Virginia—interstate railroad workers are specifically excepted from state workers' compensation programs. Railroad workers also might not be covered in Texas if a railroad elects not to be covered by state workers' compensation. Coverage of railroad workers in the other six states was less clear and could depend on a number of factors, including legal interpretations about the extent to which states have the power to regulate businesses engaged in interstate commerce.

The Congress Could "Grandfather" the Current Workforce Under FELA

The Congress could elect not to subject the current railroad workers to any one or all of the proposed modifications to FELA. In fact, if the Congress chose to replace FELA with a nationwide no-fault system or allow the railroads to come under state workers' compensation systems, it still could choose to allow existing employees to remain under the current FELA system. Such "grandfathering," however, may have problems. First, the railroads might have to handle injury claims under two systems or under two sets of rules and restrictions, likely adding to costs rather than reducing them. Second, two railroad workers suffering from the same injuries might have access to different types and levels of compensation. Although grandfathering might assuage opposition to replacing or modifying FELA, doing so might create significant problems.

Conclusions

Decisions about modifying FELA are complex and must be viewed in several ways. From the railroads' perspective, there may be opportunities to reduce costs. For example, capping the noneconomic portion of FELA awards and attorneys' fees might act to reduce the railroads' costs, depending on the portion of FELA settlements represented by noneconomic damages and the relationship between attorneys' fees and settlements. Similarly, restricting where FELA suits can be filed might reduce costs, depending on how many suits continue to be filed in jurisdictions perceived as being favorable to plaintiffs. From the injured workers' perspective, however, the issues are different. Modifying FELA could reduce the amount of compensation they receive or limit the availability of legal counsel. There are other complexities as well, such as whether arbitration would actually save time and money if applied to a compensation system that involves issues of negligence like FELA, how opting out could change the character of injury compensation for railroads

and their workers, and whether opting out could lead to federal involvement in resolving disputes about compensation.

If the Congress decides that it wants to modify FELA, it will need to take into account the possible consequences of some of the proposed changes. For example, permitting current employees to remain under FELA while new employees are under a new system could create tension in the workplace.

FELA Is Less Expensive for Passenger and Small Freight Railroads

FELA applies to employees of nearly all railroads regardless of size or type of service provided. We surveyed the small freight railroads to determine, among other things, the impact of FELA on overall operating costs.[1] We also collected information from passenger railroads—commuter railroads and Amtrak—on their experience with FELA in 1994. Our survey found that small freight railroads experienced lower FELA costs than the large freight railroads. In part, small freight railroads have lower costs because, on average, fewer workdays are lost per on-the-job injury and they have a lower percentage of injuries that result in lost-work time. In general, data obtained on passenger railroads showed similar results. Like the large freight and passenger railroads, the small freight carriers purchase insurance to protect against large FELA payouts and other liabilities. Most large railroads have high deductibles and are considered self-insured for FELA purposes.

FELA Costs Were Less for Passenger and Small Freight Railroads

In 1994, the passenger and small freight railroads experienced lower FELA compensation costs than the large freight railroads. As shown in table 4.1, the passenger carriers paid about $83.7 million, or $0.96 per hour worked, while the small freight carriers paid about $42 million in compensation costs, or $0.96 per hour worked. In contrast, the large railroads paid $2.26 per hour worked—more than twice what the passenger and small freight railroads paid.

[1]For the purposes of our analysis, small freight railroads include (1) regional railroads, which are line-haul railroads operating over 350 or more miles of road and/or earning annual revenues of at least $40 million but less than the thresholds for Class I railroads; (2) local railroads, which are line-haul railroads falling below the criteria for regional operations; and (3) switching and terminal railroads, which primarily perform switching services in a terminal area. The passenger railroads include Amtrak, which provides the public with intercity passenger services, and commuter railroads, which provide the public with local and regional passenger services usually between a central city and its suburbs.

Table 4.1: Summary of 1994 FELA Compensation Costs by Type of Railroad

Type of railroad	Claims and suits settled	Claims and suits per 100 employees	Payout for claims and suits	Average cost per employee	Average cost per employee-hour worked
Large freight railroads	21,478	11	$896,706,801	$4,756	$2.26
Small freight railroads	1,284	6	42,043,569	1,966	0.96
Passenger railroads	4,370	10	83,715,524	1,911	0.96

Note: Payouts include amounts paid by insurance companies.

Source: GAO's survey and data from AAR and the passenger railroads.

The cost differences may be traced, in part, to two factors: (1) the average number of lost workdays and (2) the wage rate. Data on injuries from the Federal Railroad Administration showed that the passenger and small freight railroads generally average fewer lost workdays per injury than the large freight carriers. For example, in 1994, the average number of lost workdays per injury for both the small freight railroads and the passenger carriers was less than half that of the large railroads—30 days each compared with 77 days. Also, the proportion of injuries that resulted in lost workdays was lower at the small freight railroads than it was at the large freight carriers and passenger railroads. In 1994, only 54 percent of the injuries at the small freight railroads resulted in lost workdays, compared with 67 percent at the large carriers and 75 percent at passenger railroads. We did not attempt to analyze the reasons for these differences. At the same time, average wages and salaries were more than 20 percent higher at the large railroads—$46,714 compared with $38,730 at the small railroads that responded to our survey—resulting in higher compensation for lost wages per day lost. Average wages and salaries at passenger railroads were even lower—$36,690.

Adding the administrative and legal expenses for FELA increased the passenger and small freight railroads' costs by about 21 percent and 41 percent, respectively. As shown in table 4.2, the small freight carriers paid about $17 million in administrative and legal costs, or $0.39 per hour worked. In contrast, the passenger carriers paid $0.21 per hour worked, and the large freight railroads paid about $0.34 per hour worked for these expenses—about 46 and 13 percent less than the small freight railroads, respectively. In part, this is because of certain economies of scale in processing claims. The passenger and large railroads might have in-house counsel, for example.

Table 4.2: Summary of 1994 FELA Administrative and Legal Costs by Type of Railroad

Type of railroad	Administrative and legal costs	Average cost per employee	Average cost per employee-hour worked
Large freight railroads	$136,089,284	$722	$0.34
Small freight railroads	17,080,437	799	0.39
Passenger railroads	17,183,687	425	0.21

Source: GAO's survey and data from AAR and the passenger railroads.

FELA Costs Were Not the Same for All Small Railroads

Although the small railroads experienced lower overall FELA costs than the large railroads, the costs were not the same for all types of small railroads. For example, in 1994, the switching and terminal railroads experienced significantly higher compensation costs under FELA than the regional and local carriers. As shown in table 4.3, these railroads paid about $1.30 per hour worked, or almost 67 percent more in such costs than the regional carriers and 41 percent more than the local carriers.

Table 4.3: Summary of 1994 FELA Compensation Costs by Type of Small Freight Railroad

Type of small freight railroad	Claims and suits settled	Claims and suits per 100 employees	Payout for claims and suits	Average cost per employee	Average cost per employee-hour worked
Switching and terminal railroads	475	7	$16,508,941	$2,556	$1.30
Regional railroads	523	5	16,804,827	1,644	0.78
Local railroads	286	6	8,729,801	1,857	0.92

Source: GAO's survey.

The higher compensation costs experienced by the switching and terminal railroads may be attributable to at least three factors, including the nature of the work these railroads perform, the degree of union representation, and the average level of wages. First, switching and terminal railroads, by definition, perform switching services in terminal areas; therefore, their employees are exposed to potentially dangerous activities connected with moving and placing freight cars and locomotives. Second, according to our

survey, in 1994, the switching and terminal railroads had more employees represented by labor unions than the regional and local railroads—74 percent of employees compared with 61 percent and 33 percent of employees at the regional and local railroads, respectively. Those switching and terminal railroads that were unionized had higher annual FELA compensation costs than the nonunion switching and terminal companies—$2,858 per employee compared with $874 per employee. Finally, in 1994, the switching and terminal railroads paid average annual wages that were comparable to those of the regional carriers and higher than those of the local railroads—$40,707 compared with $40,204 and $32,806 at the regional and local railroads, respectively.

Switching and terminal railroads also experienced the highest administrative and legal costs. As shown in table 4.4, these railroads paid almost $9 million in administrative and legal costs, or $0.71 per hour worked. In contrast, regional railroads paid $0.24 per hour worked, while local railroads paid $0.31 per hour worked. The switching and terminal railroads' legal costs alone amounted to $7.4 million—about three times the legal costs of either the regional or local carriers. Two factors that may have contributed to this result are the number of cases in which an employee filed a lawsuit and the number of cases in which the railroads hired outside defense attorneys. In 1994, 32 percent of the switching and terminal railroads' FELA cases involved a lawsuit, compared with 23 percent at regional railroads and 13 percent at local railroads. This situation may have necessitated the need for outside defense attorneys. In 1994, the switching and terminal railroads settled 41 percent of their cases with the assistance of outside defense attorneys, compared with 29 percent at the regional railroads and 20 percent at the local railroads.

Table 4.4: Summary of 1994 FELA Administrative and Legal Costs by Type of Small Freight Railroad

Type of small freight railroad	Administrative and legal costs	Average cost per employee	Average cost per employee-hour worked
Switching and terminal	$8,966,643	$1,388	$0.71
Local	2,923,925	622	0.31
Regional	5,189,869	508	0.24

Source: GAO's survey.

Small Railroads Rely on Insurance to Protect Against Large FELA Awards

The availability of insurance to cover a large FELA award is critical to a small railroad because a large FELA award has the potential to severely affect the railroad's financial health. Although liability insurance that includes FELA coverage has not always been readily available and affordable, it appears that it currently is. At the time of our review, most small railroads had liability insurance that included coverage for FELA payouts.

Insurance Is Critical for Protection Against Large FELA Awards

Like the large freight and passenger railroads, most small railroads purchase insurance to protect against large FELA payouts and other liabilities.[2] Fifty percent of the small railroads that responded to our survey had fewer than 13 employees and payrolls under $400,000. Seventy-eight percent had annual operating revenues of less than $5 million. A large FELA award, if paid entirely out-of-pocket, could threaten these railroads' survival. To reduce the impact of large FELA awards, these railroads purchase insurance from private companies.

The results of our survey showed the critical role that insurance plays in protecting the small railroads against large FELA awards. Almost 88 percent of the small railroads had some form of insurance, typically railroad liability insurance that included FELA coverage, and 68 percent of these policies had deductibles that ranged from $25,000 to $100,000 per claim. In the event of a large FELA award, a railroad with liability coverage would be responsible for its deductible.

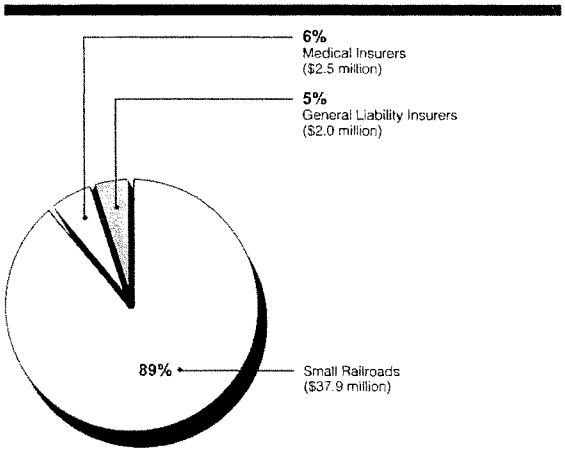
Only about 12 percent of the railroads that responded to our survey reported that they were self-insured. Railroads can self-insure if it is cost-effective to do so. For example, some railroads choose to self-insure themselves because they have the resources to cover their potential liabilities. Similarly, a railroad with a history of only a few minor injuries per year could also choose to self-insure itself for FELA purposes, finding it cheaper than paying insurance costs. Our review of the accident and injury histories of the self-insured railroads that responded to our survey showed that about 25 percent of these railroads had no work-related injuries from 1990 through 1994. An additional 25 percent had five or fewer injuries during this period.

[2]Although the large freight and passenger railroads are generally considered to be self-insured for injury compensation, many of these railroads maintain liability insurance that includes FELA coverage. However, the deductible levels are much higher than those for the small railroads. In 1994, the deductibles for large freight and passenger railroads that provided this information ranged from $2 million to $25 million.

Insurance Does Not Pay All FELA Costs

Although insurance protects the small railroads from paying out-of-pocket for large FELA awards, most FELA settlements are within the limits of the deductible. As shown in figure 4.1, on the basis of our survey results, we estimate that in 1994 the small railroads paid about 89 percent of the FELA compensation costs themselves. Liability insurance paid only about 5 percent of FELA costs, and medical insurers paid the remaining 6 percent. According to our survey, only 10 small railroads had FELA payouts that exceeded their deductible levels. These payouts accounted for $2 million and only 17 of the 1,284 cases settled in 1994.

Figure 4.1: Distribution of 1994 FELA Payouts for the Small Railroads



Source: GAO's survey.

To cover employees' medical expenses, the small railroads either pay the costs directly or, like some large freight railroads, obtain special health

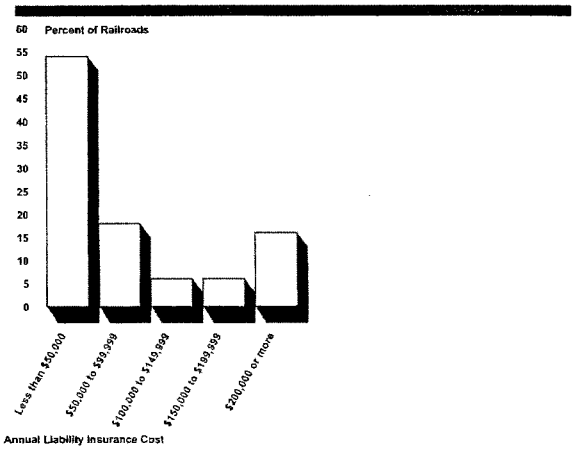
insurance. A special health plan provides for 24-hour coverage of both work-related and off-duty injuries and illnesses. Our survey showed that in 1994, about two-thirds of the small railroads purchased some form of health insurance to cover injured employees' medical costs.

Insurance Is Currently Available and Affordable

FELA insurance has not always been affordable for the small railroads. In the late 1980s, only one domestic company provided small railroads with insurance that included FELA coverage, and according to one insurance company official, premiums were double what they are today. As a result, the small railroads either paid costly insurance premiums or assumed the risk of these liability costs themselves. We identified eight companies that as of August 1995, provided small railroads with liability insurance that included FELA coverage. Because of the increased competition, premiums have declined over the past 5 years. Insurance industry officials estimated that in 1995, small railroads' annual premiums for liability insurance with FELA coverage generally ranged from $25,000 to $50,000. One official described an average policy as costing $50,000 for $5 million in coverage with a deductible of $50,000 per claim.

Our survey results for the small freight railroads generally support the estimates of the insurance providers. Of the 264 railroads that provided us with information on their insurance costs, 54 percent paid less than $50,000 for a liability policy that included FELA coverage. Most of these railroads' deductible levels ranged from $25,000 to $100,000, and just over half of the railroads had annual premium costs that were 10 percent or less of their payroll. Many of the railroads with annual premiums of $200,000 or more had more employees and higher payrolls. The cost of premiums for half of these latter railroads was also in the 10-percent-of-payroll-or-less range.

Figure 4.2: Liability Insurance Costs Paid by the Small Freight Railroads in 1994



Source: GAO's survey.

Insurance Purchasing Groups Are Not Widely Used

A small railroad could reduce its liability insurance costs by pooling its resources with other small railroads and obtaining a group policy. Such purchasing groups were authorized for FELA purposes by the Liability Risk Retention Act of 1986. A purchasing group would spread all or any portion of its members' liability exposure and costs. While 10 percent of the railroads in our survey reported that they were part of purchasing groups, upon further review, we found that most of these railroads were technically not in such groups. Rather, these railroads were subsidiaries of railroad management companies and other entities that owned more than one railroad and had group insurance for their railroads. Like a purchasing group, this arrangement serves to spread the railroads' liability exposure and costs.

Most of the railroads that responded to our survey reported very little interest in participating in a purchasing group, and only 16 percent

indicated that they had ever seriously considered entering into such an arrangement. For the railroads that had not considered a purchasing group, the most common reason given was that no other railroad had suggested it. Another leading reason was that these railroads did not want to depend on the safety records of other railroads in the underwriting process.

Conclusion

FELA does not appear to be any more burdensome for passenger and small freight railroads than it is for the large freight railroads. Our review suggests that compared with the large freight railroads, passenger and small freight railroads are less burdened by FELA and that they currently can insure against catastrophic losses. Therefore, we found no reason, at least on the basis of financial considerations, that these railroads need to be treated differently in any deliberations about whether to either modify FELA or replace it with a no-fault compensation system.

Appendix I

Methodology for Estimating Cost Differences Between FELA, FECA, and LHWCA

The model used in this analysis was developed for the Association of American Railroads (AAR) by Mercer Management, Inc. It is designed to estimate the benefits that injured railroad workers might have received if their injury compensation had been provided under a no-fault compensation system rather than under the Federal Employers' Liability Act (FELA).

If the railroads' files divided information on injury compensation settlements into amounts for each type of loss suffered as a result of an injury (i.e., economic compared with noneconomic losses), comparing FELA payouts with those likely under alternative no-fault systems would be straightforward. Those damages that are not compensable under the no-fault alternatives, such as awards for pain and suffering, would be deleted. Damages that are compensated at different levels would be adjusted, and damages that are not compensated under FELA but are compensated under no-fault alternatives would be added. However, because the railroads do not separate the compensation settlements by the various types of damages, estimating payments under the alternative systems involves estimating the benefits that workers would receive under the alternatives, summing those benefits, and comparing them with the lump-sum settlement that the workers actually received under FELA.

We made some modifications to the model to account for changes in the data supplied by the railroads and to adapt the model to the alternative no-fault systems that we chose to analyze.

Data were supplied by the Burlington Northern, CSX Transportation, Norfolk Southern, and Union Pacific railroads. These four railroads are the same ones that participated in the Mercer Management, Inc., study for AAR, and the model is designed to use the data from these railroads. While only four railroads are used in the estimates, these railroads represent about 60 percent of the employees of Class I railroads.[1] The data supplied are for all 10,158 injury claims closed in 1994 for these four railroads.[2]

We looked at the effect on the railroads' injury compensation costs of adopting a uniform benefit plan that would apply to all workers. We considered two alternatives whose level and structure of benefits were derived from the two existing nationwide no-fault insurance systems that are administered by the federal government. The Federal Employees'

[1]Class I is a designation used by the former Interstate Commerce Commission. In 1994, railroads with revenues of at least $255.9 million were designated as Class I railroads.

[2]We had sufficient data to analyze 10,153 of these claims.

Compensation Act (FECA) defines the compensation system that applies to civilian employees of the federal government, and the Longshore and Harbor Workers' Compensation Act (LHWCA) defines the system that applies to workers employed in the maritime industry.

FECA benefit levels are higher than those under LHWCA, but both systems authorize higher benefits than are generally paid under state workers' compensation systems. If the railroads shifted to state workers' compensation systems, their injury compensation costs would likely be lower than the estimates presented here, as would the benefits received by injured workers.

In this appendix, we describe the structure of the model, the benefits paid under the two alternative systems used in our analysis, the assumptions we made about inflation and various discount rates, and the effect of different assumptions about permanent disability. Finally, we present the results of the model.

Structure of the Model

The Mercer Management model incorporates a main computation model and four small mapping programs. The mapping programs translate the unique data sets of each of the four railroads into a consistent set of inputs for the computation model. The computation model estimates the benefits that a worker would have received under an alternative system by running the claim through a number of modules, each of which computes one of the benefits.

Mapping Programs

The mapping programs translate the data into consistent forms, construct new variables, and estimate missing data. Each railroad tracks information on an employee and the circumstances of an on-the-job injury in its own way. However, the computation model requires that all of the variables used to estimate a benefit be consistent. The primary purpose of the mapping programs is to translate the railroad-unique data into variables that can be used in the computations. Because some railroads do not track all of the data that are required to estimate a benefit, the mapping programs also construct variables (from available data) and supply data for missing variables.

We modified the mapping programs supplied by Mercer Management to reflect changes made by the railroads to their claims files since the model was developed and to provide the specific variables required for

estimating the benefits of FECA and LHWCA. The only additional significant change was our substitution of different wage variables for those used in the original program for missing wage data. For two of the railroads, CSX and Burlington Northern, we used the median wage of injured workers in the year of the claimant's accident from the other railroad in their region (Norfolk Southern for CSX in the East and Union Pacific for Burlington Northern in the West).

Computation Model

The computation model runs each claim through modules that estimate the benefits for current and future wage loss, scheduled benefits, vocational rehabilitation expenses, health insurance premiums (for totally disabled employees), and death benefits, when appropriate. Parameter values that reflect the benefits of the compensation system being estimated must be entered. Medical expenses were not estimated because it is assumed that coverage for medical expenses related to workplace injury (including medical rehabilitation) would continue to be provided as it is now through the railroads' health plan if the railroads adopted a uniform, nationwide no-fault compensation system.[3]

The model produces estimates for each injury claim on the basis of the severity of the injury. For those workers with temporary and permanent partial disabilities who return to work, the model calculates actual wage loss and any scheduled benefits. For those workers who do not return to work, the model estimates actual wage loss, rehabilitation expenses, future wage loss, and future medical premiums. For deaths, the model calculates funeral and survivors' benefits.

The model permits the user to select values for key parameters in the estimates. These include wage compensation rates, the scheduled benefit structure, rehabilitation expenses, health insurance premium benefits, death benefits, inflation rates, the discount rate, and the percentage of permanently totally disabled workers who are unable to return to any employment.

[3]This assumption is based on evidence considered in the National Research Council's 1994 FELA study that indicated that the railroads' current medical costs for injuries may be lower than those of typical no-fault workers' compensation systems. Consequently, if railroads were to join state workers' compensation systems, the medical cost component of their injury compensation costs would likely rise, particularly if medical self-insurance were not permitted. Railroads currently pay 100 percent of the medical costs for work-related injuries. Both FECA and LHWCA also require 100-percent coverage by the employer.

Benefits Paid Under FECA and LHWCA Used in the Analysis

The principal benefits paid under the two alternative systems—and computed by the model—are wage loss, scheduled benefits, rehabilitation expenses, health insurance premiums for permanently totally disabled workers, and death benefits. The benefits of these two systems differ somewhat.

Wage Loss

Wage-loss compensation may be temporary or permanent, depending on the nature of the injury. Temporary disability extends from the time of injury until the employee returns to work. Permanent disability may occur if some lingering impairment from the injury reduces the injured worker's ability to work (permanent partial disability) or prevents any work at all (permanent total disability). The model estimates temporary total, permanent partial, and permanent total disability benefits, where applicable.

For FECA, 100 percent of the wages are paid for the first 45 days of lost work. After that time, either 66.7 percent or 75 percent of the wages are replaced, depending on the number of dependents. For LHWCA, the wage replacement rate is 66.7 percent for all lost time after a minimum period of 3 days for all employees. After 14 days, the first 3 days are also compensated. Under FECA, the employer pays the employee's full wage for the first 45 days of the wage loss due to injury in the workplace. Only if the disability continues past 45 days do the wage replacement and other provisions of FECA apply. At that time, a 3-day waiting period applies before wage replacement benefits begins. Those 3 days are compensable if the disability continues for 14 days or permanent impairment results from the injury.

Both FECA and LHWCA provide for permanent partial disability compensation only if the workers' wages are affected (except for scheduled benefits, which are discussed below). If the worker returns to work at a lower wage than before the injury, a portion of the difference between the new and old wage rates is provided as compensation. This compensation continues as long as the wage loss continues.

Permanent total disability compensation provides wage replacement benefits for those workers unable to return to any employment. Under both FECA and LHWCA, compensation continues as long as the total disability continues.

Under most no-fault systems, the wages paid for wage replacement are about two-thirds of the preinjury wages, are not taxable, and are subject to maximum and minimum amounts. The wage replacement rate is two-thirds of the weekly wages for workers covered by LHWCA and for employees with no dependents under FECA. For married employees or those with at least one dependent, the wage replacement rate is 75 percent under FECA. Under LHWCA, the minimum weekly payment is 50 percent of the national average weekly wage as determined annually by the Department of Labor. The maximum is 200 percent of the national average weekly wage. The minimum for FECA is 75 percent of the salary at the wage rate in the GS (general service) schedule for a GS-2, step 1, or 100 percent of actual pay, whichever is less. The maximum is 75 percent of the salary at the highest step of the wage rate at the GS-15 level.

Scheduled Benefits

The two federal compensation systems, as well as nearly all state workers' compensation systems, have a limited schedule of benefits for specific injuries in addition to compensation for lost wages. These benefits are for injuries that result in the loss of, or loss of the use of, various body parts including fingers, hands, arms, toes, feet, legs, sight in one or both eyes, hearing in one or both ears, and disfigurement.

The benefit schedules for FECA and LHWCA are the same, but because the wage caps and wage replacement rates of the two systems differ; the dollar amount received by an employee may differ as well. Compensation is based on a schedule that provides a certain number of weeks' pay for each injury, although scheduled payments are not made while temporary total disability payments are occurring under FECA. For example, the loss of a leg would entitle the injured worker to 288 weeks pay that is independent of any salary that the employee might also be earning after the injury.

Rehabilitation Expenses

For those employees with serious injuries who may not be able to return to their previous job, vocational rehabilitation is often available in an attempt to return the worker to some gainful employment. Both FECA and LHWCA provide vocational rehabilitation benefits for training and expenses. Rehabilitation expenses depend on the number of employees who receive vocational rehabilitation and the average cost per employee. It is assumed that all employees who did not return to work after their FELA settlement will go through rehabilitation. Those who are assumed to return to work in the model are assumed to have been successfully rehabilitated, and those

who are assumed to be permanently totally disabled are not successfully rehabilitated and therefore are not capable of returning to work.

Health Insurance Premiums for Permanently Totally Disabled Workers

Although permanently disabled workers receive wage replacement, they may or may not be eligible for continued health insurance premium subsidies from their employer. Under FECA, disabled federal employees receive the same health insurance premium subsidy that they received as employees. There is no requirement under LHWCA for firms to subsidize health insurance premiums, although firms may elect to provide injured employees with this benefit.

Death Benefits

Death benefits are typically paid to surviving spouses and dependents of workers who die from job-related injuries. Funeral expenses may also be provided. Both FECA and LHWCA provide survivors' and funeral benefits. Under FECA, the percentage of the deceased employee's wage that is paid to the survivors depends on the number of survivors. For example, a surviving spouse would receive 50 percent, and a spouse and two children would receive 75 percent—the maximum. FECA provides a funeral benefit of $800 and $200 for the administrative expenses for terminating the decedent's employment with the federal government. Under LHWCA, a single survivor receives 50 percent of the employee's wages; if there is more than one survivor, the amount is raised to two-thirds of the wages subject to the LHWCA maximum. The funeral benefit is $3,000.

Assumptions About Inflation

Inflation rates are used to estimate future changes in employees' wage rates, in the national average weekly wage, and in the cost of health insurance premiums. For estimating future wage increases, we used the long-term inflation rate for the consumer price index for urban consumers estimated by the Congressional Budget Office in its August 1995 budget update—3.2 percent. For the health insurance premiums, we used 6.5 percent as the inflation rate. This rate represents the recent trend in estimates of the annual increase in the cost of medical services.

Use of Various Discount Rates

Discount rates are used in the model to discount back to 1994 the estimated future stream of payments that injured employees would receive if they were paid under FECA and LHWCA. Under those systems, wage replacement occurs as it is incurred. Therefore, an employee who is permanently disabled would receive wage replacement extending a

number of years into the future. To compare these payments with the lump-sum settlements made to employees under FELA in 1994, the payments must be discounted back to 1994.

The choice of discount rates can significantly affect the outcome of the estimates, particularly when combined with the permanent disability rate that determines the estimated number of severely injured workers for whom benefits will be calculated. Therefore, we ran the model with three different discount rates: 8 percent, 10 percent, and 12.5 percent. These rates are nominal—not real—discount rates because future benefits have been inflated. These rates cover a range of possible discount rates around the 7-percent real rate used by the Office of Management and Budget for regulatory and benefit-cost analyses, which equates to a 10-percent nominal rate.

Effect of Assumptions About Permanent Disability

As part of their FELA lump-sum settlements, many injured workers do not return to work for their previous employer.[4] We assume that for some, the severity of their injuries may preclude their return to any work. Others may not be capable of returning to their previous job on the railroad, and still others may be capable of returning to work but choose to take their FELA settlement and attempt to find gainful employment in another industry. If all workers who did not return to work under FELA were so severely injured that they could not return to work under the no-fault alternatives, they could receive permanent total disability payments until their death. For lesser levels of permanent disability that result in only a partial loss of wage-earning capacity, workers would receive compensation for a proportion of this wage loss.

The actual distribution of permanent disability and the resulting loss of wage-earning capacity determines the compensation that must be estimated for this group of workers who left their railroad after settlement. However, the information on injuries reported in the railroads' files and used as the input in the model is insufficient to determine with certainty the severity of these employees' injuries. Because this distribution is unknown, assumptions about it must be made. A wide range of distributions is possible, each with a different number of workers at different levels of permanent disability ranging from 5- or 10-percent disability to a 100-percent disability (permanent total disability). Rather than estimating a large number of alternative distributions, various levels

[4]Of the 10,153 claims closed by the four large railroads, 1,327 claims involved workers who did not return to work after their settlement.

of permanent total disability were estimated; each level is equivalent in wage compensation cost to a large number of possible disability distributions.

Assuming that all these workers are not capable of returning to work would be an extreme assumption, and in the estimates reported, this is used as one extreme. The other extreme, in which all these workers are capable of returning to railroad employment, is also estimated, as are various intermediate points.

Model Results

The results of our estimations are presented in table I.1.[5] Besides the benefit levels of the no-fault system being estimated, the results depend primarily on the discount rate chosen and the unknown number of workers who are permanently disabled by their injuries. Table I.1 shows the total estimated payouts for the four large railroads that we examined for three discount rates and for a range of assumptions about the incidence of permanent total disability among the workers who did not return to railroad employment after receiving their FELA settlement. If all workers who did not return to the railroad were actually physically capable of returning to employment at their preinjury wage, then these railroads' costs might have been only about one-third what they paid under FELA in 1994. At the other extreme—if all of these workers are permanently totally disabled and therefore incapable of returning to any work—then these railroads' costs might have been higher by 13 percent (LHWCA at a 12.5-percent discount rate) to 53 percent (FECA at an 8-percent discount rate). In 1994, the four railroads paid $479 million in total FELA payouts.

[5]If a worker was eligible for a Railroad Retirement Board disability or retirement benefit, that benefit was estimated and subtracted from the results reported here.

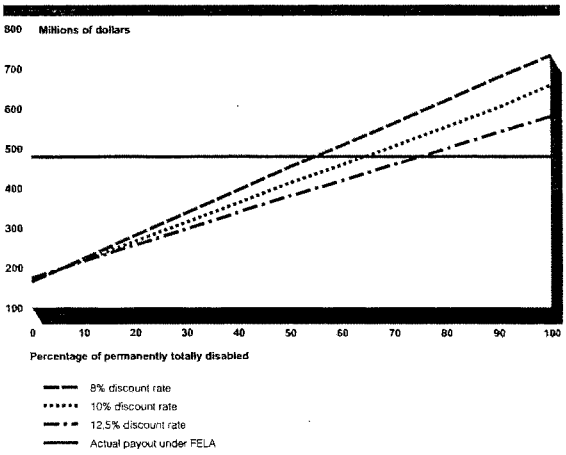
Table I.1: Estimated Payouts in 1994 for Four Large Railroads Using Various Assumptions About the Incidence of Permanent Total Disability Among Workers Who Did Not Return to Work Following a FELA Settlement

Dollars in millions

Incidence of permanent total disability in percents	Total compensation cost with FECA-level benefits			Total compensation cost with LHWCA-level benefits		
	Discount rate in percents					
	8	10	12.5	8	10	12.5
0	$164	$168	$174	$146	$149	$154
10	222	217	216	201	196	195
20	280	266	256	256	243	234
30	336	313	296	310	288	272
40	393	361	337	364	334	310
50	453	412	379	421	382	351
60	506	457	417	471	425	387
70	562	505	458	525	470	426
80	619	553	498	580	517	465
90	677	602	540	635	564	505
100	733	650	580	688	609	543

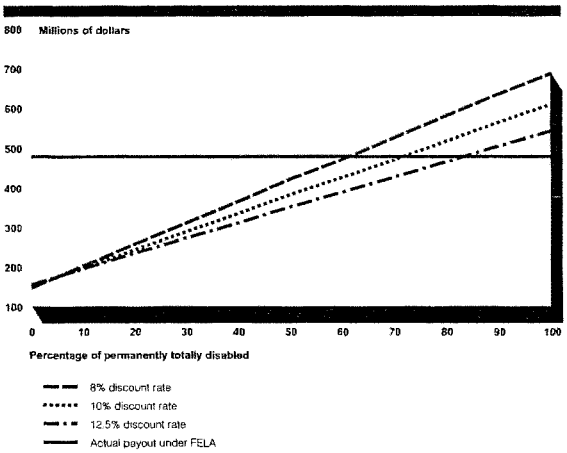
Although the incidence of permanent disability is unknown for this group of workers at these four railroads, the break-even point between FELA and the no-fault alternatives can be seen in the results. The percentage of workers who must be permanently totally disabled for the cost of the no-fault alternative to equal the amounts actually paid under FELA varies with the discount rate applied and the no-fault systems' benefit levels. (See figs. I.1 and I.2.) The lower the discount rate, the more costly the future payments to each injured worker and, therefore, the higher the percentage of workers who must be capable of returning to work for the break-even point to be reached. The break-even point ranges from about 55 to 75 percent for FECA-level benefits and from about 60 to 80 percent for LHWCA-level benefits.

Figure I.1: Estimated 1994 Total Injury Compensation Costs for Four Large Railroads Using FECA-Level Benefits and Different Discount Rates



Source: GAO's analysis of data on FELA claims that were closed in 1994 at four large railroads.

Figure I.2: Estimated 1994 Total Injury Compensation Costs for Four Large Railroads Using LHWCA-Level Benefits and Different Discount Rates



Source: GAO's analysis of data on FELA claims that were closed in 1994 at four large railroads.

For the group of workers who return to railroad employment following their FELA settlement, these four railroads would likely have saved about two-thirds of their actual FELA payouts of $147 million.[6] The payouts with FECA- and LHWCA-level benefits are shown in table I.2. Most of the estimated amounts that these workers would have received under the no-fault options are for wage loss. Under their FELA settlement, these workers likely received an additional amount for noneconomic damages (chiefly pain and suffering) and perhaps for some expected future wage loss or other impairment not shown in their claim file. If the latter is the case, the estimates for FECA and LHWCA would underestimate the costs for these workers. The numbers in table I.1 include the amounts shown in table I.2.

[6]Of the 10,153 claims examined, 8,826 involved workers who continued to work for their railroad after their settlement.

Table I.2: Estimated Payouts in 1994 for Four Large Railroads for Workers Who Returned to Work Following a FELA Settlement

Dollars in millions

Discount rate in percents	Payout with FECA-level benefits	Payout with LHWCA-level benefits
8.0	$48	$40
10.0	50	42
12.5	53	45

Small Railroads' Responses to GAO's Questionnaire on Experiences With FELA

U.S. General Accounting Office

GAO

Short Line and Regional Railroads' Views and Experiences with the Federal Employers' Liability Act (FELA)

Introduction:

The United States General Accounting Office (GAO), an agency that examines issues for the Congress, is conducting a study of possible modifications or alternatives to the Federal Employers' Liability Act (FELA). This law governs compensation to railroad workers for work-related injuries, fatalities and occupational illnesses. This investigation was requested by the Subcommittee on Railroads, House Committee on Transportation and Infrastructure.

As a part of our review we are gathering base line data on the costs and benefits of the FELA process and asking about options that might increase the effectiveness or efficiency of the FELA process. We are also interested in possible alternatives to FELA that could provide similar employee compensation at a lower cost. Finally, we are asking about the availability and affordability of insurance to cover injured workers under FELA. To obtain these data we are sending a questionnaire to all regional and short line railroads.

If you are the president or CEO of more than one regional or short line railroad you will receive more than one questionnaire. Please respond to all questionnaires you receive but respond only for the particular railroad that is identified on the attached label. Please respond within 10 days of receipt of the questionnaire, if possible, in the enclosed self-addressed business-reply envelope. If the envelope is missing or has been misplaced please return the questionnaire to the following address:

U.S. General Accounting Office
Attn: Carol Ruchala
Room 1826
441 G St., N.W.
Washington, DC 20548

If it would be more convenient for you, you can fax your response back to GAO at (202) 512-6171.

If you have any questions, please call Carol Ruchala at (202) 512-6846. Thank you for your assistance.

* NOTE: N=398 for all questions unless otherwise noted

FELA SETTLEMENTS

Q1. For this question and throughout the questionnaire, a **settlement** is defined as a case where the railroad's total cost (i.e., all medical, wage loss, pain and suffering, and any other costs) has been paid or a structured payment schedule has been agreed upon.

In the following table we are seeking information on your railroad's work-related injury, death, and occupational illness cases settled in calendar year 1994. These are the cases in which the worker received some payments. These payments could be made either directly by your railroad or by its insurance company. Please enter the number of cases settled in each category below and the total payments for each type of expense for those cases. If there were no cases in a category, enter 0s for all amounts in that category.

Settlements in 1994 with employees who **were not** represented by attorneys				
	Number of settlements	$ paid out-of-pocket and by insurance for medical costs	$ paid for current lost wages	$ paid for future lost wages and pain and suffering or other non-monetary losses
Work-related injuries				
Work-related deaths	For a summary of responses to Q1 see table at the end of the questionnaire			
Occupational illnesses				
Settlements in 1994 with employees who were represented by attorneys				
	Number of settlements	$ paid out-of-pocket and by insurance for medical costs	$ paid for current lost wages	$ paid for future lost wages and pain and suffering or other non-monetary losses
Work-related injuries				
Work-related deaths				
Occupational illnesses				

Q2. For those cases settled in 1994, how many, if any, involved an outside claims service at any time during the investigation, negotiation, and/or settlement? (Enter number)

mean=0.1 settlements total=47 N=392

Q3. For those cases settled in 1994, how many, if any, involved the hiring or use of an outside legal counsel by your railroad at any time during the investigation, negotiation, and/or settlement? (Enter number; if none, enter 0)

mean=1.0 settlements total=402 N=392

Q4. Of the cases settled in 1994, how many, if any, involved the filing of a Federal Employers' Liability Act (FELA) law suit by an employee? (Enter number; if none, enter 0)

mean=0.8 cases involving law suits
total=311 N=392

Q5. Of the FELA law suits against your railroad closed in 1994, how many, if any, of those suits resulted in a jury verdict? (Enter number, if none, enter 0)

mean=0.0 law suits resulting in a jury verdict
total=18 N=392

2

Q6. To the best of your knowledge, what was your railroad's total FELA-related legal cost in 1994? (Enter amount)

mean=$32,564 total=$12,536,953 N=385

Q7. To the best of your knowledge, what was your railroad's total FELA-related administrative and investigative cost in 1994? Note, by administrative cost we mean costs that accrue from railroad employees establishing and monitoring claims, assisting in the filing of claims, investigating the merits of a case, monitoring a case during rehabilitation, and negotiating settlements; this does NOT include any legal costs. (Enter amount; if none, enter 0)

mean=$11,925 total=$4,543,484 N=381

Q8. At any time in 1994, did your railroad have a permanent in-house staff attorney(s) who worked on FELA-related matters? (Check one)

5.5% Yes

92.5% No

2.0% missing

LIABILITY INSURANCE ISSUES

Q9. What type of insurance coverage, if any, are FELA claims against your railroad covered under? (Check one)

81.2% General liability policy that includes FELA coverage

2.3% Special policy for FELA

12.1% None, self-insured ==> SKIP TO Q13

1.0% Other policy ==> PLEASE SPECIFY

3.5% missing

Q10. What is the self-insurance retention amount, if any, that your railroad must pay before your insurance covers a FELA claim? (Enter amount; if none, enter 0)

mean=$337,090 per case N=331
median=$50,000

Q11. To the best of your knowledge, in 1994 what percent of the annual cost of your railroad's general liability coverage was attributable to the FELA portion of the coverage? (Enter percent; if have special FELA policy, enter N/A)

mean=34.0% N=202

Q12. In 1994, what was the annual cost of either your railroad's general liability coverage that included FELA or your railroad's special FELA policy as a percent of your railroad's total payroll? (Enter percent on the appropriate line)

mean=17.0% for general liability N=272

mean=7.0% for special FELA policy N=8

Q13. One alternative to individual railroads each buying their own FELA coverage is for a number of railroads to pool their resources to buy insurance that would cover all of them. Has your railroad seriously considered such an arrangement with any other railroads? (Check one)

83.2% No

15.3% Yes ==> SKIP TO Q15

1.5% missing

3

Q14. Why has your railroad never seriously considered entering into a pool with other railroads? (Check all that apply) N=331

19.0% Would raise insurance premiums

16.6% Would take too much effort to set up the pool

16.6% Would take too much effort to administer claims

51.1% Don't want to depend on the safety records of other railroads

67.1% No other railroad has suggested such an arrangement to us

14.5% Other ==> PLEASE SPECIFY

Q15. Is your railroad currently in an insurance pool that includes FELA with any other railroads? (Check one)

10.3% Yes

88.2% No ==> SKIP TO Q17

1.5% missing

Q16. How many other railroads are in your insurance pool? (Enter number)

mean=13.3 railroads N=37

MEDICAL INSURANCE ISSUES

Q17. In 1994, did your railroad have medical insurance that covered employee work-related injuries and occupational illnesses? (Check one)

64.3% Yes

33.4% No ==> SKIP TO Q19

2.3% missing

Q18. To the best of your knowledge, in 1994, what was the annual cost of your railroad's medical insurance as a percent of your railroad's total payroll? (Enter percent)

mean=12.9 % N=210

Q19. In 1994, did your railroad cover 100% of employee costs for medical treatment resulting from work-related injuries and illnesses, either through direct payments or insurance? (Check one)

75.9% Yes

3.5% No

18.3% N/A, no medical treatments

2.3% missing

VIEWS ON FELA

Q20. How satisfied or dissatisfied is your railroad with the current FELA system? (Check one)

1.0% Very satisfied } SKIP
5.5% Somewhat satisfied } TO Q22

10.6% As satisfied as dissatisfied

12.6% Somewhat dissatisfied

62.6% Very dissatisfied

7.8% missing

Q21. What are the biggest concerns your railroad has with the current FELA system? (Check all that apply) N=341

89.7% Uncertainty or unpredictability of settlement amounts

70.4% Jury system determines awards

66.6% Award amounts vary by venue

75.1% Railroads always considered negligent

79.8% Creates an adversarial relationship between management and labor over the settlement of claims

75.7% Encourages fraudulent claims

50.7% Impedes investigation of accidents or addressing the causes of accidents

11.7% Other ==> PLEASE SPECIFY

4

Q22. The following modifications to FELA have been proposed. Would your railroad favor or disfavor each of these changes? (Circle one number for each that best represents your answer)

		Greatly favor	Somewhat favor	Favor as much as disfavor	Somewhat disfavor	Greatly disfavor	missing
1.	Legislative cap on pain and suffering awards	83.7%	8.3%	2.8%	0.0%	0.5%	4.8%
2.	Legislative cap on plaintiff's legal fees	81.9%	8.0%	5.0%	0.3%	0.3%	4.5%
3.	Court venue restrictions	62.1%	17.1%	12.6%	0.5%	0.8%	7.0%
4.	Reduce time limit from 3 to 2 years for an employee to file a law suit as in the original FELA	80.2%	10.3%	4.0%	0.3%	0.8%	4.5%

Q23. The following alternatives to FELA have been proposed. Would your railroad favor or disfavor each of these alternatives? (Circle one number for each that best represents your answer)

		Greatly favor	Somewhat favor	Favor as much as disfavor	Somewhat disfavor	Greatly disfavor	missing
1.	A nationwide no-fault system similar to workers' compensation	54.3%	23.6%	10.3%	2.3%	3.8%	5.8%
2.	Placing railroads and their workers under state workers' compensation systems	45.7%	24.4%	10.3%	5.3%	8.5%	5.8%
3.	Permitting railroads and their workers to opt out of FELA and into state workers' compensation systems or a nationwide no-fault system	44.7%	27.6%	12.6%	3.5%	6.3%	5.3%

BACKGROUND INFORMATION

Q24. What was your railroad's average monthly employment in 1994? (Enter number)

All railroads: mean=54.8 N=390
Regional railroads: mean=365.0 N=28
Local railroads: mean=22.7 N=207
Switching and terminal railroads: mean=41.7 N=155

Q25. In 1994, what percent of your railroad's employees were represented by a labor union? (Enter percent; if none, enter 0)

All railroads: mean=23.9% represented N=392
261 railroads had no represented employees
Railroads with representation: mean=71.5% N=131

5

&Q26. What was your railroad's total payroll in 1994? (Enter amount)

All railroads: mean=$2,190,584 N=378
Regional railroads: mean=$14,675,961 N=28
Local railroads: mean=$767,110 N=201
Switching and terminal railroads:
mean=$1,764,595 N=149

Q27. Does your railroad have a profit sharing plan with its employees? (Check one)

37.2% Yes

60.8% No

2.0% missing

Q28. Please provide the name, title, and telephone number of the person filling out this questionnaire in case we need clarification of any of your answers.

Name:_____

Title:_____

Telephone number:(_____)_____

Q29. If you have any additional comments on the FELA process or the topics covered in this questionnaire, please enter them below.

21.4% with comments

[1] Based on follow-up with a random sample of the railroads responding that they were self-insured, we learned that a portion of them actually did have insurance.

[2] GAO determined that the railroads responding they were in an insurance pool were technically not in a pool, but rather were owned by railroad management companies or other entities that owned more than one railroad and had group insurance for their railroads. Like an insurance pool, this arrangement serves to spread the railroads' liability exposure and costs.

6

Table II.1: Responses to Question 1 on FELA Settlements in 1994

Category	Number of railroads reporting settlements of this type[a]	Number of settlements	Dollars paid out-of-pocket and by insurance for medical costs	Dollars paid for current lost wages	Dollars paid for future lost wages and pain and suffering or other non-monetary losses	Total dollars paid
Settlements in 1994 with employees who were not represented by attorneys						
Work-related injuries	120 N=393	787 N=393	$1,630,165 N=390	$1,181,085 N=390	$3,357,845 N=390	$6,124,536 N=388
Work-related deaths	1 N=391	1 N=391	$339 N=391	$0 N=391	$449,661 N=391	$450,000 N=391
Occupational illnesses	7 N=391	27 N=391	$5,498 N=391	$2,525 N=391	$74,722 N=390	$82,745 N=390
Total not represented	121 N=390	814 N=390	$1,625,401 N=387	$1,183,610 N=388	$3,882,228 N=387	$6,655,841 N=385
Settlements in 1994 with employees who were represented by attorneys						
Work-related injuries	68 N=393	297 N=393	$3,062,812 N=388	$2,679,099 N=386	$25,144,923 N=386	$30,804,459 N=385
Work-related deaths	5 N=390	5 N=390	$2,218 N=391	$0 N=391	$2,944,782 N=391	$2,947,000 N=391
Occupational illnesses	15 N=389	171 N=389	$20,968 N=390	$0 N=390	$1,770,386 N=390	$1,791,354 N=390
Total represented	68 N=389	470[b] N=389	$3,076,622 N=384	$2,679,099 N=384	$29,787,091 N=383	$35,542,813 N=383
Grand total	**145 N=388**	**1,284 N=388**	**$4,697,557 N=380**	**$3,862,709 N=381**	**$33,542,819 N=379**	**$42,043,569 N=377**

Legend

N = number

Note: The numbers in individual rows and columns do not total the numbers in total rows and columns because of missing data.

[a]The number of railroads reporting settlements of each type does not total the numbers in the total rows because of railroads that reported more than one type of settlement.

[b]Out of the 470 cases represented, 311 involved FELA lawsuits and 18 were settled by a jury verdict.

Passenger Railroads' FELA Costs, 1994

	Number of settlements[a]	Amount paid out-of-pocket and by insurance for medical costs	Amount paid for current lost wages
Total	4,370	$ 8,862,462	$ 9,408,850
Mean	336	$ 738,539	$ 784,071
Number of railroads	13	12	12

Amount paid for future lost wages and pain and suffering or other noneconomic losses	Total FELA payout	FELA-related legal costs	FELA-related administrative and investigative costs	Number of employees	Payroll
$ 65,444,212	$ 93,715,524	$ 8,287,210	$ 8,896,477	43,804	$ 1,607,180,022
$ 5,034,170	$ 6,439,656	$ 753,383	$ 908,771	3,370	$ 123,629,233
13	13	11	11	13	13

Notes:

1. Passenger railroads are listed in appendix IV. In 1994, the following commuter rail systems were operated by the National Railroad Passenger Corporation (Amtrak) and are included in the table: Connecticut Department of Transportation (Connecticut DOT), CalTrain, MARC, Massachusetts Bay Transportation Authority (MBTA), Metrolink, and the Virginia Railway Express. The information for Metra includes only operations run directly by Metra, not Metra operations run by Burlington Northern Railroad and Chicago and North Western Transportation Company. The data on MARC include only operations run by Amtrak, not those services operated by CSX Transportation. The information for MBTA includes only cases handled by Amtrak, not those cases directly litigated by MBTA. We did not obtain information on FELA from the following commuter rail systems for the reasons indicated: Tri-County Commuter Rail Authority is under the Florida workers' compensation program, the San Diego Northern Railway and Dallas Area Rapid Transit had not begun operations in 1994, and the Southeastern Pennsylvania Transportation Authority did not provide us with information.

2. In general, when Amtrak operates commuter railroads, it administers and pays for cases related to FELA on behalf of the commuter railroad in return for a fee based on a percentage of payroll. The exception to this is MBTA, which, in 1994, directly handled and paid for its litigated FELA cases itself.

[a]Of the 4,370 settlements, 950 involved lawsuits and 52 involved jury verdicts

Source: Amtrak and commuter railroads.

Organizations Contacted for This Review

Federal Agencies

Federal Judicial Center
Federal Railroad Administration
Office of Workers' Compensation Programs, Department of Labor
Railroad Retirement Board
Social Security Administration

Freight Railroads

Alaska Railroad
Burlington Northern Railroad
Canton Railroad
Chicago & Illinois Midland Railway
Colorado & Wyoming Railway
Conrail
CSX Transportation
CP Rail Heavy Haul U.S.
Dakota, Minnesota & Eastern Railroad
Eastern Shore Railroad
Emons Transportation Group
Great Western Railway
Gulf & Ohio Railways
Illinois Central
Indiana & Ohio Rail Corporation
Kansas City Southern Railway
Maryland & Delaware Railroad
Norfolk and Portsmouth Belt Line Railroad
Norfolk Southern Corporation
Pinsly Railroad Company
Rail Management and Consulting Group
RailTex, Inc.
Southern Pacific Lines
Union Pacific Railroad Company
Washington Central Railroad
Wisconsin Central Ltd.
(398 small railroads provided us with information through our survey)

Passenger Railroads

Amtrak
CalTrain—Peninsula Corridor Joint Powers Board
Connecticut DOT
Dallas Area Rapid Transit
Long Island Railroad
MARC

Massachusetts Bay Transportation Authority
Metra
Metrolink—Southern California Regional Rail Authority
Metro-North Commuter Railroad
New Jersey Transit
Northern Indiana Commuter Transportation District
Port Authority Trans Hudson Corp.
San Diego Northern Railway—North San Diego Transit Development Board
Southeastern Pennsylvania Transportation Authority
Tri-County Commuter Rail Authority
Virginia Railway Express

Associations

Academy of Rail Labor Attorneys
American Arbitration Association
American Short Line Railroad Association
American Public Transit Association
American Trial Lawyers Association
Association of American Railroads
National Association of Railroad Trial Counsel
Regional Railroads of America

Unions

American Federation of Railroad Police
Railway Labor Executives Association

Safe Transit and Rail Transportation, on behalf of the following unions:

American Train Dispatchers
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employees
Brotherhood of Railroad Signalmen
Hotel and Restaurant Employees Union
Firemen and Oilers National Conference, Service Employees International Union
International Association of Machinists
International Brotherhood of Electrical Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Sheet Metal Workers International Association
Transport Workers Union

	Transportation Communications International Union United Transportation Union
Insurance Companies/Brokers	Alexander and Alexander, Inc. American Custom Insurance Canton Agency, Inc. Continental Excess and Select Cigna Specialty Insurance Fireman's Fund Insurance General Star Insurance Leach Agency Lexington Insurance Company Reliance Insurance Company Shortline Railroad Insurance Brokers United Underwriters Agency, Inc. United Shortline, Inc. Zurich American Insurance Group
Railway Claims Services	Railway Claim Services, Inc. Rail Services Incorporated
State Workers' Compensation Organizations	California Division of Workers' Compensation California Workers' Compensation Rating Bureau Illinois Industrial Commission Nebraska Workers' Compensation Court Pennsylvania Bureau of Workers' Compensation Pennsylvania Workmans' Compensation Appeals Board Texas Workers' Compensation Commission
Other	California Workers' Compensation Institute National Center for State Courts National Council on Compensation Insurance

Appendix V

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San Diego Law Review
January/February, 1988

*49 AN EVALUATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT

Jerry J. Phillips [FNa]

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INTRODUCTION

Recently, renewed attacks have been leveled at the Federal Employers' Liability Act (FELA). [FN1] These attacks contend that the Act should be replaced with some sort of federal or state no-fault workers' compensation system. [FN2] The charges leveled against FELA are that: (1) fault-based liability is against the developing trend of modern tort law and out of step with the widespread adoption of workers' compensation schemes generally for industrial injuries; (2) the results under FELA are unpredictable; (3) the process is unduly protracted; (4) the administrative costs and settlement payouts are excessive; and (5) the procedure is adversarial, fostering divisiveness between employer and employee and discouraging rehabilitation of the injured worker.

An examination of the available data indicates that these charges are either unsupported or demonstrably incorrect. FELA serves as a real and valuable incentive to promote employee safety in the railroad industry, which remains one of the most hazardous in this country. FELA's cost of operation is commensurable with that of comparable workers' compensation systems and it is not an unduly slow procedure. Its results are tailored to the individual needs and losses of the injured worker. Finally, FELA is no more adversarial *50 than workers' compensation programs, and probably less so. Overall, FELA is a fairer system than workers' compensation in both design and operation.

In recent years state and federal workers' compensation systems have come under a variety of substantial attacks for costliness, inadequacy of benefits and of coverage, rigidity of application, and basic unfairness. [FN3] These charges raise the fundamental question of whether or not the trend should be toward a FELA type of system, and away from workers' compensation schemes, rather than the other way around.

The railroad industry is concerned with the continued applicability of FELA to railroad injuries and occupation-related diseases because they foresee burgeoning claims for occupational injuries and diseases that may not become manifest until after employee

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EXHIBIT
2

retirement. [FN4] FELA would cover such claims, but workers' compensation would not. As will be discussed below, it is debatable whether an employer could escape tort liability for such claims. Even under a workers' compensation system, railroads may not escape liability due to developing tort exceptions to the exclusivity provisions for intentional injuries. The more fundamental issue, however, is whether the railroads *should* escape liability for such injuries. The fair answer is that they should not.

THE BACKGROUND AND DEVELOPMENT OF THE FEDERAL EMPLOYERS' LIABILITY ACT

The Federal Employers' Liability Act was passed in 1908, [FN5] as a means of providing a reasonably reliable tort compensation system for workers in the dominant American railroad industry, which was causing an appalling number of injuries and deaths per year. FELA preceded the wide adoption of workers' compensation systems in this country. It retained the tort characteristics of fault-based liability and compensatory damages based upon actual damages suffered, rather than upon a fixed or arbitrary scale of benefits. FELA adopted a pure comparative fault standard, except that assumption of risk was no defense in cases where the employer was guilty of negligence per se in violating a federal safety statute or regulation. [FN6] In 1910 FELA was amended to provide concurrent state and federal ***51** jurisdiction and nonremovable venue in any jurisdiction where the defendant resided or did business, or where the cause of action arose. [FN7] In 1939 Congress eliminated the defense of assumption of risk, established a three-year statute of limitations, and made it a crime for any person to attempt to prevent the furnishing of information relating to the injury or death of an employee. [FN8]

In a series of decisions, notably *Rogers v. Missouri Pacific Railroad* [FN9] and *Gallick v. Baltimore & Ohio Railroad*, [FN10] the United States Supreme Court broadened and liberalized the definitions of fault and proximate cause as applied under FELA. *Rogers* held that a jury question of fault is presented if 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' [FN11] In *Gallick* the Court ruled that a jury question of causation is presented where there is 'evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm.' [FN12] The salutary effect of these decisions was to present a jury question of fault and causation in all but the clearest instances. As a result, FELA cases generally are decided by a panel of one's peers.

FELA AS A SAFETY INCENTIVE

One commentator has contended that the 'railroad industry is one of the safest industries today,' and that the need to provide incentives for railroads to make their industry

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safer by means of a FELA system of tort liability 'no longer exist[s] today.' [FN13] These assertions are simply not borne out by the evidence.

A current economic study of the railroad industry shows that it continues to be one of the most dangerous occupations in the American economy. [FN14] This study reports that from 1975 to 1984, 'high speed and mile-long trains, hazardous commodities and drastic elimination of employees' contributed to an injury rate in the railroad industry that was 'fifty percent higher than the average for the entire*52 economy.' [FN15] In addition, the study notes that almost all of the railroad crafts 'work outside in all weather by day and by night on all days of the year, often on risky footing on or near moving equipment.' [FN16] The 1983 amputation rate for railroad employees, the study found, 'was 58% greater than that for all U.S. industry,' and the fracture rate 114% greater. [FN17] During the 1975-1985 decade, '953 on-duty railroad employees were killed and 532,033 were injured.' [FN18] A November 1987 report of The Railway Labor Executives' Association (RLEA) states that ' o ver the last decade, an average of almost 49,000 rail workers have been injured *each year*,' resulting in an average per-year injury of '1 out of every 10 rail employees.' [FN19]

The railroad industry is not only a hazard to its employees, but a substantial and growing danger to the public at large as well. Ninety-five percent of the railroad accident fatalities in 1985 were sustained by nonemployees, such as motorists at railroad crossings. [FN20] A 1987 report of the Illinois Public Action Council (IPAC) states that for the decade 1976-1985 an average of 1253 non-employees were killed per year in railroad accidents. [FN21] That same report notes that approximately 25% of the 500 major rail accidents reported in the *New York Times* between 1975 and 1987 'involved toxic substances, explosives, hazardous waste or nuclear material,' [FN22] and that ' a lmost one in ten rail cars involved in accidents now contains hazardous materials.' [FN23] Furthermore, the report states that the amount of hazardous substances 'as a percentage of total rail tonnage,' is 'rapidly increasing.' [FN24] The number of 'rail-transported nuclear spent fuel shipments increased ten times from 1975 to 1985,' and the 'Office of Technology Assessment of the U.S. Congress estimates that rail shipments of spent nuclear fuel will be involved in from one to five rail accidents per year by the year 2000.' [FN25]

Railway safety 'is not covered by OSHA [Occupational Safety and Health Act]' but instead is covered by the Rail Safety Act which, according to the RLEA report, 'does not provide incentives *53 for compliance with safety regulations.' [FN26] The report further points out that ' r ail companies know they can be fined only if they fail to correct hazards *after* they are found by an inspector,' with the result that 'in 1986 the FRA Federal Railroad Administration imposed fines that average only about $10 per cited defect.' [FN27] The IPAC report states that the FRA 'has not required strict compliance with the amended power brake rules,' and that trains 'regularly leave terminals with little or no inspection.' [FN28] The report also states that the FRA 'is ignoring the increasingly

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widespread failures by the railroads to report accidents and incidents as required by law.' [FN29] Thus, it is apparent that governmental regulation does not function as an adequate safety incentive for the rail industry.

Nor can a no-fault workers' compensation system be relied on to provide the necessary safety incentive for the railroad industry. A recent study of the Rand Corporation Institute for Civil Justice indicates that the less the injury costs to an employer, the less inclined the employer is to correct its safety problems. [FN30] It is well documented that workers' compensation payments are generally less than tort awards, especially for the more serious injuries. [FN31] Workers' compensation premiums do not provide an adequate safety incentive to employers. Although the employers of about 80% of the nation's employees that are covered by workers' compensation are experience rated (that is, workers' compensation premiums are based, in part, on the company's safety record), there is no indication of any substantial correlation between such ratings and increased workplace safety. [FN32] According to IPAC, the predictability of workers' compensation***54** payouts, whether in insurance premiums or self-insured liability, encourages the employer practice 'of trading the lives of employees and low, predictable compensation benefits for short-term profit.' [FN33]

The fault-based FELA system, with its compensation exceeding the typical workers' compensation award (particularly for the more serious injuries), is designed to serve as a real and present safety incentive. A recent study of the Consumer Federation of America concluded that the tort system, '[b]y assigning responsibility for actions . . . is one of the strongest mechanisms in our capitalist society for ensuring that the profit motive is pointed toward positive achievements.' [FN34] The comparative fault aspect of FELA [FN35] serves as an incentive to employee safety as well.

By contrast, the Steering Committee for the Association of American Railroads (AAR) strongly advocated replacing FELA with some sort of no-fault workers' compensation scheme. Among other things, they foresaw 'the burgeoning onset of occupational illness claims compensable under the FELA now sweeping the country,' including a 'great increase in hearing loss claims' and the increase 'at an alarming rate' of '[a]sbestos-related claims.' [FN36] The Steering Committee also noted 'a recent rash of alarming jury awards,' including 'the $58 million of judgments against the Norfolk & Western Railroad Company in the recent dioxin cleanup cases.' [FN37] However, IPAC points out that the 'railroads knew of these hazards for years,' but 'took no corrective action until lawsuits were filed against them under the FELA.' [FN38] The Council also notes that work disabilities and diseases that are discovered after an employee retires or leaves the work force are not compensable under workers' compensation plans. [FN39] Such injuries are compensable, however, under FELA. [FN40]

The AAR may be mistaken in believing that tort liability can be avoided under a workers' compensation scheme for injuries from workplace dangers of which the

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employer was aware but took no corrective action. Such liability may fall within an intentional misconduct tort exception to the exclusive remedy provisions of workers' ***55** compensation law. [FN41] Furthermore, workers' compensation coverage would not avoid liability for toxic spills such as those cited by the AAR, since such claims largely involve tort liability to non-employees. In any event, the suggested motive for replacing FELA with a workers' compensation scheme must sit ill indeed with an American public that is concerned for fairness and accountability in its compensation laws.

CRITICISMS OF FELA

Monetary Cost

One of the persistent attacks against the Federal Employers' Liability Act is that it is too expensive due to the high administrative costs and large awards. Once again, the data does not support these criticisms.

In an in-depth 1952 study of the Illinois workers' compensation system, Alfred F. Conard and his associates found to their surprise that the FELA system was significantly less expensive to operate than the state workers' compensation scheme. They found that the ratio of total cost to benefits paid under FELA was approximately one-fifth to four-fifths, while under workers' compensation the ratio was one-third to two-thirds. [FN42] Operating costs were at least 50% more expensive in every category of expenditure for workers' compensation, as compared to FELA. [FN43]

The primary reason for this disparity in costs, they concluded, was the significantly greater involvement of attorneys in workers' compensation claims as opposed to FELA claims. Conard and his associates noted that workers' compensation boards or commissions generally 'frown upon an employee's appearing without counsel' because of the difficulty of the issues involved, such as defining 'arising out of and in the course of employment' and the 'extent of injury.' [FN44] They found that attorneys were involved in only 1.6 to 5% of the FELA claims, while they were involved in 90 to 98% of the nonfatal and approximately 25% of the fatal workers' compensation claims. [FN45] ***56** Conard and his associates concluded that the smaller size of workers' compensation payouts relative to railroad injury payments 'has a negligible effect on the higher ratio of aggregate claimants' expense in these cases.' [FN46] These researchers prophetically noted that 'misconceptions may not be confined to the relative costs, but may extend to many other features of both systems.' [FN47]

The conclusions of this study are borne out by contemporary research in the area. The Oldfather study concluded that in 1985 the 'estimated reparations costs as a percent of total operating expense were 2.2% in the inter-city bus industry and 2.4% in the rail industry.' [FN48] The study found that in 1982 injury expense as a percentage of

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operating expense was 2.7% for the coal industry and 2.2% for railroads. [FN49] Thus, railroads compare favorably in this regard with both a relatively safe (bus) industry and a relatively dangerous (coal) no-fault workers' compensation industry.

Comparing the rate of increase of expense, adjusted for inflation, the Oldfather study found that the rail injury expense increased by 42% between 1970 and 1984, while workers' compensation expense increased by 129% during the same period. [FN50] Between 1972 and 1984 inflation-adjusted compensation and medical payments under the Longshore and Harbor Workers' Compensation Act (LHWCA) increased by 286%. [FN51] During the same period, inflation-adjusted rail injury expense increased only 34%. [FN52]

Oldfather studied a representative sample of 2645 FELA cases closed by attorneys during the 1982-1985 period. He found that 76% of these cases resulted in settlements of $100,000 or less, and 55% settled for $50,000 or less. [FN53] The 1985 cost to the railway industry for all injury expenses (including both employee and non-employee injuries) was 2% of total operating revenue; this compares favorably with industries that are under workers' compensation systems. [FN54] Moreover, the railroad industry has become quite profitable since deregulation in 1980; [FN55] therefore, railroad difficulties cannot be used as ***57** an argument against the higher payouts of FELA as opposed to a workers' compensation system.

The RLEA states that '85% of FELA cases are settled without the worker hiring a lawyer.' [FN56] Only 1.1% of FELA cases are settled in court while there is a much higher percentage of litigated cases in workers' compensation cases. For example, 13% of workers' compensation cases were litigated in Mississippi while 27% were litigated in Illinois. [FN57]

The 1983 AAR study supports these cost findings. It observes that '[a]bout 85 percent of the claims closed in 1981 were settled directly between the railroads and the claimants.' [FN58] Of the remaining 15% represented by attorneys, 5% were settled without suit being brought and 88% were settled before trial. [FN59] This study also notes that ' a pproximately 4 % of the claims' representing 58% of the total payout were settled for $75,000 or more, while ' f ully 88 % of the claims were settled for less than $25,000 and accounted for about a fifth of total payout.' [FN60] These settlements were 'determined primarily by the economic loss sustained by the claimant.' [FN61]

The AAR study concluded that the railway industry paid out $366 million in FELA claims in 1981, and that a simulated payout of the same claims under LHWCA, reduced to present value, would result in a payment of $417 million. [FN62] A comparable payout under the Illinois workers' compensation program would have cost $344 million, only 6% less than the FELA payout. [FN63]

FELA-related administrative costs for eleven selected carriers examined in the AAR study showed that these costs ranged from 11% to 31% of the actual FELA payout.

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[FN64] These figures suggest that operating costs are in significant part a function of railroad efficiency in administering the compensation program, rather than of the program itself.

***58** One of the repeated charges made against the FELA system is that plaintiffs' contingent attorney fees are exorbitant-according to one commentator such fees can be as high as forty percent of the FELA award. [FN65] The AAR study, however, notes the FELA practice is a limited field because the rail unions traditionally have recommended only a few well-known tort lawyers who handle FELA suits for a flat 25% contingent fee rather than the 33.3% contigent fee which is the standard in the personal injury area. [FN66]

Other Costs

Critics of FELA level other charges not directly related to its monetary cost, but nevertheless challenging its efficiency as a compensation system. They contend that the process involves undue delay, discourages rehabilitation, provides improvident lump sum settlements, is divisive, and makes unpredictable awards. An examination of each of these criticisms shows that they lack factual basis and present no significant difference from a workers' compensation system; furthermore, they involve value judgment that, on balance, weigh in favor of FELA.

By the railroads' own admission, the typical length of time from date of injury to date of settlement cannot by any stretch of the imagination be considered excessive. The 1983 AAR study showed that the median time for this purpose 'was nearly three months.' [FN67] The median number of months from filing to disposition of a federal diversity tort claim ranges from fifteen to twenty months, according to the 1984 annual report of the Administrative Office for United States Courts. [FN68] As already noted, only a small fraction of FELA claims ever result in the filing of a suit. [FN69] Moreover, railroad workers are entitled to various sickness and disability benefits that help to cushion any delay in settlement. [FN70] In any event, delay in payment is a matter that primarily concerns claimants, and railroad employees widely support FELA rather than a workers' compensation program for railroads.

The AAR study illustrates the railroads' disbelief that the FELA compensation system discourages rehabilitation. As they frankly admit, 'most workers in the rail industry can be relied upon to want to ***59** return to work, rejoin their peers, and enhance their opportunities for promotion, rather than sit at home.' [FN71] Their 1981 survey showed that the 'vast majority' of FELA claimants, namely 89% returned to their previous jobs. [FN72] Their study also found that ' o ver half' of the claimants in their twenties and thirties who were permanently totally disabled for railroad work took jobs elsewhere. [FN73]

In his 1952 study of the Illinois workers' compensation system, Professor Conard found that the 'large majority' of employers and

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employees preferred payment in a lump sum to payment in the weekly installments provided by the law, and that 'qualified informants estimated that 80 to 85% of cash benefits are so paid.' [FN74] On the other hand, the AAR study reported that structured settlements were used in a significant number of FELA cases, particularly for cases involving settlement amounts of $75,000 or more. [FN75] This study found the structured settlement technique to be of particular interest because 'it closely resembles the central feature of no-fault compensation systems.' [FN76]

Moreover, it seems that the use of a lump sum or a structured form of settlement should be based on the agreement of the parties, rather than upon a form of settlement imposed by law. It is much too rigid to assume that all claimants are incapable of managing a lump sum settlement, or that a lump sum settlement would not be preferable for claimants in some instances.

Critics of FELA contend that it encourages divisiveness between employees and employers. [FN77] Such assertions are unsupported by any evidence. It is worth noting that a number of states have found it necessary to provide a civil remedy against retaliatory discharge for filing a workers' compensation claim. A 1981 article found that eleven states provided such a remedy [FN78] and a 1986 article found that the number of jurisdictions providing such a remedy had risen to twenty-seven, [FN79] indicating that the problem is a growing one for workers' compensation claimants. If there is any validity to the unsupported***60** assertion that FELA claims are divisive, the substitution of a workers' compensation remedy seems unlikely to provide any solution and might make matters worse.

As previously noted, [FN80] most FELA claims are settled without the intervention of an attorney, and such cases presumably are settled amicably, creating no friction. A lawsuit typically is filed only in the cases involving serious injuries and permanent disability, where the employee often is unable to return to work with the railroad. [FN81] In such cases, there should be no continuing friction between such employees and the railroad. Most important, the claimant has a legal right to assert his claim-any refusal of the railroads to respect this right is reprehensible and should be conbatted actively whenever and wherever encountered. This problem should not be evaded by an attempt to change to a workers' compensation system which will likely provide no solution to the problem anyway.

When facing unpredictable awards, the railroad industry itself admits that recovery of lost wages is the central issue in the majority of FELA claims, and that the total settlement value of a FELA claim is determined primarily by the economic loss sustained by the claimant. [FN82] A 'high payment' judgment will often become the standard by which similar cases are judged in the future. [FN83] Professor Conard puts the matter more succinctly: ' w e have no doubt that the ability of claimants to recover judgments furnishes the adjusters' measure of the fair value of a FELA claim.' [FN84]

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The Procrustean approach of workers' compensation schemes to the question of damages fails to take adequate account of the individual circumstances of each case. Professor Conard notes that relatively few workers' compensation cases can be solved by reference to the schedule. [FN85] Workers' compensation does not allow recovery for pain and suffering. Pain and suffering and diminished enjoyment of life constitute a very real item of damage. The tortfeasor who inflicts an injury should bear the burden of any uncertainty in calculating the damages associated with that injury.

There is no evidence that any significant number of meritorious FELA claims result in the denial or undercompensation of recovery. On the other hand, there is ample evidence that workers' compensation claims generate a large amount of litigation, principally over questions of the extent of damage and whether the claim 'arose out ***61** of or in the course of employment.' [FN86] It is unclear whether, or how many, meritorious workers' compensation claims result in a denial of recovery, but it is clear from the very nature of the system that a large number of such claims are significantly undercompensated. [FN87]

CONSIDERATIONS OF FAIRNESS

Matters of cost and efficiency in the operation of a compensation system must in all events give way to the paramount concern of fairness. When measured by the standard of fairness, it is evident that FELA clearly outdistances no-fault workers' compensation programs in this country.

Workers' compensation has come under repeated attacks for excessive rigidity, underinclusiveness of coverage, and undercompensation. [FN88] A number of tort-claim exceptions-such as intentional misconduct, the dual capacity doctrine, and third-party claims for contribution and indemnity-have developed as a reaction to the exclusive remedy provisions of workers' compensation laws, [FN89] indicating a general dissatisfaction with workers' compensation as the exclusive remedy for workplace injuries.

It has been recognized that tort litigation serves a number of valuable goals in addition to that of compensation for injury. [FN90] It promotes deterrence. It reinforces the dignity of the individual. It gives the claimant a feeling of participation in the system, and a sense of ***62** vindication against unjust treatment. These are values that should not lightly be discarded in our democratic society.

CONCLUSION

The charges that are leveled against the FELA tort system of compensation do not hold up under scrutiny. Employment in the railroad industry continues to be hazardous, and the industry is in need of the deterrent effect of a tort liability system. FELA is less expensive to administer than no-fault workers' compensation schemes. Compensation under

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FELA is more individualized and equitable than workers' compensation. More important, FELA is fairer in operation than workers' compensation. The question is not whether FELA should be changed to a workers' compensation system, but whether workers' compensation should be changed to a tort system like FELA. [FN91]

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[FN1]. 45 U.S.C. §§ 51-60 (1986).

[FN2]. *See, e.g.*, Schwartz & Mahshigian, *The Federal Employers' Liability Act, A Bane for Workers, A Bust for Railroads, A Boon for Lawyers*, 23 SAN DIEGO L. REV. 1 (1986); Havens & Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987).

[FN3]. *See infra* notes 32 & 88 and accompanying text.

[FN4]. *See* I Ass'n Am. R.R. Steering Committee, Federal Employers' Liability Act Study (1983) (unpublished manuscript on file with the author) [hereinafter AAR Report].

[FN5]. The Act as originally passed in 1906, 34 Stat. 232, was struck down in Howard v. Illinois Cent. R.R., 207 U.S. 463 (1908), owing to the Court's finding that the Act unconstitutionally regulated intrastate commerce.

[FN6]. *See* 45 U.S.C. § 53.

[FN7]. 45 U.S.C. § 56; 28 U.S.C. § 1445(a) (1973).

[FN8]. *See* 45 U.S.C. §§ 54, 56, 60.

[FN9]. 352 U.S. 500 (1957).

[FN10]. 372 U.S. 108 (1963).

[FN11]. *See* Rogers v. Missouri Pac. R.R., 352 U.S. at 506.

[FN12]. Gallick v. Baltimore & O.R.R., 372 U.S. at 116.

[FN13]. *See* Schwartz & Mahshigian, *supra* note 2, at 2.

[FN14]. Oldfather, FELA-Is it Time for Change? 2 (1987) (unpublished manuscript on file with the author).

[FN15]. *Id.* at 1-2.

[FN16]. *Id.* at 2.

[FN17]. *Id.*

[FN18]. *Id.*

[FN19]. RAILWAY LABOR EXECUTIVES' ASS'N, FELA-A MATTER OF RAILROAD SAFETY, INJURY COMPENSATION AND CORPORATE ACCOUNTABILITY 7, 12

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(1987) (emphasis original) [hereinafter RLEA REPORT].

[FN20]. Oldfather, *supra* note 14, at 2.

[FN21]. ILL. PUB. ACTION COUNCIL, RAILROADING THE PUBLIC SAFETY 2 (1987) [hereinafter IPAC REPORT].

[FN22]. *Id.* at 15.

[FN23]. *Id.* at 2.

[FN24]. *Id.*

[FN25]. *Id.*

[FN26]. RLEA REPORT, *supra* note 19, at 4, 13.

[FN27]. *Id.* at 13. In a letter dated June 3, 1987 to the Hon. John J. Exon, Jr., Chairman of the United States Senate Subcommittee on Surface Transportation, James R. Snyder, Chairman of the Safety Committee of RLEA, states that 'out of 311,000 defects discovered by FRA inspectors in 1986, only $3.1 million in fines were imposed last year, or about $10 per defect.' As one writer notes, because government agencies 'are subject to political pressures' and may relax safety enforcement 'to advance an Executive's political agenda,' such enforcement should be backed up 'with the strong general deterrence provided by tort law.' T. Haas, On Reintegrating Workers' Compensation and Employer's Liability 36, 38 (1987) (unpublished manuscript on file with the author).

[FN28]. IPAC REPORT, *supra* note 21, at 23.

[FN29]. *Id.* at 19.

[FN30]. RAND CORP. INST. FOR CIV. JUST., AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS 59 (1986).

[FN31]. *See* Oldfather, *supra* note 14, app. G at 72-73.

[FN32]. J. Phillips, The Relationship Between the Tort System and Workers' Compensation-The True Cost 7-8 (1982) (unpublished manuscript on file with author) (citing THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 96-97 (1972)).

[FN33]. IPAC REPORT, *supra* note 21, at 49.

[FN34]. CONSUMER FED'N OF AM., THE BENEFITS OF THE MODERNIZATION OF THE TORT LAW IN THE CONTEXT OF THE SOCIAL MOVEMENT FOR IMPROVED SAFETY AND QUALITY IN THE NATIONAL ECONOMY 2 (1987).

[FN35]. 45 U.S.C. § 53.

[FN36]. AAR Report, *supra* note 4, at 11.

[FN37]. *Id.*

[FN38]. IPAC REPORT, *supra* note 21, at 8; *see also id.* at 45-47.

[FN39]. *See id.* at 47.

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[FN40]. *Id.*

[FN41]. *See* Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

[FN42]. A. CONARD, R. MEHR, B. HEDGES, G. HILL, P. JOHNSON & J. LISTEN, COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS 1-2 (1952) [hereinafter A. CONARD].

[FN43]. *Id.* at 1.

[FN44]. *Id.* at 9, 41.

[FN45]. *Id.* at 29, 32, 39; *see also* Oldfather, *supra* note 14, app. G at 75. 'In 1975 attorneys were hired in 48% of the permanent partial disability cases, 66% of the permanent total disability cases and 63% of the death cases,' (citing VII INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE, U.S. DEPT. OF LABOR, A SURVEY OF WORKERS' COMPENSATION CLOSED CLAIMS 153 (1979)).

[FN46]. A. CONARD, *supra* note 42, at 50.

[FN47]. *Id.* at 2.

[FN48]. Oldfather, *supra* note 14, app. A at 27.

[FN49]. *Id.* app. D at 49-50.

[FN50]. *Id.* app. E at 61.

[FN51]. *Id.* app. E at 62.

[FN52]. *Id.*

[FN53]. *Id.* app. I at 88. Oldfather also notes that '[o]nly 11 cases involved settlements of $1 million or more,' or .4% of all cases. *Id.*

[FN54]. *Id.* summary at 2. The percentage of FELA cases tried to verdict is 2%, as compared with 3.5% for the tort system as a whole. *Id.* app. I at 89.

[FN55]. *Id.* app. C at 38-39. During the period 1980-1985 net operating revenue of the railway industry 'averaged $2.3 billion per year,' net ordinary income 'averaged $1.76 billion per year,' and return on shareholders' equity 'averaged 7.7% per year.'

[FN56]. RLEA REPORT, *supra* note 19, at 5, 6. Some idea of the magnitude of workers' compensation appellate litigation can be gained by reviewing the reported workers' compensation cases in the Decennial Digest for the periods 1976-1981 and 1966-1976. For the 1976-1981 period these reports fill 1156 pages of Vol. 33; for the 1966-1976 period, they fill two thirds of Vol. 44 (1057 pages) and all of Vol. 45 (1509 pages).

[FN57]. *Id.* at 5.

[FN58]. AAR Report, *supra* note 4, at 24.

[FN59]. *Id.*

[FN60]. *Id.* at 19.

[FN61]. *Id.* at 28.

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[FN62]. *Id.* at 49.

[FN63]. *Id.* at 69.

[FN64]. *Id.* at 32.

[FN65]. Schwartz & Mahshigian, *supra* note 2, at 9.

[FN66]. AAR Report, *supra* note 4, at 79.

[FN67]. *Id.* at 22. By contrast, the mean number of days required to settle a contested death case in workers' compensation, according to a United States Department of Labor study, 'was 544 days.' Oldfather, *supra* note 14, app. G at 76.

[FN68]. T. Hass, *supra* note 27, at 4 n. 23 (citing the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF U.S. COURTS 291 (1984)).

[FN69]. *See supra* notes 58-59 and accompanying text.

[FN70]. Railroad employees are entitled to various sickness and disability benefits as a matter of course. *See* AAR Report, *supra* note 4, at 37-40.

[FN71]. *Id.* at 62.

[FN72]. *Id.* at 21.

[FN73]. *Id.* at 51.

[FN74]. A. CONARD, *supra* note 42, at 37.

[FN75]. AAR Report, *supra* note 4, at 20.

[FN76]. *Id.*

[FN77]. Havens & Anderson, *supra* note 2, at 314.

[FN78]. McGarry, *Retaliatory Terminations in Workmen's Compensation Cases*, 44 TEX. B.J. 617 (1981).

[FN79]. Love, *Retaliatory Discharge for Filing a Worker's Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 554 (1986).

[FN80]. *See supra* notes 58-59 and accompanying text.

[FN81]. *See supra* notes 60 & 73 and accompanying text.

[FN82]. AAR Report, *supra* note 4, at 22, 28.

[FN83]. *Id.* at 28.

[FN84]. A. CONARD, *supra* note 42, at 26.

[FN85]. *Id.* at 41.

[FN86]. *See supra* note 44 and accompanying text. Conard also notes that FELA, 45 U.S.C. § 56, allows a claimant three years after the cause of action accrues to file a claim, while the much shorter statute for workers' compensation claims shows 'striking instances of inadvertent loss of claim.' *See* A CONARD, *supra* note 42, at 49.

[FN87]. Oldfather notes that while many workers' compensation statutes 'purport to award 66% of the injured worker's wage loss,

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most workers do not receive that amount.' Oldfather, *supra* note 14, app. G at 73. Moreover, since the percentage is fixed by a ceiling based on the average weekly wage for the jurisdiction, higher paid employees are substantially penalized by this ceiling. Railroad employees are among this group of higher paid employees, since the average wage for such employees in 1985 was $2,916 per month. *Id.* app. G at 73, 74 & 77.

[FN88]. *See, e.g.*, J. Phillips, *supra* note 32 and authorities cited therein; DeLeon, *Workers' Compensation: A Legal System in Jeopardy*, 29 FED'N INS. COUNS. Q. 337 (1979).

[FN89]. *See* Rust, *New Tactics for Injured Workers*, Oct. 1987 A.B.A. J. 72; Marks, *Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Coemployees, Employers and Carriers*, XXII TORT & INS. L.J. 612 (1987); Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 (1983).

[FN90]. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5-15 (1986); Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 615-616 (1985); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-1173.

[FN91]. Haas advocates making an alternative tort remedy available to workers. This has been proposed by others and is the rule in England. He notes that the *quid pro quo* rationale originally used for adopting workers' compensation in lieu of a tort remedy would hardly pass muster today, since the defenses of assumption of the risk, contributory negligence and the fellow-servant rule-which the workers' compensation statutes were designed to obviate-would have little or no vitality in tort law today. *See* T. Haas, *supra* note 27, at 1-2, 18-22.

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25 San Diego L. Rev. 49

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Maryland Law Review
1993

Symposium: Future Prospects for Compensation Systems

*1063 FELA REVISTED

Jerry J. Phillips [FNa1]

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Introduction

In 1988 I wrote an article [FN1] evaluating the effectiveness of the Federal Employers' Liability Act (**FELA** or the Act) [FN2] as a system of deterrence and compensation for railroad injuries, as contrasted with administrative schemes of safety regulation and compensation. I undertook this study in response to persistent criticisms of the **FELA** [FN3] and repeated attempts on the part of the railroad industry to have the Act repealed and replaced by a program similar to a **workers' compensation** system.

The criticisms were that the **FELA** is excessively costly, slow, unpredictable, and divisive. [FN4] I found none of these criticisms to be supported by the available evidence.

One interesting argument against the **FELA** was that the railroads have become a relatively safe industry, [FN5] so that a tort-based system of compensation is no longer necessary to provide a safety incentive. I found no evidence to support the argument that the railroads are safe. I found considerable evidence to the contrary, to support the conclusion that the railroads continue to be a hazardous industry. [FN6] But even if railroads have become relatively safe over the course of the twentieth century, this trend may well be owing to the safety incentive provided by the FELA, above and beyond the technical safety improvements otherwise effected in the industry. [FN7] If the safety incentive of the Act were removed, the hazardousness and injury rate of railroads might well increase.

***1064** Another objection that has been leveled against the **FELA** is that it is anomalous today, when almost all other industrial accidents in this country are compensated under **workers' compensation** schemes. [FN8] This objection has validity, however, only if no-fault **workers' compensation** is superior to the **FELA** compensation plan: there is, however, no persuasive evidence that it is. On the contrary, the spiraling costs of **workers' compensation** schemes, the intense politicization of the subject and structure of **workers' compensation**, widespread dissatisfaction

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EXHIBIT
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with the inadequacy of **compensation** payments under **workers' compensation**, nagging doubts about its efficacy as a system of deterrence, and substantial indication of widespread fraud, abuse, and waste within its administration, [FN9] lead to serious doubts not only as to whether **workers' compensation** is a better system than the **FELA**, but whether in fact it may on balance be a significantly worse system.

The criticisms of the **FELA** continue, [FN10] and a federal committee has undertaken an in-depth study of the question of whether the Act should be replaced by an administrative scheme like **workers' compensation**. [FN11] It seemed an appropriate time, therefore, to revisit the subject of my earlier study, to see if the conclusions in that study are still valid. My review of the current evidence leads me to believe that my prior conclusions remain valid and, if anything, have been further substantiated by the passage of time. Perhaps an equally important question, then, is why the attacks upon the FELA continue.

I. The Evidence

There may be no better source of information as to the state of affairs in the railroad industry than that provided by the industry itself. If such information were prepared for public relations purposes, its reliability would be questionable. A study by the Association of American Railroads in 1991, [FN12] however, was compiled for ***1065** internal use and there is no reason to doubt its accuracy.

The study offers a number of revealing insights. In 1990, the total FELA payout by railroads was $877.4 million (an eleven percent increase over the previous year), representing 2.9 percent of gross operating revenues. [FN13] The study notes, however, that " d espite the increase in payout the exposure base indices continued to decline. In 1990, the number of employees decreased 2.45%, total man hours worked decreased 3.56%, and miles of road decreased 2.72%." [FN14]

The increase in payouts from 1989 to 1990 resulted not so much from increased lawsuits, but from an increase in payment of claims where no lawsuit was filed. The lawsuit payout in 1990 was $477.9 million, a seven percent increase from 1989, while the payout in that year for claims not resulting in lawsuits was $399.5 million, a seventeen percent increase from 1989. [FN15]

The relationship between the number of lawsuits and the payout amount is striking. According to the study, there were 46,901 nonlitigated claims disposed of-with or without payment-compared to 5,729 disposed of after a suit had been filed. [FN16] That is to say, while claims for which no lawsuit was filed accounted for only about forty-six percent of the money paid out by railroads over employee injuries, they amounted to more than eighty-nine percent of the number of all such cases. Stated the other way around, lawsuits, which accounted in number for less

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than eleven percent of total claims made, represented fifty-five percent of the total payout. Thus, lawsuits galvanized the payout process and set the trend for the fair value of FELA claims.

The average FELA payout for 1990, including both lawsuits and nonlitigated claims, was $25,851. The average nonlitigated payout in that year-not counting claims disposed of without any payment at all-was $14,161, while the average litigated payout was $83,419. [FN17] These figures illustrate the catalytic effect of lawsuit claims on the overall payout. [FN18] They also demonstrate that the claims, whether resulting in a lawsuit or not, are on the average modest in amount. Moreover, the average lawsuit payout dropped by 11.19% from 1989 to 1990, and the average payout for lawsuits ***1066** and nonlitigated claims dropped by 20.22% during the same period. [FN19]

If occupational illness claims-defined for purposes of this study as hearing-loss and asbestos-injury claims [FN20]-are excluded, the average payout figures rise significantly-to $21,954 per nonlitigated claim, $143,144 per lawsuit claim, and $43,750 per claim overall. [FN21] This difference is explainable-according to the study-by the fact that occupational-illness claims, whether litigated or not, "have settled for far less than non-occupational cases." [FN22] The lion's share of the occupational-illness claims was represented by hearing loss as opposed to asbestos claims. In 1990, for example, approximately 30,000 hearing-loss claims were filed, as compared to about 1,200 asbestos claims for the same period. [FN23]

Thus, it can be seen that lawsuits provide an upper pressure on the amount of FELA payouts. Also, whether the payouts are analyzed in terms of lawsuits, claims not resulting in lawsuits, all claims, or claims not including occupational illnesses, the FELA payouts on the average are not large compared to personal injury damages in other contexts. [FN24]

The railroads pay significant amounts of non-FELA claims. In 1990, for example, total employee-claim payouts amounted to $877,431,702, while railroad-crossing payouts for that year amounted to $87,302,627, and a third category described by the study as "miscellaneous payouts" amounted to $70,883,640. [FN25] Thus, railroad-crossing claims equaled nearly ten percent, and miscellaneous claims about eight percent, of the **FELA** claims. The miscellaneous and crossing categories are presumably tort claims, [FN26] which would not be eliminated by the adoption of a **workers' compensation** type of scheme for employee injuries. Moreover, the size of the crossing claims illustrates the continuing hazardous nature of railroads as a transportation industry. These crossing claims also raise an equitable issue, suggesting that there is no reason to treat ***1067** railroad employee injuries differently from non-employee injuries. If tort liability is the preferred method for establishing liability, it should apply to both categories of claims.

As noted in the introduction, not all has been a bed of roses-even from the employer perspective-in the realm of **workers' compensation**. It is by no means clear that

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employers, let alone employees, would benefit from a changeover from the **FELA** to a no-fault **workers' compensation** system in the railroad industry. The cost of **workers' compensation** has been steadily and dramatically rising during the past decade and more. [FN27] **Workers' compensation** has become a politicized subject, and there is evidence of widespread fraud, abuse, and waste in the system. [FN28] Moreover, a perennial concern has been the undercompensation of injured employees in **workers' compensation** payouts. All of these factors argue against changing from the **FELA** to a **workers' compensation** scheme for compensating railroad employee injuries.

A growing area of coverage for **workers' compensation** recovery involves injuries resulting in mental disability. While the earlier cases required the presence of some physical injury either causing or resulting from the mental injury, the modern trend is to allow compensation for pure mental injury that is shown to be job-related. [FN29] While most courts require that the mental injury result from a sudden, traumatic event or from extraordinary employment stress, there is a trend-at least in California-to allow workers' compensation recovery for pure mental injury resulting from ordinary job stress, even when the employee is especially susceptible to such injury. [FN30]

It is evident that workers' compensation claims for pure mental distress constitute a potential for a large increase in the number and size of such claims in our stressful society. It is as yet unclear whether recovery for job-related pure mental distress will be extended to **FELA** claims. In view of the trend toward recovery in this regard under **workers' compensation**, however, it seems unlikely that such recovery will be denied under the **FELA**.

***1068** II. The Nature of the Controversy

The usual objections to the **FELA**-slowness, costliness, unpredictability, and divisiveness-do not appear to be valid criticisms of the Act. The basis for the attacks must therefore lie elsewhere.

Why does railroad management seek the repeal of the **FELA**? It seems apparent that they believe payouts, as well as overall costs, under a **workers' compensation** scheme would be significantly less than under the **FELA**. It hardly seems likely that they would so vigorously advocate a change if they thought the cost of **workers' compensation** would be more than the cost of **FELA** compensation. If they believe that a **workers' compensation** scheme would, on the whole, be more beneficial or fairer to railroad employees than the **FELA**, the demonstration of this conclusion is not apparent, and railroad management has done an exceedingly poor job in trying to make it apparent. Moreover, management may well be incorrect in believing that the costs of administering a **workers' compensation** scheme would be less than the costs of administering the **FELA**, especially in view of the spiraling costs of

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workers' compensation.

There is some indication that railroad management believes, or believed, that recovery for occupational illnesses would be less likely under **workers' compensation** than under the **FELA**. [FN31] If so, there appears to be no basis for this belief. While the amount of recovery may be less under **workers' compensation** than under the **FELA**, it is by no means clear that the likelihood of recovery will be less under one or the other.

It is noteworthy that railroad employees generally find the **FELA** to be a satisfactory method of injury compensation. Indeed, if they did not, the Act would have been repealed long ago and replaced by a **workers' compensation** scheme, because the railroad industry has tried repeatedly to bring about such a change, almost from the inception of the **FELA**. It is the railroad employees, through their union representatives, who have stood in the way of such a repeal. [FN32]

Why do railroad employees prefer to retain the **FELA**, rather than switch to a **workers' compensation** scheme? Apparently they believe the payouts under the **FELA** are on the whole more generous and fairer than they would be under a **workers' compensation** administrative scheme. The evidence appears to bear them out on this point.

***1069** The assumed virtue of a **workers' compensation** system is its automatic payout, without regard to proof of employer fault. Proof of employment causation (injury arising out of and in the course of employment) is another matter, however, since a great deal of **workers' compensation** claims-especially those involving occupational diseases-are vigorously contested by employers on this point. Under the **FELA**, on the other hand, the requirements for proving both fault and causation have been attenuated, so that it is likely that the **FELA** plaintiff can satisfy these elements in most of the cases where the non-**FELA** plaintiff would not be able to establish liability under a **workers' compensation** scheme. [FN33] Pure **comparative** fault and the liberal choice of venue rules are also features that make the **FELA** an attractive remedy to railroad employees. [FN34]

A feature of the **FELA** that should be given significant weight is its accident-deterrent effect in providing an incentive to safety. Presumably, **workers' compensation** liability also provides a safety incentive, but probably not as great an incentive as tort liability because of the potentially greater amount of exposure under the **FELA**. [FN35] A society should act with great caution in altering an established institution of proven workability such as the **FELA**, especially where that institution provides an apparently strong safety incentive to a hazardous activity such as the railroad industry.

Conclusion

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The burden of proof should be on the proponents of change to prove the desirability of change. The railroad industry has not carried this burden in its efforts to obtain repeal of the FELA. The Act provides a system of individualized justice that appears to work well. It provides fair, and not excessive, compensation. It likely provides a greater employer incentive to safety than workers' compensation. As the adage goes: If it ain't broke, don't fix it.

[FNa1]. W.P. Toms Professor of Law, University of Tennessee. B.A., Yale University; M.A., Cambridge University, J.D., Yale Law School.

[FN1]. Jerry J. Phillips, An Evaluation of the Federal Employers' Liability Act, 25 San Diego L.Rev. 49 (1988).

[FN2]. 45 U.S.C. §§ 51-60 (1988).

[FN3]. See Phillips, supra note 1, at 49 n.2 (citing Victor E. Schwartz & Liberty Mahshigian, The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers, 23 San Diego L.Rev. 1 (1986); Arnold I. Havens & Anthony A. Anderson, The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform, 34 Fed. B. News & J. 310 (1987)).

[FN4]. See Phillips, supra note 1, at 55-61.

[FN5]. See Schwartz & Mahshigian, supra note 3, at 2.

[FN6]. Phillips, supra note 1, at 51-53.

[FN7]. Id. at 54.

[FN8]. Maritime employees, however, are covered under the FELA by the Merchant Marine Act (the Jones Act). See 46 U.S.C. app. § 688 (1988).

[FN9]. See generally Gary T. Schwartz, Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience, 52 Md.L.Rev. 983 (1993).

[FN10]. See, e.g., Thomas E. Baker, Why Congress Should Repeal The Federal Employers' Liability Act of 1908, 29 Harv.J. on Legis. 79, 84 (1992) (arguing that "[a]lthough the societal, industrial, and legal environments at the turn of the century warranted the enactment of the FELA, the current societal, industrial, and legal environments do not justify the statute's continued existence").

[FN11]. See Schwartz, supra note 9, at 995. Professor Schwartz is a member of the committee. Id.

[FN12]. Association of American Railroads, 1990 Report of Claim & Litigation Experience (1991) (on file with author) [hereinafter AAR Report].

[FN13]. Id. at 1-5.

[FN14]. Id.

[FN15]. Id.

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[FN16]. Id. at 2-9.

[FN17]. Id. at 2-8.

[FN18]. See Phillips, supra note 1, at 60.

[FN19]. See AAR Report, supra note 12, at 2-8.

[FN20]. Id. at 1-5.

[FN21]. Id. at 3-9.

[FN22]. Id.

[FN23]. Id. at 3-3.

[FN24]. See Phillips, supra note 1, at 60. "[T]he railroad industry itself admits that recovery of lost wages is the central issue in the majority of FELA claims, and that the total settlement value of an FELA claim is determined primarily by the economic loss sustained by the claimant." Id.

[FN25]. AAR Report, supra note 12, at 4-1.

[FN26]. It is possible that these figures also include administrative fines and contract claims. See Phillips, supra note 1, at 52-53.

[FN27]. See, e.g., Robert Pear, Health-Care Plan May Cover Injuries on Jobs and Roads, N.Y. Times, May 7, 1993, at A1; Employees Make Fewer Claims for More Money, Christian Sci. Monitor, May 5, 1993, at 8.

[FN28]. See generally Schwartz, supra note 9.

[FN29]. See 1B Arthur Larson, The Law of Worker's Compensation § 42.21 (1991).

[FN30]. Schwartz, supra note 9, at 1008.

[FN31]. See Phillips, supra note 1, at 54.

[FN32]. See Baker, supra note 10, at 90-92.

[FN33]. Id. at 51; Guido Calabresi, A Common Law for the Age of Statutes 32-33 (1982).

[FN34]. See Phillips, supra note 1, at 50-51.

[FN35]. See id. at 53-54.

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LAW OFFICES OF
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November 8, 2007

Hon. James Oberstar
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Dear Chairman Oberstar:

Thank you again for permitting me to testify at the October 25, 2007 hearing of the T & I Committee. I very much enjoyed the experience and thank you and all involved for taking time to look into the important issues of rail carrier harassment and intimidation of injured railroad workers.

I have attached my corrections to oral testimony and also I attach as a supplement to my testimony a Response with three exhibits that I hope will be made part of the record on this matter. I believe that the record would be incomplete and indeed inaccurate if such information is not included.

Many of the members of Panel Three claimed to the Committee that the underlying cause of harassment and intimidation of injured railroad employees is the "adversarial environment" between management and injured employees brought on by the FELA. The documentation attached debunks such argument.

Rail management wants to replace the FELA with a national workers compensation system. The GAO report attached of 1996 thoroughly examined every argument that Panel Three advocated to the Committee and did not reach the same conclusions articulated by Panel Three.

I have received numerous phone calls and emails from railroad workers who are worried that you might be in favor of eliminating the FELA. I told them that while I cannot speak for you, that I know that you care deeply about the rights of injured railroad workers. I remind them that as Otto von Bismark once remarked: "People who like sausages and laws should not watch how they are made". I believe that as Chairman you consider all points of

view and then make the best possible decisions on behalf of your constituents and the people of the Country.

Keep up the good work!

Very truly yours,

Bill Jungbauer

William G. Jungbauer
Before the House Transportation & Infrastructure Committee
Response to Panel Three Witnesses Testimony of October 25, 2007

SUPPLEMENTAL STATEMENT

Dear Chairman Oberstar, Chairwoman Brown, Ranking Members and Members of the Committee:

I write to supplement my testimony to the Committee by responding to remarks by Congressman Shuster directed towards me and to testimony made by various members of Panel Three to this Committee not covered in my previous remarks.

I have three points to discuss:

1. I very much respect every Member of Congress and every Member of this Committee. However, I was saddened that Congressman Shuster objected to my presence on Panel Two. Having personal experience with every rail carrier present to testify I believe I was uniquely qualified to testify on the subject matter of this Hearing. I respectfully must respond to his comments and objections regarding my presence on this panel.

2. Most of the testimony of Panel Three members was consciously not on point with regards to the purpose of October 25 Hearing. Had such testimony been offered in a court of law the judge would have stricken such testimony as non responsive and irrelevant to the questions posed. Furthermore, the testimony of Panel Three members failed to fairly acknowledge the problems of harassment and intimidation of injured railroad workers or to pledge that such harassment and intimidation would cease.

3.Assertions by members of Panel Three that the Federal Employer's Liability Act (FELA) is the cause of employer harassment and intimidation of injured employees are not accurate. The "adversary environment" described by Panel Three members under FELA would also exist under any national workers compensation system as rail carriers would continue to

challenge many of the same worker claims made under FELA requiring similar amounts of time from injury to conclusion of claims.

1. Response to Congressman Shuster's objection to my testimony:

At the onset of the October 25 Hearing Congressman Bill Shuster objected on the record to a "lawyer" testifying before the committee. That would be me. His justification for such objection was (1) that such "lawyer" had open cases and even a client testifying before the Committee (the merits of which open case were not discussed in any detail in the hearing); and (2) that numerous lawyers had been charged with ethical improprieties and that the Congressman was allowed to "bash attorneys" since his own brother is an attorney. I patiently awaited the "bashing" that Congressman Shuster had promised as I prepared to testify before the Committee. We never got to have an interchange of ideas.

Most in Congress know that ethical charges, allegations or even indictments of individuals do not necessarily apply to others in the same profession. If asked, I planned to testify that I believe that the actions of individuals, be they lawyers mentioned in Panel Three papers or even former Members of this Committee or their staffs do not necessarily reflect on those involved in the practice of Law nor on Members of Congress or their hard-working staff members. No lawyer, union officer, carrier official nor Member of Congress condones any breach of ethics by any person or entity. We all know that neither groups of people nor groups of professions should be judged by the few bad apples in any bunch.

2. Most of the testimony of Panel Three Members was not on point and should be stricken from the Record or disregarded.

The issue before the Committee was not FELA reform but harassment, intimidation of injured workers, and safety. The only way that FELA could arguably have anything to do with this discussion is that FELA is the only avenue of recourse for workers to stand against Billion dollar companies in a court of law to press their rights where they have equal footing. Juries do what is right. We should trust juries. No Congressperson should claim members of juries are misguided or stupid ; jurors are the same people that elect Members of Congress.

Billion dollar rail carriers have been very successful over the years in eroding the

rights of injured rail workers. The Billion dollar rail companies do not want to talk about how they mistreat their own workers...how they deny or delay medical treatment to injured workers and then sue in Federal Courts to stop states such as Minnesota and Illinois from preventing even CRIMINAL behavior.

The Billion dollar rail companies refused to talk about the real issues of harassment and intimidation of their injured employees at the October 25 hearing. There is an old saying in FELA law for Railroad Defense Lawyers: If the facts aren't with you, argue the law; if the law is not with you argue the facts; if neither the law nor the facts are not with you blame the victim!

Panel Three members have adapted this defense to script their testimony in this hearing: They ATTACK THE FACTS regarding harassment and intimidation of injured employees by merely claiming they do not tolerate harassment or intimidation; they ATTACK THE LAW by claiming that FELA is a bad law and that it should be repealed; and they ATTACK THE VICTIMS of rail injuries by suggesting FELA should be repealed to provide even more profits for Billion dollar rail companies at the expense of fully compensating injured rail workers.

3. Panel Three members claim that the FELA needs to be replaced with a national workers compensation system and that the problems causing the "adversary relationship"between rail carriers and their injured employees would be eliminated.

I attach, as Response Exhibit 1, a copy of the Government Accounting Office (GAO) report of 1996 which directly studied the issues presented by members of Panel Three. It is important to remember that this study was undertaken during the time Rep. Susan Molinari was chair of the Railroad Subcommittee. Rail carriers and AAR made all the same arguments in 1996 regarding FELA that were made by Panel Three in the October 25 Hearing. A close reading of the GAO report rebuts all of the arguments made by Panel Three members regarding replacing the FELA.

The "Results in Brief" of the GAO report clearly outline the crucial balance of interests between rail carriers' interests and the interests of injured railroad workers:

> "Modifying FELA could reduce the railroads' costs....On the other hand, such modifications could adversely affect railroad workers by reducing the compensation they receive and limiting the availability or quality of their legal counsel." GAO/RECD-96-199, Page 3

Perhaps an even more convincing review of these issues may be found in the articles by the W. P. Toms Professor of Law at the University of Tennessee, Jerry Phillips, *An Evaluation of the Federal Employers' Liability Act,* 25 San Diego L. Rev. 49 (1988) and *FELA Revisited,* 52 Md. L. Rev. 1063 (1993)[Attached Exhibits 2 & 3]. Professor Phillips thoroughly debunks the cost issue citing to actual studies done comparing FELA to workers comp systems, including work done by the AAR. The results of these studies are quite clear–overall costs of administering workers compensation schemes are essentially the same as that of FELA. The major difference is that under workers comp, significantly more money is spent in administering the system, and significantly less is paid to the workers.

If Congress is willing to limit the benefits to injured railroad workers and limit their access to quality legal counsel, Congress can reduce the costs to railroads for injuries they cause to their employees by replacing the FELA with a national workers compensation system.

The GAO report recognizes that replacement of FELA would not necessarily eliminate issues of contention between railroad claim agents and injured employees:

> "Railroad claims staff would be primarily concerned with determining how extensive and severe the injury is, whether the injury was job-related, and whether continuing impairment exists." GAO/RCED-96-199 Page 25.

Professor Phillips, relying on work done by the RLEA (Railway Labor Executives Association), reaches the same conclusion:

> The RLEA states that '85% of FELA cases are settled without the worker hiring a lawyer.' Only 1.1% of FELA cases are settled in court while there is a much higher percentage of litigated cases in workers' compensation cases. For example, 13% of workers'

> compensation cases were litigated in Mississippi while 27% were litigated in Illinois. 25 San Diego L. Rev. 49 at 57.

As a trial lawyer who currently represents injured railroad workers across the entire country, I can tell the Congress that these issues are fought NOW under the FELA; replacing FELA with a Workers Comp system would result in a system that still places the financial interests of rail carriers against the financial interests of injured workers. The adversary relationship would continue to exist. Lawyers would still represent injured workers. Therefore the roots and causes of harassment and intimidation of injured workers would still exist under any Workers Compensation system. The only winner in the replacement of FELA would be Billion dollar railroads at the expense of the injured railroad worker.

Another vehicle of attack for rail carriers against their injured employees under a Workers Compensation system is the phony job rehabilitation system. Currently under the FELA many railroads send lists of "jobs" to injured employees where such jobs are hundreds if not thousands of miles from the injured person's home. Rail carriers insist that such jobs are "At Will" and could be eliminated once a FELA case is finished. Railroads have eliminated thousands of jobs across the country over past years. Why should injured employees trust rail carriers not to do the same again? The same issue of return to work would weigh heavily under any Workers Comp system. Injured rail employees would have the same issues facing them as they currently face under FELA: Is the job "real"? Will the job be eliminated if I move my family and take the job after my case is done? Will the railroad eliminate the job or claim I cannot medically do the job in the future?

Additional "benefits" of Workers Comp advocated by Panel Three members also do not hold water as recognized by the GAO report:

> "Resolving disputed claims may still be time consuming." GAO/RCED-96-199, P.26

As noted above, the same issues that claim agents investigate, contest, and use against injured workers under FELA would exist under a Workers Comp system. Furthermore, the GAO report found after analyzing two current Federal Workers Comp systems with railroad data and information that the time delay of contested cases between FELA and a Federal Workers Comp system might be similar, thus

eliminating another claimed reason to scrap FELA by Panel Three members.

> "Resolution of Contested cases under FECA and LHWCA might be similar to resolution under FELA" GAO/RCED-96-199 P.26

CONCLUSION:

The October 25, 2007 Hearing of the House Transportation and Infrastructure Committee was an important hearing that identified the continuing problems of rail carrier harassment and intimidation of injured rail employees. The House has taken several key steps in this legislative session to deal with those problems and should be commended for taking time to look into this complex issue. It is hoped that the Senate will join with the House in providing further protection for injured workers and that such bill will be signed into law. The arguments that the "adversary relationship" between rail carriers and injured workers under FELA is the cause of carrier intimidation and harassment of injured workers simply does not hold water. The same financial pressures would drive railroads to contest compensation of injured workers under a Workers Comp system as exist under the FELA at this time. The only benefit of replacing the FELA with a Workers Comp would be a financial savings to railroads at the expense of the benefits paid to their injured employees.

Respectfully submitted,

William G. Jungbauer

Before the
United States House of Representatives
Committee on Transportation and Infrastructure

Hearing on
The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America's Railroads

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Fort Wayne, IN 40825
(260) 489-6847

Good morning Chairman Oberstar, Ranking Member Mica, and Members of the Committee. My name is Timothy Knisely. I used to be a conductor for the Norfolk Southern Railroad. I hired out in October of 1974, at the age of 20. In 2001, I was injured in the course of my duties.

On the evening of March 9, 2001, I reported to work as usual. I was required by the Norfolk Southern to take a train from our Homestead Yard in Oregon, Ohio to CSX's Stanley Yard in Walbridge, Ohio, to pick up a number of rail cars and bring them back to the Homestead Yard. After arriving at the CSX Yard, I went to disconnect the air hose from the set of rail cars. The brass fitting on the air hose fractured because of metal fatigue and old age. When this happened, the air hose, being under approximately 80 pounds of pressure, began to whip around in the air much like a fire hose, and with its brass fitting on its end. The hose struck me, knocking me to the ground. It repeatedly hit me in my legs, back, chest and head. Each time I tried to get up off the ground, it would knock me back down. This lasted for about one minute. It finally stopped when the hose got caught underneath one of the cars and permitted me to get on my feet as best I could. I knew I was seriously injured and called for help.

The Norfolk Southern trainmaster came to the site to investigate the incident. He transported me to the local hospital that the railroad uses. The trainmaster attempted to persuade me to not report the injury, but I refused his coercion and reported the injury. The next day, I was charged with making a false injury report. The trainmaster did acknowledge that I, in fact, was struck in my legs, back, and chest, but claimed because he could not see any injury on my head, and, therefore, I must have lied about being struck in the head. After 27 years of dedicated and loyal service to the railroad, I was subsequently charged with lying about being struck in the head and eventually fired. This charge happened solely because I dared to report my injury.

The day after the incident the trainmaster, with others, went back out to the CSX yard to video tape a re-enactment in order to prove at my hearing that I could not have been struck in the head by the hose, to show that it could not go that high so as to support my firing. Unbeknownst to me, the video tape was altered and those portions that showed that the hose would in fact go much higher than my head were removed from the video tape. The railroad contended that the hose would only go five to 10 inches off the ground. The railroad proceeded to have their hearing and fired me after 27 years of service allegedly not because of the incident and not because I claimed to be hit on other places on my body, but simply because I claimed I was hit on the head. The truth was that they fired me because I chose to report my injury; and the claim that I was **not** struck in the head was simply the best they could come up with.

The Railroad fired me even after I submitted voluminous pages of medical documentation specific to my head injury. The medical reports included the emergency room treatment of the day of the injury and the immediate months thereafter, not the least of which was extensive examination right here in Washington, D.C., with doctors from George Washington University School of Medicine. The railroad chose to ignore both my statement and the volumes of medical proof of severe head injury. Nevertheless, I remained permanently fired not because of my work that night, nor because of my injuries, but solely because I chose to report my injuries.

During the civil FELA litigation that followed, the railroad was required to produce that video tape. It was then that it was discovered that the video tape had been tampered with and a portion out of the middle of the tape which proved that the hose under these circumstances would fly in the air up to nine feet or more was taken out. When this was brought to the attention of the Court, the railroad acknowledged and admitted in Court to the tampering of the video tape. The Court made a finding that:

> a video tape recreating an equipment malfunction which was video taped by Defendant Norfolk Southern and produced during the course of discovery in this case, was deliberately and intentionally changed for the purpose of deception before it was provided to Plaintiff.
>
> . . .
>
> Of particular concern to the Court is the fact that Defendant Railroad edited a significant portion from the video tape which helps substantiate the type of injuries Plaintiff received on March 9, 2001 by the malfunctioning and defective equipment, and which controverts the basis upon which Defendant Norfolk Southern terminated Plaintiff's employment. (See attached document, emphasis added by myself.)

It was my belief then, and it remains my belief today, that I was charged and fired for daring to make an injury report so as to be made an example of; and so that others in the future would think twice before filing a Federal Railroad Administration required injury report.

I am aware of other colleagues of mine at the same yard, Arthur Richter, Michael Linkenbach, Susan Sheidler, and Jimmy Doyle, and others who have been similarly charged for allegedly filing false injury reports within days or hours of such reporting of their injuries. It is my belief, as well as the belief of others, that the purpose of such firings is to maintain a chilling effect throughout the Toledo, Ohio area on the abilities and initiative of other injured people who might dare to report their injuries as required by the FRA.

Thank you all for taking the time to listen to me today.

FILED
LUCAS COUNTY

2004 OCT 21 A 11: 07

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

COPY

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

Timothy D. Knisely,	:	
Plaintiff,	:	
vs.	:	
Norfolk Southern Railway, a/k/a Norfolk Southern Corporation, et al,	:	CASE NO.: CI0200301123
	:	JUDGE WILLIAM J. SKOW
Defendants.	:	
	:	
	:	

ORDER AND FINDING

This matter is before this Court on Plaintiff's Motion for Emergency Hearing to Preserve Evidence. A hearing was held on August 31, 2004. Based on the evidence presented, the Court finds that a video tape recreating an equipment malfunction which was video taped by Defendant Norfolk Southern and produced during the course of discovery in this case, was deliberately and intentionally changed for the purpose of deception before it was provided to Plaintiff. The Court notes that as soon as defense counsel became aware of the Defendant Railroad's misconduct, defense counsel notified Plaintiff's counsel on August 27, 2004, to inform him of same.

Of particular concern to the Court is the fact that Defendant Railroad edited a significant portion from the video tape which helps substantiate the type of injuries Plaintiff received on March 9, 2001 by the malfunctioning and defective equipment, and which controverts the basis upon which Defendant Norfolk Southern terminated Plaintiff's employment. The Court has been advised that the middle of the video taped recreation was deleted from the recording which was provided to Plaintiff in discovery.

Defendant Railroad is ordered to immediately produce a true and accurate copy of the unedited and unmodified video taped recreation to Plaintiff and the original of the same to the Court. The Court will hold any disposition of sanctions against the Norfolk Southern Railroad in abeyance at this time.

10-21-04
Date

Judge William J. Skow

U.S. House of Representatives
Committee on Transportation and Infrastructure

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

Washington, DC 20515

November 7, 2007

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

Mr. Timothy Knisely
6918 Peachwood Court
Fort Wayne, IN 40825

Dear Mr. Knisely:

On October 25, 2007, the Committee on Transportation and Infrastructure held a hearing regarding "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". I would like to thank you for the testimony that you provided to the Committee at the hearing. Attached you will find additional questions that I would like you to answer for the hearing record.

I would appreciate your response within 10 business days so that they may be included in the hearing record. Please send your response to: Mr. Clay Foushee, 586 Ford House Office Building, Washington, DC, 20515. Due to delays in the receipt of mail in the mail screening process, I also request that you email your response to Mr. Foushee at Clay.Foushee@mail.house.gov or fax your response at (202) 226-6012. Should you have any questions or concerns, you may reach Mr. Foushee at (202) 226-4697.

Sincerely,

Jim Oberstar

James L. Oberstar, M.C.
Chairman

CC: E.J. Leizerman, fax: 419-243-8200

Enclosure

Questions from Chairman James L. Oberstar
"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. What do you think your employer's motivation was for treating you the way they did?
2. Have you ever received any apologies, at the very least, by any company officials for what you've experienced?
3. Did your coworkers encounter harassment and intimidation, which have caused them to not report an injury?
4. Do you believe that harassment and intimidation is widespread and part of normal railroad operations?
5. While you were on the job, did you notice that the safety policies of your employers were readily accessible? Were they posted in common areas, like break rooms?
6. What type of safety training did you receive during your employment? Did any of this training cover workplace harassment and intimidation? Did you ever see a company policy that explicitly stated the types of harassment that you all experienced is not tolerated?
7. Have you ever seen or heard of supervisors or managers being fired or demoted for harassing and intimidating employees?
8. Were you ever aware that your company had a hotline that you could call to report something, such as wrongdoing by a supervisor or an injury that you were afraid to report? What is your view of hotlines?

Answers to James L. Oberstar's Written Questions | 16 Nov. 2007

(1.) I believe my former Employer's Motivation for treating Me the way I did was for Several Reasons.

a.) The primary Reason was to Send A MESSAge to All Railroad employees in the Toledo OHIO AREA, By MAKING AN EXAMPLE OF Me, That ANYONE who dares to MAKE out AN INJURY Report (which is REQUIRED by the F.R.A. - FEDERAL Railroad Administration, will be FIRED! It won't MATTER what the Reason is, The Railroad (Norfolk Southern Corp.) Will Come up with Some Reason to terminate your Employment with them. I might SAY A Very CHILLING MESSAGE!

b.) ANOTHER Reason they did WAS the bottom Line, Money If they CAN intimidate AND SCARE People (Not just Myself) So the people won't turn in AN Accident Report of which will Be Reported to the F.R.A. The Railroad (Norfolk Western Corp.) Stands to SAVE Millions AND Millions OF DOLLARS.

c.) IF the Railroad (Norfolk Southern Corp.) CAN intimidate AND SCARE people enough Not to turn in AN Accident Report Required by the F.R.A. it will MAKE them look LIKE the ARE A Very SAFE Railroad. Something the F.R.A. watches very Closely.

d.) AND Finally, the "Big Picture" Reason, the Railroads do this is to cut down on the NUMBER OF REAL Accident Reports So they Could ultimately SAY that Hey, We DON'T NEED FELA (Federal Employees Liability ACT) ANY MORE. WE Could get by with A WORK MANS Compensation Form of INSURANCE.

FELA is the "ONLY Hope" the Railroad Workers Have. Protection! FELA is the only WAY Railroad workers

HAVE A CHANCE FOR FAIR COMPENSATION pg. 2
FOR INJURYS, PAIN AND SUFFERING (not only for themselves but also their FAMILYS). This includes ALL injurys. Both SERIOUS AND CATASTROPHIC injurys AND ALSO OTHER INJURYS which MAY NOT be QUITE AS LIFE THREATENING Such AS Sprained Ankles, COAL Fragments in Eye etc. which CAN ALSO turn INTO VERY SERIOUS injurys IF NOT TAK CARE OF Promptly AND Correctly.

If the RAILROADS ARE EVER Allowed to go to A WORKMANS COMPENSATION System, The ABUSE tha WILL OCCUR By the RAILROADS will be so min. Boggleing that THE UNHEARD OF AMOUT OF intimid. AND HARASSMENT, you ARE Attending to NOW, will Seem LIKE NEEDLES IN A HAY STACK in COMPARISON.

FELA AND Reportable injury Reports to THE F.R.A. (Federal Railroad Administration) ARE the ONLY thing that Keep THE RAILROADS ACCOUNTABLE for SAFETY AND HUMANE Treatment OF Their Employees!

(2.) No, I HAVE NEVER Received ANY Apologies for the WAY I WAS treated by the Railroad (Norfolk Southern Corp.) IN ANY FORM. VERBAL OR WRITTEN. AS A MATTER OF FACT, AT the very END OF My Settlement PROCEEDINGS, THE RAILROAD (Norfolk Southern Corp.) MADE AN Agreement with MYSELF AND My Attorney in THE Judges CHAMBERS (in Toledo, OHIO). Then At the LAST MINUTE, After our Court date passed they went BACK on their word AND Re-Nigged on their Agreemen

in un necessary income taxes which I could have used very much at this point in my life to help put my two youngest daughters through College. I feel that this was the Railroads' (Norfolk Southern Corp.) one last JAB at me for even daring to report my injurys. Pg. (3.)

(3.) YES, my Co-workers encountered harassment and intimidation on a DAILY basis. For many YEARS of my carrier, with the Norfolk Southern Corp., all of our employees were afraid to even go to work because we were threatened with our jobs if we made any slight mistake. Not to even begin to mention what would happen to us if we even DARED to file an injury report! Where is the proof? Just look what the Railroad, (Norfolk Southern) did to ME!

(4.) YES, I do believe that harassment and intimidation is widespread and apart of normal Railroad operations. I have personally talked with many many employees of Railroads other than Norfolk Southern Corp. who have stated that they do receive the SAME treatment on their Railroad (CSX Toledo Terminal R.R., Con-Rail, Burlington Northern, Baltimore & Ohio, Chicago and Northwestern, Canadian Pacific to mention a few.).

(5.) Yes, when on the job safety policies of my employer were readily accessible and posted on bulletin boards, common areas and break rooms. My employer constantly talked about safety and practices but any time a safety policy or equipment failure

(5. cont'd.) To (4.)

The Company NEVER wanted to TAKE the BLAME.

(6.) The types of SAFETY TRAINING we Received during my Employment Consisted of SAFETY Presentations periodically by Films, Slide presentations etc. Some times Before WORK AND Sometimes AFTER. ONCE A YEAR We All were Required to Attend AN ALL-DAY Book of Rules EXAMINATION AND SAFETY SEMINAR All Combined into ONE.

NONE of this training EVER Contained ANY INFORMATION ON WHAT We Should do if we AS Employees were HARASSED or intimidated by our Employers, Supervisors, Superintendents, TRAINMASTERS, YARDMASTERS, MANAGERS or FOREMEN.

I personally NEVER SAW ANY "Company" Policy that explicitly stated The types of HARASSMENT that we All Received AND experienced WAS Not to Be Tolerated AS I Stated in AN EARLIER Question, in this Questionnaire, th We (employees) feared for our JOBS on A Daily BASIS! We Never SAW ANY PLACE, in Either WRITTEN Format or VERBAL that this type of Behavior by our Employer Should NEVER Exist.

(7.) I HAVE NEVER Seen or heard of ANY Supervisor or MANAGER being fired or demoted for HARASSING AND intimidati employees. Actually, it WAS Quite the Contrary. The Supervisor AND MANAGERS used to "Pride" themselves for Being the "Best" at HARASSMENT AND intimidation of their employees so AS to instill A SENSE OF FEAR AMONG All the Employees that the Employees would SHAKE in their Shoes when these particular [illegible] the Room or WORKPLACE

(#7. Cont'd.) However, I have heard of (Pg. 5.)
Supervisors or managers being demoted and forced
to take Early Retirement for getting "Caught"
in a lie in a public setting. The Railroad (Norfolk
Southern Corp.) Always had a "policy" for its Supervisors
and managers. It went like this, "Lie, Cheat, Steal,
Harass, intimidate and do any thing else you can
think of to "WIN". Just Don't Get Caught by
the public and Embarrass the Company in Public
or you will PAY!" Thats exactly what happened
in my own personal case. The Supervisors and managers
got caught altering the same tapes they used to
Fire me by my attorney and the Court. As far
as I know, the Superintendent was demoted and mov-
to a different city. Several of the Train masters were
forced to take Early Retirement. I have no personal
[redacted] Proof of the actual discipline, I only know what
I heard from other employees after the [redacted] incident.

(8.) I personally was NEVER aware that my Company had a
"hotline" that I could call to Report something, such
as wrongdoing by a Supervisor or any injury that I was
afraid to Report. I actually believe that where I worked
the Company went out of its way to MAKE CERTAIN
that the Employees NEVER discovered that there
was actually a Place or Person available to Report

(8. Contd.) I Also believe that if there was A "Hotline" to Report Such incidents, that if the person on the other end of the line was Employed By Norfolk Southern Corp., the Messages would be overlooked, covered-up AND Concealed by the Company. Norfolk Southern Corp. Protected its Supervisors AND Managers to the limits. There is No WAY they would override A Manager or Supervisor in the Field just Because An "Employee" called in with A Complain

(Pg. 6.)

My view of "Hot lines" is that they ARE A Very "GOOD IDEA" in THEORY but do they Really work in the REAL World?

I believe that in order for A "Hot-Line" to Really work it would HAVE to be Monitered by AN independen party who HAS No Connections with the Company (Railroads). This person or People should be Required to Report directly to A FEDERAL Comittee or Chairperson who "Actually" has Authority to do Something About the Complaint. This person or People should ABSolutely NOT be Allowed ANY influence by the Railroads via Monetary, Gifts, VACATIONS, Dinners, etc. to Avoid Corruption! I believe this is Really the ONLY WAY A "Hot line" could Exist AND Actually work.

Thank You for the opportunity to answer these questions!

Sincerely

i, Please Excuse My Handwritten Answers but I, ...

Written Testimony of Mark Schulze

Vice President of Safety, Training and Operations Support

BNSF Railway Company

Before the House Committee on Transportation and Infrastructure

For a Hearing on "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads"

Thursday, October 25, 2007

BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
Telephone: 1-800-795-2673

Chairman Oberstar, distinguished Members of the Committee, my name is Mark Schulze and I am the Vice President of Safety, Training and Operations Support for BNSF Railway Company. In my testimony to you today, I want to make three key points:

First, safety in the railroad industry has improved enormously over the years. That's not the product of managed reporting. That's a fact. Twenty years ago, more employees were getting hurt and there was more risk from rail accidents. Like much of the industry, over that 20 year period BNSF has immensely improved in our safety. Our injury rate is down nearly 80% while rail equipment incidents are down over 25%. The safety plans that railroads have implemented over the years with the help of their employees have accomplished these improvements in safety. The fact remains, however, that approximately one-third of our accidents and one-half of our injuries are human-factor related. There's more to be done. We intend to keep the ground we've gained and continue to make even further progress through improved processes, training and deployment of technology.

Second, railroad safety plans are important. At BNSF, we develop our safety plans with a thoughtful balance of employee empowerment and accountability at all levels of our operation. Railroading is - and always will be - a unique work environment. The factory workfloor stretches across vast distances. In many instances, our employees are independent operators, substantially self directed in their work. That's why many self-starting, independent men and women sign up for the railroad. They recognize that their co-workers, their communities, and their company depend upon them to exercise their best judgment, and follow the rules. The routine work of handling heavy, moving equipment in an outdoor environment makes adherence to uniform safety rules even more important.

That adherence to operating rules and eliminating at-risk behaviors can be life-or-death critical. I believe our employees appreciate that reality, and we take that into consideration in developing our safety plans and the fairest means of implementing them.

Third, and most importantly for the purposes of this hearing, there is no place on our railroad for harassment and intimidation - neither for meeting safety goals, nor for managing employees. BNSF has zero tolerance for harassment, intimidation or discrimination. We believe any such behavior must be addressed immediately if we are to maintain a climate in which every BNSF employee can reach is or her full potential. Our position on this is clear.

With the remainder of my testimony, I want to share with you our safety vision and how we implement it, so that you can understand not only just our operations, but also our philosophy.

At BNSF, safety is our highest priority. A safe railroad aligns with every aspect of our corporate vision – return, corporate citizenship and being a valued employer.

Our safety vision is to operate injury- and accident-free. This is about our employees going home after work injury-free, not about managing to statistics. We believe our vision is achievable because we believe every accident is avoidable. We are committed to the ongoing development of processes, training and technology targeted to protect our employees and communities.

The BNSF vision of an accident and injury free workplace has been embraced at all levels of our company.

BNSF will achieve this vision through:

- A culture where safety is our highest priority

- Providing resources and tools where known hazards will be eliminated or safe-guarded
- Employing work practices and training for all employees
- Empowering the workforce

All employees are empowered to take responsibility for their own safety and the safety of their colleagues and our communities. They are expected to take the initiative to stop work processes when they feel safety may be compromised, and they do. The fact is, we learn a great deal from our employees about safety and what we all need to do to be safer. We'd like to take that even further, but often find that post incident collaborative root-cause analysis is made difficult because of FELA. The adversarial nature of the FELA system, and some of the plaintiffs' attorneys, interferes with the railroad's ability to reasonably discover how an injury accident occurred. Others on this panel will speak of FELA at greater length, but it is my opinion that we manage to be safe in spite of not being given the opportunity all of the time to understand those root causes of incidents.

Like all U.S. railroads, BNSF is required to comply with all safety rules, regulations and requirements of the Federal Railroad Administration (FRA). These regulations govern the safety of railroad operations and rail employees throughout the country. BNSF consistently meets or exceeds these requirements. In addition, BNSF has our own safety rules and operating rules for employees and complies with the General Code of Operating Rules (GCOR) which governs the operations of most western U.S. railroads. At BNSF, we utilize a federally mandated operations testing program to confirm that our employees are working safely and in adherence with those rules. Tests under that program occur in a normal operating environment and require employees to show

understanding of the concepts involved in our operating rules. This overall program then is used as a guide to focus resources such as programs, process improvements or training.

The foundation of a particular work group's safety effort is its Safety Action Plan. Every operating division and shop creates and implements a Safety Action Plan that defines the vision and requirements for a safe workplace. These plans include risk identification procedures, employee participation in safety committees, communication, and incident reporting and emergency response procedures.

BNSF employees are also represented in the system-wide Safety Assurance and Compliance Process (SACP) Task Force, a joint safety improvement process that includes the FRA, BNSF management and labor representatives. On each of BNSF's 13 operating divisions, division safety teams, which include labor and management representatives, oversee resolution of issues raised by local site safety teams. Site safety teams are responsible for continuous improvement in processes that identify and reduce human and environmental safety risks at a local level.

Additionally, BNSF was the first railroad to establish safety participation agreements with our labor unions. The first such agreement was signed by the United Transportation Union in March 2002, and by the end of 2007 nearly all of BNSF's labor unions had such agreements in place. These agreements represent a fundamental change in our approach to safety for employees and allow for non-punitive, training-based responses to many types of rule violations instead of traditional discipline.

These agreements, which include craft employees, also provide for workplace observations to identify and prevent potentially at-risk behaviors and conditions. In addition, through these safety participation agreements, more than 100 craft employees

have been selected by their labor leaders to focus full-time on safety programs and to oversee craft-specific safety processes.

Training is also a fundamental element of BNSF's safety program. To assist our employees to properly understand these rules and polices and improve their performance, BNSF provides state of the art training. At our Technical Training Center, located on the campus of Johnson County Community College in Overland Park, Kansas, more than 110,000 square feet of office, classroom and studio space features extensive simulation and lab equipment. I invite you to take a tour of our facility at your convenience. The center's training programs are complemented by other BNSF training methods such as field trainers, training simulators, rules classes and computer based training. These methods allow for additional time and delivery varieties to enhance employees' ability to understand and demonstrate the concepts.

As I previously mentioned, the key element of our safety plan is to educate, train and obtain the commitment of each employee to their own safety and that of those around them. The vast majority of our employees are committed to working safely. However, as we all know, inattention can set in, normal practices can slip for whatever reason or skills can decline as new technology or operating practices are introduced. Our safety program is aimed at respecting the commitment these employees have made to working safely and helping them maintain mindfulness, and at refreshing and improving their skills when needed. With any human organization, there is a small percentage of employees – we estimate no more than 3% - that are either risk-takers, troubled or do not maintain awareness of the consequences of their actions. There is usually a cumulative string of incidents that indicate that an employee is having difficulty. We are focused on identifying

those employees who present risk to themselves and others through an employee review process.

The purpose of our Employee Review Process (ERP) is to assist employees in working without an accident or injury. When an employee's record indicates that individual assistance may be needed, the supervisor will contact the affected employee and conduct an ERP session. Multiple criteria for selection of employees may be used. The ERP is a problem-solving process that does not impact an employee's employment record, nor is it in any way related to an employee discipline process or FELA defense. It involves an employee's supervisor and union representative, if the employee so desires. It begins with an interview, produces a work plan with a list of actions that the employee and the supervisor should take to assist the employee in remaining injury- and accident-free for the remainder of his or her railroad career. Coaching, training and understanding the employee's perspective are at the heart of this employee review process.

As with every work environment, and especially in a safety-critical work environment, accountability for compliance with work rules matters. One of the reasons you've asked me here today is to discuss this. Our goal at BNSF is to consistently, but fairly, apply employee accountability so that the seriousness of safety rules violations is appreciated. The employee discipline process is conducted in accordance with the BNSF "Policy for Employee Performance Accountability." It is designed, first, to encourage all BNSF employees to be actively engaged in safe work behaviors and in ensuring a safe work environment. Second, when a rule violation occurs, this policy provides a process for arriving at an understanding of improvements needed to prevent similar rule violations.

Third, for those rare cases where there is a marked disregard for safety and BNSF rules and procedures, it provides a process to enforce BNSF and federal safety requirements.

The vast majority of rules infractions are handled through coaching and counseling by supervisors. BNSF additionally has alternative handling agreements with labor that in many cases are utilized in lieu of formal discipline. Alternative handling includes training and other non-disciplinary, non-punitive responses to identified or self-reported rule violations. An alternative handling event is not recorded on the employee's personal record and is not considered discipline. Alternative handling events are tracked outside of the formal discipline process and may only be used to determine eligibility for future alternative handling. Formal discipline, whether an employee personal record notation, suspension or termination, represents a small percentage of follow-up to rules violations. Each termination case is reviewed by a senior team of operating employees, including the Chief Operations Officer, in order to ensure consistent and fair application of the policy.

I want to conclude my remarks with a final comment about harassment and intimidation. An essential part of all of the processes I've discussed is our belief that all employees deserve to be treated with dignity and respect. There is no room at BNSF for intimidation, discrimination or harassment. In addition to a corporate culture that absolutely rejects such tactics, BNSF operates under the requirements of Section 225.33 Internal Control Plans, of Title 49, Code of Federal Regulations, Part 225. Among these requirements is that BNSF have a "Policy Statement" prohibiting harassment and intimidation and a declaration of our commitment to complete and accurate reporting of all accidents, incidents, injuries and occupational illnesses. This regulation also requires a "Complaint Procedure" within our Internal Control Plan. BNSF's Internal Control Plan

"Policy Statement" and "Complaint Procedure" were developed through a labor-management consensus process as part of the SACP.

Additionally, BNSF safety rules and policies strictly forbid harassment and intimidation. We have instituted supporting policies and processes in order to make supervisors fully aware of their responsibilities in this arena. Supervisors found to be in violation of this policy would be subject to discipline up to termination.

BNSF's injury handling and safety reporting policy clearly outlines supervisory responsibility regarding injury reporting and medical treatment. Our injury handling and safety reporting policy, currently located in our Management Instruction No. 21, states, "It is not only BNSF policy but also federal law that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical attention or from reporting an accident, incident, injury or illness will not be permitted or tolerated." The policy, which has been communicated to supervisors in a number of ways, makes it clear that supervisors cannot, for any reason, discourage an employee from reporting an injury or seeking medical attention. Employees are encouraged to use the Internal Complaint Procedure to report any circumstances in which they feel a supervisor has discouraged them from reporting an injury.

This policy further states that when an injury does occur, the supervisor's first concern must be the welfare of the employee and obtaining prompt medical treatment if required. The supervisor is to focus on the employee first and then on the need for information for the purpose of preventing future incidents.

In addition to the Internal Complaint Procedure, an individual employee has many other means by which he or she can report harassing or intimidating behavior. For

example, an employee may report such behavior to the FRA or to an anonymous BNSF hotline.

The FRA has instituted strict rules prohibiting harassment and intimidation. The FRA can investigate reports of harassment or intimidation and can levy penalties on individuals who willfully cause a violation of, or non-compliance with, the harassment and intimidation policy.

Another place where BNSF has demonstrated its commitment to a harassment-free work environment is through the creation of the third-party 1-800 hotline. This hotline is also available for employees to report a multitude of concerns such as fraud, theft, safety hazards or harassment. Those concerns may be reported anonymously if the employee desires. Those complaints will then be investigated by appropriate personnel in the BNSF's Law, Human Resources and/or Internal Audit departments. All internal hotline cases are reviewed by a group comprising senior executives, including the Chief Executive Officer.

Taken together, we believe we have processes and procedures and a culture that reject harassment and intimidation and promote a cooperative approach to safety. At the same time, we do not believe that the management of employee expectations and accountability is harassment or intimidation.

I welcome the opportunity to respond to your questions.

Mark A. Schulze
Vice President
Safety, Training & Operations
Support

BNSF Railway Company
P.O. Box 961034
Fort Worth, TX 76161-0034
2600 Lou Menk Dr.
Fort Worth, TX 76131
Phone: (817) 352-1220
Fax: (817) 352-7434
Email: mark.schulze@bnsf.com

Mr. [redacted]
[redacted] Ford House Office Building
Washington D.C. 20515

Dear [redacted]

Please find enclosed responses to Chairman Oberstar's additional questions for "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads" hearing record. Please let me know if you have any questions.

Enclosure

Responses to Questions from Chairman James L. Oberstar

"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. *Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?*

No. The BNSF railroad culture is a culture focused on safety. Like other railroads, due to our unique work environment with physical plant stretching thousands of miles we have a largely self-directed workforce. The fact is that the work of handling heavy, moving equipment in our outdoor environment makes adherence to uniform safety rules very important; our employees concur with that. It's usually when those standards aren't adhered to that accidents and injuries occur. The effort to identify and address at-risk behaviors and drive individual accountability is not an exercise around the blame of individuals, it is a generally cooperative process of maintaining adherence to proven, uniform safety standards that save lives.

2. *We've reviewed your safety programs and ICP's, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?*

At the outset, BNSF respectfully disagrees that there is underreporting of work-related injuries at BNSF. Occasionally there are interpretation differences in what constitutes a reportable injury between the railroads and the FRA. The reporting guidelines state that it is the reporting officer's accountability to make a reasonable reporting decision. BNSF takes our reporting requirements very seriously and make strong efforts to ensure uniform and consistent compliance. BNSF expects its reporting officer to account for every work-related injury.

3. *In general, do you think your railroads have a problem with underreporting of injuries?*

No.

4. *Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidation exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?*

A BNSF employee is actually subject to discipline for failing to report an injury, and additionally a BNSF supervisor would be subject to discipline for discouraging the reporting of an injury. A demonstrated history of work-related injuries in any industry should garner the attention of a supervisor. At BNSF, we intervene through the use of coaching and counseling to work with the employee to try to prevent future injuries. Additional attention with the goal of enhancing safety awareness is a cooperative process and, furthermore, is not associated with any discipline process. Therefore, we would take issue with the assertion that injury reporting in some way should be intimidating to employees.

5. *Even though you claim to discipline supervisors when caught putting pressure on employees not to report, don't you think there are pressures that cause this type of behavior to continue?*

BNSF has clearly communicated to its supervisors that every work-related injury is to be reported and that employees are to receive prompt medical care, if necessary. In the rare or isolated instance of this not happening, it is promptly addressed when discovered. We believe this kind of behavior is so isolated that we do not agree that there are pressures that cause such behavior to continue. It is not a part of the institutional culture of our company at any level.

6. *Most of your operations are so widespread, how can you assure us that you are making every effort that you can to identify front-line supervisors who may be placing pressure on employees not to report injuries?*

Employees have various avenues to alert us of perceived pressures. They are consistently encouraged through various communications to utilize resources such as the toll-free, independently monitored hotline, or through direct notification to FRA, if the employee so chooses.

7. *Do you simply rely on complaints after the fact to identify these managers, who are bad actors, or do you make an attempt to investigate management practices on a more proactive basis?*

Employee notification is one way these issues are identified. Additionally, other measures such as our supervisor performance management process, internal audits or surveys have been utilized at various times to proactively identify these types of issues.

8. *What policies do you have in place to provide disincentives to supervisors who engage in harassment and intimidation, and to catch this type of behavior?*

This subject is covered under our injury reporting policy. Supervisors are aware of their obligations and the consequences, including individual discipline. This is also reinforced, as are all safety policies, in our Safety Action Plans. These Safety Action Plans are created for each large functional work group and are annually promulgated and discussed with supervisors and between scheduled employees and their supervisors.

9. *Couldn't you utilize employee surveys on a routine basis to identify managers that are of concern to employees?*

Surveys, in addition to other means, can be, and have been, utilized to identify areas of safety concerns.

10. *Have you recently fired or demoted front-line supervisors for failing to report accidents, or for harassing and intimidating employees to not seek the proper medical care? How did you uncover these cases? Was it through an audit or a complaint, or some other means?*

Yes. It was identified through a complaint letter from labor.

11. *Do you have an "availability policy" that requires that an employee be available to work for a specific number of days per year, which include days lost due to injury and sickness?*

We have policies in place to support our expectation of full-time employment. Some type of lost days are automatically excluded from those thresholds (e.g. lost days due to injury), while others can be removed at the discretion of supervisors (e.g. sick days).

12. *Are you moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factors causes in accidents? Have you implemented such programs on at least a trial basis? If so, how?*

We are continuing to review this type of program. After the withdrawal by the FRA earlier this year from a proposed C3RS pilot program in Nebraska, we are looking at alternative programs modeled after the airline industry. We will continue to utilize existing risk identification programs to improve in this area.

13. *If you have implemented such programs, how have you seen that affecting employees on the ground?*

Not applicable.

14. *Where do you stand on the implementation of C3RS system-wide?*

We would likely implement a close calls type program on a pilot territory to gauge results. System-wide implementation would be looked at after reviewing initial results.

15. *The FRA has a standard 7-day reporting deadline for filing a report for a "reportable" injury. Do you have a different internal standard?*

Our standard is to report to the FRA within that 7-day deadline.

16. *Do you all have a confidential "ethics hotlines" where an employee can call in and report anything that they are uncomfortable with?*

Yes.

a. *How are hotline cases pursued?*

Calls are followed-up by internal audit, human resources and/or the legal department and are usually resolved within 30 to 60 days. As indicated above, BNSF has an independently monitored, toll-free, hot-line with a close-loop process for handling complaints.

b. *Can this system really be confidential?*

Yes. This system is administered by a third-party and the caller may remain anonymous. If the caller chooses to waive confidentiality, follow-up to specific details of incidents will occur to appropriately resolve the issue(s).

17. *Do supervisors have any portion of their bonuses based on injury statistics in their management area?*

No. While a portion of annual bonuses is indirectly affected by BNSF overall safety results, no portion of the bonus metric is directly based on an individual supervisor's injury statistics. BNSF believes that our success should include a measurement of our ability to reduce and eliminate injuries in the workplace.

(If yes), what is the maximum amount that he/she could earn based on injury statistics alone?

18. *It's pretty clear that you have good corporate policies on harassment and intimidation, and also safety. However, there seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring? And, what are you doing to make sure that your corporate policies are being implemented correctly at the "local" level?*

We respectfully disagree that there is any "disconnect" between corporate policies on harassment, intimidation, and safety, and behavior by our front-line supervisors. However, as with any large organization with a dispersed workforce, there are rare instances where behaviors sometimes do not meet expectations. We believe these are infrequent and they do not stem from a "disconnect".

19. *Are you motivated by the Harriman Award to drive down your injury statistics?*

No. While BNSF sees the Harriman Award as a notable recognition, our real motivation is driven by our desire to have employees safely return home to their families and communities.

Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics?

No. BNSF's motivation is to eliminate injuries from the workplace.

Do you think that any of the metrics of the award should be changed to incentivize reporting?

No. Again, BNSF's motivation is to have an injury-free workplace, irrespective of the Harriman Award.

20. *Do you all have audit processes that links medical claims with injury reports?*

At BNSF, yes.

What do you do if someone puts in a claim but there is no injury report on file for them?

The employee is written a letter to inform them that we have received a claim but there is no corresponding injury report. We then allow the employee a reasonable period of time to complete the report of personal injury.

21. *Do you have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?*

Yes. This is located in our injury reporting policy.

22. *Do you believe these types of point systems create "unintended consequences"?*

Please see answer to question 27, below.

23. *Human factors research has shown that rarely is an accident ever due to a single individual or casual factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?*

Assuming the "human factors research" cited is accurate, it would be difficult based on that statement alone to make a comprehensive response as to how this could be incorporated into FRA regulatory policy. BNSF would be willing to review and study, along with the other railroads, the

"human factors research" upon which this statement relies in order to see how such data could be incorporated into FRA regulatory policy.

24. *Do you have "Light Duty"-type programs where instead of marking off an employee for being injured, they come to work and basically do nothing but sit in a room all day?*

We have light duty or restricted duty programs. These programs do not allow for "an employee to come to work and basically do nothing but sit in a room all day." BNSF is always interested in working with an employee's healthcare providers to explore return to productive work consistent with medically imposed work restrictions.

Do you consider this practice to be harassment?

BNSF does not engage in this practice.

25. *Do you honestly think that no intimidation exists?*

No; however, we do not believe it should be ascribed to railroad or BNSF culture. While there are rare instances where behavior does not meet BNSF's expectations, we believe this is infrequent, isolated and when discovered dealt with promptly.

26. *How do you explain all the cases that FRA finds for underreporting?*

At the outset, BNSF concurs with the testimony by the FRA that there is no systemic underreporting of work-related injuries. Similarly, there is no widespread underreporting of work-related injuries at BNSF. There are, at times, interpretation differences between the railroads and the FRA as to what constitutes a "reportable" versus "non-reportable" injury. BNSF takes our reporting requirements very seriously and accounts for every work-related injury.

27. *Mr. Schulze, BNSF has a point system, which assigns 40 points to an employee for a reportable injury and only 5 points for a non-reportable injury. If an employee gets 45 points, they change from being a "green" employee to a "red" employee, which causes them to be automatically targeted for increased inspections and performance checks. If an employee gets hurt on the job, goes to the doctor, and the doctor gives him prescription strength Tylenol, the accident gets reported and the employee gets 40 points. Just 5 more points will make him become a "red" employee. Don't you think that this could influence the type of medical treatment that this injured worker would receive? Why would he want to subject himself to enhanced scrutiny down the road, just because of an accident? Don't you think this could lead him to cover it up?*

There appears to be some misunderstanding with the BNSF Employee Review Process (ERP). There is not a "red" or "green" system, but one that utilizes risk management principles by using multiple risk identifiers to focus our resources. The intent of the process is to identify risk to the safety of the employee and to those around them. Thus, an employee who engages in a pattern of safety rules violations should expect supervisor intervention.

When an employee is identified through this process, he or she will usually have an interview with his or her supervisor and the local chairman, if desired. This meeting and follow-up meetings are designed to assist in identifying ways to help the employee work safely for the rest of his or her career. The process and resulting discussions, coaching, counseling and training is not related to discipline and is not a form of harassment or intimidation. Thus, there should be no incentive to "cover up" injuries as they do not trigger discipline.

a. *Mr. Schulze, do you think this policy may be creating unintended consequences?*

No. We believe we have sound policies, procedures and guidelines in place in order to prevent any unintended consequences.

b. *Does BNSF have any plans in the works to revise this policy?*

As with many of our policies, processes and programs, they go under periodic review. We have been reviewing this process and discussing potential changes.

28. *Mr. Schulze, why would you assign 40 points for a FRA-reportable injury and only 5 points for a non-reportable injury?*

At one time, the point totals for reportable versus non-reportable injuries were equalized. After discussions with labor, the non-reportable points were lowered in order to encourage the identification of injuries that don't meet FRA reporting criteria.

29. *Mr. Schulze, can't you see how that might cause an employee to not report?*

The design of the program is intended to identify all injuries and not discourage reporting.

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BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON

THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

OCTOBER 25, 2007

TESTIMONY OF

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Before the
United States House of Representatives
Committee on Transportation and Infrastructure
Hearing on
The Impact of Railroad Injury, Accident, and Discipline Policies
on the Safety of America's Railroads
October 25, 2007
Testimony of
John P. Tolman, Vice President and National Legislative Representative
Brotherhood of Locomotive Engineers and Trainmen
A Division of the Teamsters Rail Conference

Good morning, Chairman Oberstar, Ranking Member Mica, and members of the Committee. For those of you who don't know me, I'm John Tolman, Vice President and National Legislative Representative of the Brotherhood of Locomotive Engineers and Trainmen, which is a Division of the Teamsters Rail Conference. On behalf of approximately 59,000 BLET members and 38,000 members of Rail Conference affiliate Brotherhood of Maintenance of Way Employes Division, I want to thank you for holding today's hearing and inviting us to address you.

The subject of today's hearing — the impact of railroad injury, accident, and discipline policies on the safety of America's railroads — is something that has been a bone of contention for Rail Conference members, and all railroad workers, for generations. At the rank-and-file level, these policies originated because of ties between the industry and the military that go back more than a century.

In the second half of the 19th Century, during the years of boom construction, many managers and executives came to the railroad directly from the military. During World War I, the railroad infrastructure was nationalized for a time, and was subordinate to military officials as part of the war effort. And when a potential strike by operating crews after World War II would have tied up the nation's transportation system, President Truman threatened to nationalize the industry again and draft the striking workers.

Indeed, this history underlies why the managerial culture in the railroad industry is known as "command and control." Accordingly, it should come as no surprise that railroads react swiftly and harshly when something goes wrong. This is true across the railroad industry: whether an incident produces an injury to a railroad worker, results in an accident, or merely involves an act or omission on the part of a worker that causes nothing more than a violation of a safety or operating rule.

It is vitally important for this Committee to understand that the industry's culture, dating back more than a century and a half, is the root of this problem. This culture manifests itself in aggressive and draconian tactics across the industry.

These tactics are among the top reasons for job dissatisfaction cited across all railroad crafts in a recently-completed survey sponsored by the Federal Railroad Administration. In the

Final Report on the survey,[1] Locomotive Engineers identified several factors that could, if improved, increase their job satisfaction, including: frequently-changing rules and "the ever-present threat of a railroad officer jumping out of a bush." *See* p. 74. Locomotive Engineers also felt the need to improve morale/relationship between labor and management. Several respondents suggest improving the relationship between labor and management. Respondents explained that they feel that management is there to discipline or fire them. One respondent felt "that a railroad hires individuals and then spends its time trying to fire them." Id. at p. 88.

Similarly, Maintenance of Way employees cited operating, safety, and FRA rules and their application as key sources of job dissatisfaction. A number of respondents expressed concern over the operating and safety rules and their application, as well as the potential for an individual to be fined for violating a FRA regulation. Specific complaints were that too many railroad rules exist; rules were always changing and, therefore, it is difficult to keep up with the rules; safety takes a back seat to being blamed for breaking a rule; and rules exist for everything. Observes one respondent, "At any given time, you can be cited for doing something wrong. That's just how many rules are out there." Respondents felt that the rules existed more to protect management than anything else. Respondents also felt that it was not fair that they could be fined for violating a FRA regulation since they work for the railroad, and they are not told what they can and cannot be fined for. Id. at p. 80.

Also cited by Maintenance of Way employees was the culture surrounding injury reporting. A number of respondents expressed frustration at the culture that encourages or rewards employees for not reporting injuries, or blames employees for sustaining the injuries. According to respondents, the employee is inevitably blamed for the injury. Notes one respondent, "Pretty much, if you get hurt, you did something wrong." Another respondent stated that the first thing his railroad does when an injury occurs is not to see if that person is OK but rather to administer a drug test. Furthermore, according to respondents, no one wants to jeopardize safety-related incentives by reporting an injury. One respondent explains, "[If] anybody gets injured, they don't want to report it. ... They don't want anybody mad at them because they got hurt. So it is better to keep their mouth shut and [to] deal with it later." Id. at p. 80.

One of the tools many railroads use to harass and intimidate their workers as part of the "command and control" culture is to keep records on aspects of their performance that does not involve discipline. For example, many railroads have sophisticated systems that are used to automatically download locomotive event recorders and run the data through a computer program. If there are irregularities in any of dozens of arbitrary categories — such as fuel consumption, braking technique or throttle modulation — "points" will be assessed against the engineer. On at least one railroad, this system has been used to decertify engineers, even though there has been no violation of any of the "cardinal sins" contained in the FRA's engineer certification rule. Points also are assessed when a worker sustains an on-the-job injury, even in cases where the worker's conduct played no part in the accident that caused the injury.

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[1] Reinach, Stephen, and Viale, Alex, *An Examination of Employee Recruitment and Retention in the U.S Railroad Industry*, FRA Office of Policy and Program Development, DOT/FRA/RRP-07/01 (August 2007).

The carriers are fond of blaming the Federal Employers' Liability Act, or FELA, as the culprit, suggesting that it is far more adversarial than other programs designed to address workplace injuries and occupational illnesses. However, the facts prove otherwise — that the railroads are wrong — for two reasons.

First, injured railroad workers seek the assistance of an attorney in only a minority of cases. In fact, a number of studies have been done, dating back years, which show that the percentage of cases in which an attorney is involved in a FELA matter is significantly smaller than the percentage of workers' compensation cases in which an attorney is retained, in many states. Moreover, the overwhelming majority of FELA claims are settled short of a jury verdict. You will hear from witnesses today who are far more qualified than me to address this subject in detail.

Second, if the industry's argument was valid, then we would expect to see noticeably more lenient responses by railroads in cases of accidents where no personal injuries are sustained and in disciplinary matters, as compared to those involving an injury or a fatality. That, simply, is not the case.

For example, when the Federal Railroad Administration ("FRA") first published its Final Rule governing locomotive engineer certification in 1991, the industry's "command and control" culture went into overdrive, and scores of locomotive engineers found their certification revoked for incidents that would not have triggered any disciplinary action whatsoever in the past. In fact, a number of railroads revoked certifications for speeding when the alleged excess speed fell within FRA's regulatory margin of error for locomotive speed indicators.

The level of aggressiveness on the part of the carriers forced FRA to reopen the rule for major revision barely a year and a half after it went into effect. On April 9, 1993, FRA published an Interim Final Rule that significantly scaled back some of the revocable offenses and clarified the others. FRA noted that railroads "have in some cases decertified employees where FRA had not anticipated such actions," and that "given the experience FRA now has acquired and the need to prevent further revocations for offenses so minor that FRA had not anticipated their being the basis for revocation, FRA has decided to act quickly to correct the situation." 58 FR 18987.

Although the industry has been hemmed in somewhat by FRA in terms of locomotive engineer certification, "command and control" remains the firm philosophy in matters of railroad discipline of workers. According to the June 27th Report of the Senate Appropriations Committee on S. 1710, Railway Labor Act Section 3 arbitration — much, if not most, of which involves discipline appeals — consumes an average of 30 months per case, and "the funding for arbitration cases routinely runs out several months before the end of the fiscal year" because of caseloads. *See* S. Rep. 110–107 at p. 290.

It doesn't matter whether an event involves an injury, an accident, or merely is a disciplinary matter. The industry's response is swift and harsh; that's what "command and control" is all about.

You will doubtless hear from industry representatives the following three-note chord. First, that there is no problem that AAR's legislative agenda won't fix. Second, if there are any problems they are small and infrequent and management looks forward to working with labor to solve them. And third, what labor wants you to do is micromanage the industry.

That should sound familiar, because it is the same chord the industry plays every time it appears before this Committee. It has been the industry's response to your questions about why nothing has been done about fatigue and limbo time. It has been the industry's response to your questions about why 40% of the nation's rail infrastructure still is dark territory, when centralized traffic control technology has been mature since the 1960s. It has been the industry's response to your questions about rail safety in general.

By passing H.R. 2095, you have acknowledged the industry's failure to voluntarily come to grips with the manner in which it mistreats its workforce in safety matters. And, indeed, in Section 606, you have gone a long way to leveling the playing field in terms of how the industry's "command and control" culture impacts injury, accident, and discipline policies. I cannot urge you strongly enough to maintain the position you have staked out in Section 606, because the current system is broken and beyond repair.

In 1996, the FRA amended 49 CFR Part 225 — governing reporting, classifying, and investigating railroad accidents and incidents — by requiring railroads to adopt and comply with written Internal Control Plans ("ICPs"). These ICPs are supposed to include a

> policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.

49 CFR § 225.33(a)(1).

When this provision was first promulgated, we were optimistic that it would have a positive impact on the "command and control" railroad culture. In more than a decade of its existence, this regulatory requirement hasn't even put a dent in the problem, as many of the witnesses today will tell you. In hindsight, we shouldn't have been surprised that this requirement would not improve the situation.

After all, there are not even enough FRA inspectors to maintain an appropriate level of oversight of infrastructure, equipment, and operating practices, much less delve into the "he said/she said" world of harassment and intimidation that vigorous enforcement of Section 225.33 would entail. Moreover, we believe only harm to FRA's reputation would result if it repeatedly insinuated itself between workers and management in order to adjudicate workers' legal rights.

In recent years, FRA has worked hard to develop alternatives to the "command and control culture." A number of these initiatives — such as the Confidential Close Calls Reporting System — involve developing data on so-called "precursor" events; unnoticed and unreported mistakes that do not lead to an accident or incident, but could easily do so. These programs operate on a pair of axes that are foreign to this industry: (1) absolute confidentiality for reporters, and (2) a guaranteed non-punitive response for reported events.

Central to the success of these types of risk reduction programs is FRA's involvement as an honest broker. Indeed, while these programs continue to be rejected by the majority of those who oversee the "command and control" culture of the railroad industry, FRA has steadfastly pushed labor and management alike to view these programs with an open mind. In our view, success for these types of programs will produce a far greater improvement in safety than FRA involvement in harassment and intimidation allegations.

Likewise — and as we've testified in the past — arbitrating 49 USC Section 20109 disputes under Section 3 of the Railway Labor Act also has proven to be a failure. Until just recently, the only time punitive damages could be awarded is when the "form of discrimination ... does not involve discharge, suspension, or another action affecting pay," which almost never would occur in this industry. Thus, the damages aspect of a Section 20109 case historically has been indistinguishable from any other disciplinary matter.

We believe Section 606 strikes an appropriate balance, in two respects. First, it guarantees the right to prompt medical attention. And, second, the bill makes it unlawful for a railroad to interfere in the relationship between an injured railroad worker and his or her doctor. This provision will counter one of the most egregious aspects of the "command and control" culture.

There is one more subject I want to address, which is the E. H. Harriman Award. I'm sure many of the railroad representatives who appear today will tell you about how many times their railroad won it. To us, the Harriman Award is symptomatic of the problem with the "command and control" culture, and not emblematic of industry safety. I say this because the most consistent "winners" also happen to be the railroads that are most often anecdotally identified as engaging in harassment and intimidation of injured railroad workers.

In conclusion, the 19th Century ended over 107 years ago. It is time to bring the treatment of railroad workers into the 21st Century. The culture of the industry must change now. Together, we must share ideas and cooperate to implement programs where labor is treated as an equal partner throughout the industry, and workers are considered a valued resource, not a disposable commodity.

Thank you, once again, for the opportunity to testify today, and I'll be happy to try to answer any questions you may have of me.

Brotherhood of Locomotive Engineers and Trainmen
A Division of the Rail Conference — International Brotherhood of Teamsters

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JOHN P. TOLMAN
Vice President and
National Legislative Representative

November 19, 2007

The Honorable James L. Oberstar, Chairman
Committee on Transportation and Infrastructure
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Oberstar,

This refers to your letter dated November 7, 2007, concerning the October 25th Committee hearing regarding the impact of railroad injury, accident, and discipline policies on the safety of American's railroads. Along with that letter were fourteen additional questions posed by you, and one submitted by Mr. Brown of South Carolina. My responses to those questions are as follows:

Questions from Chairman Oberstar

1. **Do you have any way of knowing how many injuries never actually get reported?**

For several reasons, I believe it is impossible to estimate how many injuries are unreported with any degree of accuracy. First, there are three types of injuries that may ultimately be unreported: those that clearly qualify under the Federal Railroad Administration ("FRA") regulation, but the railroad simply fails to report; those where railroad interference with medical treatment results in an injury being downgraded from reportable to non-reportable; and those that — for fear of retaliation — the worker never reports to the railroad in the first place.

Further, while the recent FRA investigation and the Committee hearing focused a bright light on some of the industry's worst actors, it is a fact that the level of harassment and intimidation — whether certification-, discipline-, or injury-related — is not the same on all railroads, or in all areas on a single, large railroad, because the harshness of the "command and control" culture differs somewhat across railroads. Finally, fear of detection and the adverse publicity that accompanies detection can change behavior. For example, I recently received evidence that one railroad adjusted its "point system" effective October 1st to eliminate assigning points when a worker is injured, apparently so it could testify that it did not assign points for injuries.

2. Is it a common understanding among employees that reporting an injury is not a very "smart" thing to do? And, is this "common understanding" pretty much the same at all railroads?

In those areas where harassment, intimidation, and retaliation are the norm, it is, indeed, the common understanding that reporting an injury will almost certainly trigger a strong response from the railroad. However, that sentiment runs neither as strong nor as deep on other railroads, where reporting an injury does not automatieally result in an attack against the injured worker.

3. What do you believe is the best way to rectify the harassment and intimidation problem?

To be sure, a significant step forward was Congressional enactment of the Implementing Recommendations of the 9/11 Commission Act of 2007, which amended 49 USC Section 20109 to (1) include reporting injuries as a protected activity, and (2) improve the process for adjudicating violations of Section 20109 rights. The House further addressed this issue in Section 606 of H.R. 2095, which must be reconciled with the rail safety reauthorization ultimately passed in the Senate. If the rights included in Section 606 could be enforced in the 49 USC 20109 adjudication process, a railroad's ability to harass and intimidate would be dramatically curtailed.

Finally, Appendix A of 49 CFR Part 225 sets the civil penalty for failure to comply with a railroad's intimidation/harassment policy at $2,500 for a violation and $5,000 for a willful violation. We believe the penalties should be increased to at least $10,000 for a violation and $15,000 for a willful violation, which is equivalent to the civil penalty that can be imposed for failure to perform a Class I brake test and initial terminal inspection on a train.

4. What do you think of points systems or rating systems that identify "risky" employees? Do they create a disincentive to report?

We believe assigning points or ratings creates a substantial disincentive to report injuries. Many of these systems also assign points for other workplace behaviors — such as fuel consumption and maintaining a schedule on a non-scheduled train — that cannot serve as a legitimate basis for discipline, and do little more than build records that are later used in efforts to justify any level of discipline imposed when a worker actually commits a misdeed.

Indeed, these systems are insidious because they work to create subliminal pressures upon workers to "conform" to whatever behavior is dictated by a particular system. They also completely insulate front line managers from the consequences of their own conduct, because the systems allow these managers to deny any responsibility for adverse actions felt by the workers, blaming the "point system," instead. Consequently, in order to keep their records as "clean" as

possible, workers frequently decline to report incidents about which management might not otherwise become aware, including apparently minor injuries they sustain.

5. Obviously, management has a responsibility to identify unsafe behaviors and attempt to influence employees into working more safely. What would be better ways to do this than the current practice?

Under the "command and control" culture, analysis of accidents, incidents and injuries typically stops when the last human to make a mistake in the chain leading to the event is identified. At that point discipline is imposed, either to punish or to coerce a different behavior. However, from a systems standpoint, an appropriate investigation requires a full root cause analysis, which helps identify all contributing factors, including the errors of others, training shortfalls, and work procedures and processes that are less safe than others.

Safety can best be enhanced by addressing all contributors to an event, not merely the last person to commit an error. Root cause analyses across a spectrum of events also can identify factors and trends that are not immediately apparent from the study of a single event, which, in turn, can lead to adjustments that actually prevent similar events in the future. Reconfiguring risky work practices established by management and refining training will lead to greater safety than continuing to merely rely upon the coercive effects of "command and control."

Similarly, the use of peer trainers — particularly calling upon workers involved in an incident, who can share with co-workers their unique perspective — has proven to be a powerful educational tool, although it can be employed on a much broader scale. That being said, there unfortunately will always the occasional situation in which some level of discipline is appropriate.

6. Do some railroads handle their employees better than others?

It has been our experience that some railroads do handle their workers better than others. In many ways, smaller railroads tend to show greater flexibility than the largest railroads. We also believe that experienced supervisors who work for railroads where the "command and control" culture is less strident also handle their workers better. In this regard, the purchase of some U.S. railroads by Canadian National and Canadian Pacific has resulted in the "importation" of certain elements of the Canadian labor-management culture, which has been very positive, in our view.

In addition, we are optimistic that the interest Congress has taken in rail safety this year, behind the strong leadership of Chairman Oberstar, may be causing at least some railroads to rethink how these issues should be handled. While there is little to report in terms of concrete achievements as of this date — and even though there remains a long road to travel — we are

have received reports of renewed interest on the part of a number of major railroads in addressing these subjects with our representatives on those properties.

7. What do you think of the Confidential Close-Call Reporting System, which FRA is experimenting with at certain UP sites and other locales? Is this the right way to go?

The BLET has participated in the project that produced the Confidential Close-Call Reporting System (C^3RS) since its inception, and we wholeheartedly support its objectives. Although still in its infancy, we expect C^3RS to produce a significant amount of data identifying risky practices that would otherwise not come to light. From this, we anticipate that remediation will be implemented that actually will reduce the likelihood of certain types of accidents, incidents, and injuries in the future.

Similar initiatives in other industries — such as the NASA-sponsored Aviation Safety Reporting System ("ASRS") and the FAA-approved Aviation Safety Action Program ("ASAP") — have contributed significantly to a demonstrable reduction in human factor accidents, and we see no reason C^3RS will not enjoy similar success. That being said, however, the "command and control" culture is so imbedded in the railroad industry that we expect many years to pass before C^3RS is in place on a large scale, and we wouldn't be surprised if some railroads accede to C^3RS only after strong governmental pressure.

8. Are there other programs that you believe would create a better working environment?

Perhaps the most sophisticated relative of C^3RS is the Investigation of Safety Related Occurrences Protocol ("ISROP") established by Canadian Pacific. ISROP's broad spectrum approach includes fatigue management, crew resource management and root cause accident investigation. This program has great promise, but — after a decade — remains a work-in-progress that has not been universally accepted.

Another is called "Changing At-Risk Behavior" — or "CAB" — and is a behavior-based accident prevention demonstration project in place on Union Pacific's San Antonio Service Unit. What CAB has in common with C^3RS is that it (1) is confidential and non-punitive, and (2) gathers data on unsafe acts and close calls, in order to identify accident precursors and trends that can be used in risk reduction and accident prevention. It differs from C^3RS in these respects: (1) it is based on workers observing and coaching one another, and (2) the data are collected and managed by the union representatives administering the program. CAB has shown itself to be the type of peer intervention and training program that produces results in a way that railroad "point systems" never will.

We also would restate here our support for the FRA's risk reduction program ("RRP") concept. Neither C^3RS, nor ISROP, nor CAB provide a "silver bullet," although combined they represent a meaningful step forward. Recognizing this, FRA has devoted significant time, energy, and resources to developing complementary programs such as these, and identifying others that may hold similar promise. We are pleased that H.R. 2095 acknowledges the importance of FRA's RRP efforts, and cannot strongly enough urge that they be funded at the requested level.

9. In your opinion, is there an adversarial relationship between management and employees, which may cause some of these instances of harassment and intimidation to occur?

As I indicated in my testimony, the issues of harassment and intimidation go far beyond how railroads treat injured workers, and are rooted in a militaristic "command and control" culture that dates back 150 years, and decades before the passage of the Federal Employers Liability Act ("FELA"). Today's adversarial relationship descends from the open industrial warfare that killed dozens, injured hundreds, and caused millions of dollars of property damage in a wildcat nationwide railroad strike that took place nearly 15 years before the infamous Homestead Massacre.

This culture is reflected in almost every aspect of the labor-management relationship, not merely how a railroad responds when a worker is injured. As the Committee has heard, railroads build dossiers on every aspect of their workers' job performance, even down to which engineers burn a few drops less of diesel fuel than the others. When those dossiers reach critical mass, the worker heads toward the unemployment line — sometimes temporarily and sometimes permanently.

If it is true that significant improvement in safety in the future depends upon workers willingly coming forward to report problems that would otherwise go undetected, and we believe it does, then the stranglehold of the "command and control" culture must be broken. Meaningful accident prevention can occur only if potential hazards — human and systemic — are identified and remediated in advance. However, if the "thanks" for providing information concerning those hazards is harassment and intimidation, then workers will continue to keep their mouths shut until an accident occurs that cannot be made to disappear.

10. What is your members' view on the Hotlines that railroads have? Do they feel comfortable coming forward and calling them when they are dealing with unfair workplace practices?

These "hotlines" are generally, and justifiably, regarded with skepticism. One reason is that this process cannot both be effective and maintain confidentiality. If an accusation against a supervisor is vigorously investigated and prosecuted, it will not take any supervisor very long to

identify the complainant, who will spend the remainder of his/her career with a target on their back for being a "snitch." Protecting the confidentiality of reporters by maintaining absolute discretion until a pattern of abuse by a particular supervisor becomes apparent will leave all but the most recent reporter feeling their complaint has fallen into a "black hole."

The other reason for the skepticism is that these systems have been established by the same senior-level executives who developed and approved bonus plans that provide a strong incentive to minimize injury reporting by any means necessary, fair or foul. At best, this delivers a mixed message that usually is resolved in favor of distrusting the "hotline." The history of relations in this industry is such that there is no confidence in self-policing by a railroad.

11. Do you think that there is a general disincentive for employees to report injuries?

One place the "command and control" culture has been institutionalized is in arbitral precedent for discipline cases involving alleged insubordination, which has enshrined the maxim "comply now and grieve later." As a result, railroad workers are socialized to take the path of least resistance, which is how the vast majority of railroad workers relate to management. When that culture manifests itself in harassment and intimidation of those who report injuries, a strong disincentive to report is inevitable.

12. When you put out the word to your members that this hearing was happening, were you surprised at all by the flood of reports that came in?

Sadly, the number of reports we received came as no surprise whatsoever. What was astonishing, however, was the depraved indifference shown by railroads in a number of cases, as exemplified in the testimony of witnesses Cook, Ehlenfeldt, Haskin, and Knisely. The nightmares they related to the Committee could not have been imagined by us. Furthermore, lest it be suggested that these four men — all of whom either retired or were fired because of their injuries — were motivated by animus toward the railroad, it should be known that we were contacted by numerous other, still active, BLET members who very badly wanted to tell their own horror stories, but were reluctant to appear for fear of retaliation if they testified.

13. Could you estimate for us, unofficially, the percentage of on-the-job injuries that go unreported?

For the reasons set forth in my response to Question #1, any estimate — official or unofficial — would be pure speculation. Since this hearing was first announced, we have worked diligently to avoid making any claim or allegation that we could not substantiate if challenged by

the industry. Accordingly, I would respectfully decline to speculate as to what percentage of on-the-job injuries go unreported.

14. Do you think that the Harriman Award is driving some of these behaviors? Do you think that the Award needs to be changed?

I would reiterate that injury-reporting suppression is but one aspect of a firmly rooted "command and control" culture that preexisted the enactment of the FELA by several decades. While the four injured workers who appeared before the Committee clearly provided the most compelling testimony, hundreds — if not thousands — of their Brothers and Sisters have been similarly victimized by the industry's parallel discipline and decertification policies, which share a common genesis with injury-related harassment and intimidation in the industry's pervasive militaristic culture.

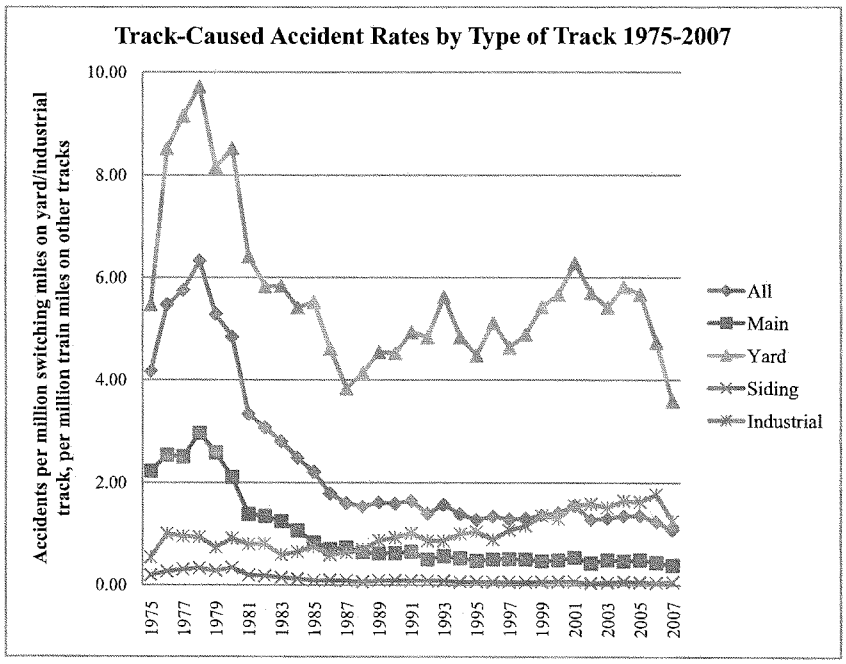
That being said, we believe that the Harriman Award provides for executive-level railroad managers the same type of injury-suppression incentive that field-level managers receive when their bonuses are tied to injury rates. To that degree, we believe it could be fairly said that the Award drives some of these behaviors concerning this aspect of the overall culture. Indeed, there have been discussions that date back many years over "reforming" how accident data is to be weighted in determining which railroads will receive the Award.

Our impression of those discussions, in which we have participated, is that the industry is willing to agree to a weighted system in which obviously discoverable injuries are assessed a high point total, while those that are most susceptible to being suppressed are assessed the lowest point total. While this does correlate, to a degree, with injury severity, it also provides a continuing incentive to suppress injury reporting, because the proposed index fails to address underreporting. We support adoption of a severity index that eliminates current incentives to harass and underreport.

Question from Congressman Brown

1. Mr. Tolman, how important are capital improvements to safety improvements on the railroads? Is the safety of employees at risk when railroads are not in a position to make necessary investments?

Congressman Brown, there is no question that insufficient capital can have a negative impact on worker safety, deferring track maintenance coming immediately to mind. Indeed, historical FRA data on accidents caused by track defects clearly shows that the worst rates occurred when the industry was in severe financial distress and deferred track maintenance was the rule, rather than the exception.



However, what the data also show is selective investment, because — while rates on main tracks and overall show significant and steady improvement — rates on yard tracks increase and decrease with no apparent pattern, and rates on industrial tracks have been increasing for nearly 25 years, almost without interruption. In fact, the track-caused accident rate on industrial tracks peaked during the very period (2000–2006) in which the industry was generating record profits and was, according to the Surface Transportation Board, revenue-adequate. Accordingly, the data establish that the industry invests its capital where it will garner the best return.

While targeting capital investment based on anticipated return is standard business practice, we cannot concur with attempts by some railroads to hold safety hostage by withholding the investment of capital that could implement safety enhancements unless some economic *quid pro quo* is granted. When the FRA published its regulation that permitted the caboose to be replaced by an "end-of-train" device ("EOTD") there was no requirement that the device be equipped

with an apparatus that would initiate an emergency brake application from the rear in the event of a runaway train, despite Rail Labor's urging that the regulation include such a requirement.

Since that capability would have increased the cost of the device, railroads did not voluntarily purchase these "two-way" EOTDs when the rule was first promulgated. During the first half of the 1990s, the National Transportation Safety Board had identified at least eight (8) runaway accidents that, according to then-NTSB Chairman Jim Hall, would have been prevented by a "two-way" EOTD.[1] We have "two-way" EOTDs on certain trains and in certain territories today ***only*** because FRA compelled their use.

More recently, there were a spate of accidents — some catastrophic — that occurred in dark territory, where there is no signal system. Despite record profits and revenue sufficiency, and in the face of NTSB recommendations that technology that has been sitting on shelves for years finally be deployed, the industry has not taken a significant step toward eliminating the risks associated with dark territory, causing us to petition the Congress to compel the industry to act.

Indeed, Centralized Traffic Control ("CTC") is a signaling technology that matured in the 1960s, yet 40% of the nation's rail main track infrastructure still is comprised of dark territory because the industry is loathe to spend capital unless compelled to do so by market forces or by Congress. Everyone agrees that one fatality or one accident is one too many, but the industry keeps pointing to a safer future that is just over the technological horizon while, at the same time, ignoring current technologies that could accomplish the same goal for a fraction of the cost.

One such example is switch point detection technology, which is currently available and significantly less costly than a full-blown CTC signal system. When two freight trains collided in Graniteville, South Carolina at about 3:00 a.m. on January 6, 2005, the ensuing toxic chlorine gas leak killed nine, including BLET member Chris Seeling. This accident would have been prevented if either CTC or switch point detectors had been installed.

Moreover, if the accident had occurred twelve hours later, the result would have been even more catastrophic, because the collision took place about 200 yards from an elementary school. In that event, we would not be debating the merits of enacting the NTSB's Graniteville recommendations; Congress already would have passed legislation mandating that CTC be installed in all dark territory. We believe the history is clear that railroads will not voluntarily invest simply to improve safety: either there must be an offsetting labor cost savings, or Congress must mandate the improvement.

The same is true with respect to what may be the two most significant safety-enhancing technologies currently in development — Positive Train Control ("PTC") and Electronically-

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[1] *See* http://www.ntsb.gov/speeches/former/hall/jh960312.htm.

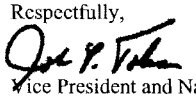
Controlled Pneumatic ("ECP") braking systems. Regarding PTC, the industry has made no secret of its intention to deploy the technology when it matures in lockstep with an effort to reduce freight train crew size from two to one. The industry maintains this position in the face of a host of new safety risks that would arise from single-person operations, which very well may outweigh the benefits flowing from PTC.

Concerning ECP, the industry essentially seeks to pay for its investment by dramatically reducing the number and quality of air brake inspections. All arguments in support of gutting the current inspection and testing regimen are predicated upon the anticipated performance of these systems, and are not supported by data that safety will not be diminished because the majority of inspections and tests will be eliminated.

We recognize — and have often pointed out — that the railroad industry is severely handicapped when compared to other transportation modes in terms of federal support. There is no federal funding for our infrastructure or our traffic control systems, as there is for highways, waterways, and aviation. However, in light of the industry's financial performance in the current decade and its prospects for the next generation, we find it nothing less than shameful that we are consistently faced with the Hobson's Choice of selecting between safer working conditions and job security.

Once again, on behalf of the BLET membership, we deeply appreciate your leadership on this issue, and are grateful for the opportunity to have participated in this most important matter. If there is anything other information you require, we would be honored to provide it.

Respectfully,



Vice President and National Legislative Representative

cc: The Honorable John L. Mica, Ranking Member
The Honorable Henry E. Brown, Jr.
BLET Advisory Board
All BLET General Chairmen
All BLET State Legislative Board Chairmen

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

OCTOBER 25, 2007

WRITTEN STATEMENT OF
CHARLES J. WEHRMEISTER
ON BEHALF OF
NORFOLK SOUTHERN CORPORATION

Chairman Oberstar, Ranking Member Mica, and Members of the Committee, thank you for the opportunity to testify about the railroad industry.

I am Charles J. Wehrmeister, Vice President Safety and Environmental of Norfolk Southern Corporation. Norfolk Southern is one of the nation's premier transportation companies. Its Norfolk Southern Railway subsidiary operates approximately 21,000 route miles in 22 states, the District of Columbia and Ontario, Canada, serving every major container port in the eastern United States and providing superior connections to western rail carriers. NS operates the most extensive intermodal and automotive network in the East.

I have held my current position on Norfolk Southern since 1998. My responsibilities include the areas of personal injury safety, employee safety and security training, grade crossing trespasser initiatives, and environmental/hazardous materials

training and response initiatives. Previously I worked in various capacities on the railroad including crossing watchman, switchman, yard conductor, road brakeman and various field Transportation positions.

In this testimony, I will briefly outline Norfolk Southern's safety program, and then specifically address the handling of employee injuries, accident reporting, employee discipline policies and Norfolk Southern's collaborative efforts with our labor organizations.

I. NORFOLK SOUTHERN'S SAFETY PROCESS

Safety at Norfolk Southern begins with our corporate vision: "***To be the Safest, most Customer-Focused and Successful Transportation Company in the World.***"

You'll notice that in our vision statement, "***To be the Safest***" is first and foremost among our business objectives, as well it should be. So how do we become world class in safety? How do we eliminate all workplace injuries?

First, note that I've identified safety at Norfolk Southern as a "process." It's not a "program" or a list of responsibilities neatly catalogued in a dusty, three-ring binder. It's a <u>living</u> process; it's our culture, a way of life for a committed group of men and women over 30,000 strong; it's the way Norfolk Southern people do business. It's also about prevention. Our goal is to prevent the incident or injury by being proactive, rather than reactive.

Safety is an evolutionary process at NS, one that has grown out of hard work and study. This is how we got here.

Looking back at the evolution of our Safety Process we've identified what we refer to as "Levels" of safety attitude. "Level I" encompassed a period of years leading up to approximately 1988 when safety was a top-down, management-legislated and supervisory-lead process. Management was committed but people were made to be safe. Rules were created, and Personal Protective Equipment required. There was improvement, but not on the scale that could be accomplished when everyone is allowed to be a player.

By 1988, safety at Norfolk Southern needed to move forward. We retained DuPont Consulting Services, recognized worldwide for their safety efforts and accomplishments, to provide NS with a plan of action to improve our safety of operations. DuPont made specific recommendations, which we adopted. We've had DuPont back with us five or more times to give us an additional pair of eyes and an objective view on how we can continue to improve our process.

With the inclusion of many of DuPont's ideas, principles and recommendations, we began shaping our unique NS safety process. After gathering input, we communicated what we'd learned and experienced, advertised our safety process, demonstrated management commitment, and began focusing on the setting of safety goals. Our employees learned that "No job is so important, no service is so urgent that

we cannot take the time to perform our work safely." In other words, we've got time to be safe.

This brought us to what I like to call "Level II" – "mutual safety" or "participative safety" - a new attitude in which safety became a top-down and bottom-up, participative process. Job briefings were initiated. Family involvement was sought to encourage safety on and off the job. Supervisors were - and are - given training on how to conduct a safety audit. Once each week they examine behaviors, proper procedures, or lack thereof, and working conditions. Safety committee members and all employees were invited, but not required to participate. This became standard practice. Importantly, the audits were proactive and educational – a method of communicating with employees.

Safety Committees were reinforced at all levels. Again, lines of communication flowed in both directions. A new policy growing from the previous safety work of two merged companies was published and distributed to NS employees, the "Norfolk Southern Six Point Action Plan for Safety of Operations." Safety Bulletin Boards were installed at all reporting locations, and were limited strictly to displaying pertinent and current safety information. The boards advertise safety success, as well as serious incidents which occur on our property, within our industry, or even other modes of transportation, when appropriate.

By the mid-1990's many locations on Norfolk Southern had risen to a new level of safety awareness, Level III, what I call "voluntary safety," characterized by

compliance with rules and procedures, and participation in the safety process just because "It's the right thing to do." Safety had become a priority both on and off the job. It's a state of consciousness that transcends rules and procedures when the right climate is set. We ask the "What ifs" such as: "I've complied with all the rules and procedures, but what else is there that might still cause an injury?"

As NS advertised and supported the safety process, people became more involved in team safety and mutual safety. NS managers and supervisors learned that "legislated" rules compliance efforts alone were not enough. Safety on the job became a process for all employees, not just management's plan.

As a result of employees buying into and taking ownership of the safety process, Norfolk Southern has been awarded the E. H. Harriman gold medal award every year for the past 18 years. As you know, this award is presented to railroads for their outstanding performance in safety. Additionally, in seven of the last eleven years a Norfolk Southern employee received the Harold F. Hammond Award, an award given to an individual railroad employee for outstanding safety achievements. The 2006 winner is Kenneth Cheek, a mechanical department employee from Bellevue, Ohio.

II. POLICY AND COMMITMENT

A. Six Point Action Plan for Safety of Operations

Our "Six Point Action Plan for Safety of Operations" is the keystone of Norfolk Southern's policy on safety and injury prevention. It details specific steps to achieve

results and establishes accountability among managers and employees. Its "Six Tenets of Safety" are the heart of the plan and worthy of repeating. They are:

1. All injuries can be prevented.
2. All exposures can be safeguarded.
3. Prevention of injuries and accidents is the responsibility of each employee.
4. Training is essential for good safety performance.
5. Safety is a condition of employment.
6. Safety is good business.

The "Six Tenets" have aged well. Originally, supervisors were responsible for prevention of injuries and no mention was made of environmental safety. At the suggestion of the people in the field, the "Six Tenets" have now evolved to include each and every employee as well as prudent environmental stewardship.

B. Safety Committees

A good example of the participatory style of NS' safety program is our commitment to safety committees. Each of the NS operating departments has a formal safety committee structure designed to encourage that safety issues be handled and percolate up from local committees (many of which are chaired by agreement employees or their labor representatives) to division planning committees, regional committees, and ultimately to the Operations Division Safety Steering Committee, or "ODSSC," a systemwide body that sets safety policy for the entire Operating Department. Chaired by

Norfolk Southern's chief operating officer, the ODSSC meets monthly in different locations throughout the NS system to conduct safety audits, meet with employees, local safety committees, and chairmen of all local crafts, and then conduct a formal, safety business meeting with senior operating department committee members. Although policy is made by this executive committee, it is influenced strongly by recommendations received from local and regional committees.

C. Internal Control Plan ("ICP")

More than 10 years ago Norfolk Southern established a formal plan, adopted pursuant to Federal Railroad Administration (FRA) regulations, which: (1) prohibits all employees from taking any actions to delay the receipt of proper medical care for injured persons; (2) expressly prohibits any form of intimidation or harassment that would have the effect of discouraging the reporting of accidents or injuries; and, (3) imposes disciplinary action against any employee, supervisor, manager, or officer who committed such harassment or intimidation. NS has posted more than 700 permanent, framed copies of this policy at prominent locations throughout the NS system. Each includes details of complaint procedures available to those who wish to report a violation. Each of our operating divisions, NS Human Resources and the Internal Audit Departments also have hotlines that employees may use to report problems confidentially. NS investigates all such claims. Employees are also informed of their right to file complaints through their labor organizations or the FRA. We have included formal training for our employees on this policy and, incidentally, have a Safety Day of Training class going on right now, facilitated by two trainers (one union and one supervisor) explaining to all employees the

respectful treatment they will be afforded if they are injured, as well as NS' policy prohibiting intimidation. In a similar vein, NS' Chairman recently mailed to the homes of all 30,000 NS employees a pamphlet, "Injured at Work - What You Should Know," outlining our employees' rights to respectful treatment.

III. HOW NS SAFETY POLICY AND COMMITMENT ARE SHARED

Norfolk Southern has never been content to simply announce innovations in safety and expect the results will be automatic. As I said at the outset, safety at Norfolk Southern is a living process. It's never "done." Here are just a few of the ways that we keep our policies and our commitment to safety fresh in the minds of all who work on our railroad.

A Norfolk Southern employee's **Personal Safety Action Plan,** or "***PSAP***," establishes individual accountability for improving safety through the preparation and daily incorporation of one's own plan to actively support a statement of personal safety. Most NS supervisors now carry PSAP's on their person. Each includes four Action Steps, namely, *Job Briefing, Communication, Recognition and Education,* that must be reviewed and followed on a daily, weekly or monthly basis, depending on the activity. Many apply this both at home and at work as a reminder that safety begins with each one of us, and includes our families, as well as co-workers.

Similarly, **Division, Terminal, or other Work Unit Safety Action Plans** are being developed for each division, major terminal, production gang, shop or territory.

I'm carrying a copy of my PSAP, my "living document" evidencing my commitment to the process. And it's been initialed. Every employee I encounter and have a chance to explain my commitment to safety is asked to initial my personal safety action plan.

Another effective means of communicating NS safety policy is the Quarterly **Safety Contact**. NS supervisors make and record a personal contact with each employee in their work unit regarding safety at least once each calendar quarter. This affords an excellent opportunity for both parties to share their concerns and establishes positive reinforcement of mutual safety goals.

The last two years have seen a renewed emphasis on the quantity and quality of **Job Briefings** on Norfolk Southern. Strengthening these protocols has been of significant importance to our safety process. Once thought to be the province of the Engineering Department, job briefings designed to ensure that all members of a work environment understand the tasks to be performed, each other's responsibilities, and the potential hazards that might exist are now required by NS safety rules whenever: (1) work begins; (2) work changes; (3) work becomes confusing, or new tasks are started, or, (4) a rule violation is observed. Many locations on our system have evolved to practice "voluntary safety," that is, participation in the process just because it's the right thing to do. Job briefings and participation have been brought to a level where we are each other's brothers and sisters' keepers, even if there is no rule or policy that requires it.

IV. EMPLOYEE INJURIES

A. Background

At the risk of being redundant, any discussion of injuries on Norfolk Southern – or even about Norfolk Southern – must start with the reminder that "All injuries can be prevented."[1] That being said, I understand that one focus of this Committee is to address reports that when a railroad employee is injured he or she may not receive prompt medical care, or is alleged to have been pressured by railroad supervisors to make sure the injury does not qualify for mandatory reporting to the FRA.[2] For the record, no matter what may be said by others in today's hearing, **this type of conduct is absolutely prohibited and will not be tolerated on Norfolk Southern!** Such conduct is a disciplinary offense.

B. Medical Attention

Earlier today I mentioned Norfolk Southern's "Six Point Action Plan," calling it the keystone of our safety process. That document, issued more that ten years ago, includes very specific instructions regarding a supervisor's primary responsibility when an employee is injured. In a separate section identified as "Medical Attention" it's made very clear that:

> **"When an employee is injured, the line supervisor's immediate and primary concern is to ascertain the need for medical attention and obtain that attention immediately."** [Emphasis added.]

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[1] See above reference to Norfolk Southern's "Six Point Action Plan for Safety of Operations."

[2] See 49 CFR Part 225 for FRA reporting requirements.

Although an NS supervisor will often accompany the injured employee to an appropriate medical facility, the "Six Point" also makes it clear that:

"He should not, however, go along to the examining room unless asked by the attending physician and with the consent of the employee."

While both of these instructions have been in place for a number of years, NS recognizes the need to emphasize and reinforce them, and has a formal process to do so. Following reports of alleged improper conduct in 2003, our Vice Presidents Transportation, Engineering, Mechanical, Safety and Labor Relations met with senior operating staff to review our compliance history, and then chaired meetings with first and mid-level operating department supervisors in two-day, off-site sessions. These are now recurring events. Supervisors are given specific instructions regarding the importance of strict adherence to NS' Internal Control Plan and FRA regulations, specifically that they must comply with reporting requirements and avoid any act that may inhibit individuals from seeking or receiving proper medical treatment.

In April 2005, Norfolk Southern again addressed the issue of prompt medical care for injured employees by publishing a special "General Safety Information Letter," signed by the vice presidents of our Transportation, Engineering and Mechanical departments. It left no doubt that any activity which delayed medical attention or interfered with a physician's determinations regarding the method or extent of treatment, is a serious violation of NS policy.

Following a recent retirement-related change in senior management, this bulletin was re-issued by current officers in May, 2007.

You may hear today – as this very Committee heard on May 8, 2007 in hearings on H.R. 2095[3], that one labor organization had "just learned" about an incident involving a rail employee in Michigan who sustained cuts to his back and was forced to postpone medical treatment until his supervisor arrived to conduct an interview. This should never, ever happen. But what you didn't hear on May 8, 2007 was that the incident actually occurred more than five years ago, first aid had been administered, and the injury was promptly reported to the FRA. The reason for the supervisor's unusual interest was an eye-witness report that the employee had falsified his description of the incident in order to avoid a rule violation. This was no excuse for delaying medical treatment. It violated NS policy and when his actions were brought to management's attention the case was investigated personally by senior officers of the company and reports made to the FRA.

I mention this incident for two reasons. The first is that in an industry as large as railroading there may, unfortunately, be isolated instances in which a supervisor receiving reports of an employee injury fails to remember his or her primary responsibility. But when these cases are reported to this Committee, I ask that you please consider that what you are told may not be the whole story, and is certainly not

[3] Federal Railroad Safety Improvement Act of 2007

representative of today's industry, especially in the area of providing prompt medical treatment.

The second reason I raise this today is to reiterate that railroad management has zero tolerance for any delay in providing medical care. We've learned from past mistakes and I'm personally convinced the message has gotten through to all levels of supervision. Our labor organizations are not shy about letting us know if they believe an employee injury has been mishandled. Whatever complaints labor has asked us to investigate during the past several years, delay in offering and providing immediate medical care has not been among them.

C. Railroad Disciplinary Investigations

The opportunity to respond to charges of an alleged failure to comply with railroad safety, general conduct, and operating rule violations is part of the "due process" guaranteed railroad employees by the Railway Labor Act. Management's responsibility to raise these charges is also an important component of any safety process. Safety rules and their enforcement are our first line of accident prevention. Employees and members of the public are safe so long as the rules are followed. Yet this Committee will be told that railroad management exercises this responsibility in such a way that it has a chilling effect on employees who have suffered work-related injuries. This is a difficult area. Often an employee injury will be the direct result of his or her own rule violation - one that may have also caused an accident with resulting injury or damage in nearby communities, company property or equipment, or co-employees. The charges are not

brought because the employee was injured, but because the resulting injury may very well have exposed unacceptable inattention to rules designed to maintain the safety of operations for all concerned.

In early 2003 Norfolk Southern listened to complaints received from our labor organizations. They told us that employees who reported on-duty injuries were being charged with rule violations as a form or harassment designed to intimate them, or others, from reporting legitimate injuries. As I've already said, this is a violation of NS policy and will not be tolerated. Nevertheless, in order to remove any chance that this might occur, a special instruction was issued by our senior transportation officer. His instructions changed the ground rules for supervisors considering such action. As of January 20, 2003, no formal investigation related to any of the following incidents or charges may be held without his prior approval. These charges include all those that involve:

1. An employee personal jury; or,
2. Failure to provide necessary information or documentation involving a personal injury; or,
3. Falsification or misrepresentation of the facts involving a personal injury; or,
4. Rule infractions leading to a personal injury.

This mandate remains in full force and effect today, and I know from my own role in the process that it is not ignored.

D. Labor – Management Collaboration

In 2003 the United Transportation Union (UTU) engaged in a campaign seemingly designed to convince Members of Congress, the FRA, and even the general public that Norfolk Southern had failed to manage employee personal injuries responsibly and in accord with FRA regulation. While we disagreed with most (if not all) of the charges we recognized that UTU's issues needed to be addressed. In September 2003 Norfolk Southern's chief labor relations officer wrote to the UTU asking them to appoint a small group to meet with NS to explore ways to address the labor organization's concerns. UTU agreed. A UTU/NS task force was formed. It reviewed NS policies and procedures and made trips to field locations. NS encouraged UTU to bring to our immediate attention any instance in which it believed an employee injury had not been handled appropriately, or in accordance with NS policy. In the intervening years UTU has done so on the average of three or four times a year, communicating directly with NS' chief labor relations officer. His office conducts a thorough investigation of all available records. All supervisory officers involved in the case, and in some instances the complaining employees themselves, are interviewed personally by Norfolk Southern's Executive Vice President-Operations and Vice President-Labor Relations. Thereafter Norfolk Southern discusses the results with the UTU and sends a written summary. In many of the cases referred by the UTU Norfolk Southern determined the handling of the employee injury had been appropriate and complied with Company policy. However, where we found that it had not, appropriate discipline was assessed against our supervisory officers.

Norfolk Southern believes this process has been constructive. The UTU has told us that it does too, and that our investigations have provided thorough and honest responses to the issues we were asked to address.

CONCLUSION

I have addressed issues related to employee medical care and alleged harassment or intimidation in disciplinary proceedings because these are important subjects of interest to this Committee. But Norfolk Southern's answer to charges that a climate of harassment or intimidation exists on our railroad is that if it ever did, it does not now, and has not for many years. Procedures are in place to assure that supervisors at every level understand that an employee's health and safety is everyone's first priority. And this message is getting through. There is perhaps no better testament to this than the unscripted words of Norfolk Southern's 2006 Hammond Award-winning Carman, Kenny Cheek. In a video presentation made at this year's E. H. Harriman Awards ceremony, Kenny let us all know exactly how he felt about our shared obligation to put safety first at Norfolk Southern. These are his own words:

> "And I told them I don't care if you are my boss or who you are, if I see you doing it wrong, I am going to come up and tell you about it. *** If they see me doing something wrong, come right over and tell me. Stop me right there, because I am not above making a slip. That's how people get hurt. For a split second, they let their guard down and something happens and if somebody sees you let your guard down, and they just turn around and walk away, then they are not a very good co-worker."

Mr. Cheek's complete remarks were reproduced for today's hearing, and are attached. I encourage this Committee to read them in their entirety to fully appreciate

Mr. Cheek's personal commitment to safety as well as the very high regard with which he is held by his co-workers, management and agreement employees alike.

The final message I would like to leave with this Committee today is that the efforts I've outlined regarding the sharing of Norfolk Southern's critical safety message with our employees have, unquestionably, made our rail operations safer. Our safety record undeniably confirms this.

2006 HAROLD F. HAMMOND MEMORIAL SAFETY AWARD WINNER
KENNETH L. CHEEK
Carmen, Norfolk Southern Corporation
Bellevue, Ohio

Transcript of Hammond Ceremony Video
Washington, DC
May 17, 2007

Narrator: Safety is measured in many ways; typically injuries per man-hours, but that standard only measures the result. What is more important is what it takes to achieve that result. It may be leadership or encouraging others to achieve it. Ultimately though, you make the greatest difference in that result by the influence that you have on others. In this respect, Kenny Cheek stands above the very best.

Chris Buttermore (Senior General Foreman): What makes Kenny a leader is that Kenny genuinely cares about his fellow employees and his friends and his family. He cares about safety. He sets goals for people. He helps people obtain those goals and once they obtain those goals, he'll set higher goals to achieve even more yet.

Shunte McClellan (General Foreman): What's important about Kenny and his leadership skills and how he is able to encourage other people to develop their's, is they see his level of professionalism. The respect for the work, respect for the hazards that's out there and once you see that, that person takes pride in what they are doing; it is kind of contagious. And that has influenced people to try to do a better job themselves.

Amy Stottlemire (Carman): If you are doing something wrong, Kenny will correct you. And we have a thing about being brother's keepers. Kenny makes you feel like part of the family. He will look out for you just like while I am like his little sister. And it's great. It's a big family.

Greg Culve: (Terminal Superintendent): He will help everybody in any department and he is one of the leaders in the terminal for safety.

Jerry Weaver (Carman): You know it rubs off on people. You know, when you see one guy doing his job, you work with him, you want to get up to the same standards that he is.

Ray Smith (Carman): It doesn't matter if you are friend or foe, if you are doing something unsafe, he's going to let you know. I mean, that kind of rhymes too, friend or foe, yeah, but anyway, that's the way he is. That is the way Kenny is. He is that type of person and I respect him for that. He and I have tangled over stuff like that a few times. He has told me stuff that I didn't like, but he was right and he's helped keep me out of trouble and keep me safe.

Craig Fisher (Carman): I know it influences myself, being around Kenny. Knowing that....you're always in the back of your mind, knowing that....Kenny is on that safety committee and he is always going to bring things up when he sees you

doing something wrong; he is going to stop you in your work and he's going to want you to do it the right way. He is going to explain it to you that way.

Joseph O'Brien (Carman): When I first came here, he was talking to me and he said, "Where did you come from Joey?" I said, "I came from Mingo Junction." He said, "Well, how did you do this type of job down there?" and I said, "Well down in Mingo this is how we did it" He said, "Well to start out with, number one, you are at Bellevue now. This is how it is done here and don't let me see you doing it wrong again." Right at first, it sort of blew my mind. You know, I said, well boy, this guy gets right to the point. I have always looked up to him and he's always been that way ever since and it just hit home base. Everybody says is Kenny Cheek a good, safe worker. I said, if you want to learn something, you work with Kenny Cheek and you will know at the end of the day exactly how to do it the correct way, I guarantee ya.

Neil Burras (Conductor): It is the safety mind set that amazes me with him. Because even if there wasn't a safety rule book, I can guarantee you this; he would have evoked his own safety rules. I mean, he is just the kind of guy that, you know, his mind set is safe. I mean, it really is.

Terry Patrick (Track Supervisor): Kenny is the kind of person that walks the walk and he leads by example. And a lot of things, Kenny does a lot of little things that go unrecognized and what I mean by that, if he comes to something minor he can handle himself, he will go ahead and handle it.

Steve Cloud (Clerk): His leadership qualities make a ripple effect that is carried on. It affects other people in a positive way, by example. And the best way to lead is by example.

Narrator: Kenny's leadership spills over into the community; coaching kids to reach for the stars, to achieve what they think is impossible.

Nick Zartman (Carman – Former Student Athlete): When Kenny was a coach, whether he was at school or now that I am out of school and I am at work and I work with him, he still coaches you along and shows you discipline and what to do and what not to do. Whether you get mad at him or not, you just learn to appreciate what he's got to say and respect what he's got to say.

Kelly Skeels (Former Student Athlete): I think it has a lot to do with the fact that he just won't let you quit. I mean, he just is always there, encouraging. Like I said earlier, he is able to, you know, broaden how you look at yourself and how you see yourself. To know, ok maybe I do have the capabilities of doing something I didn't think I could ever do.

Kristen Rathburn (Current Student Athlete): A lot of it and his teachings for us in cross country is your mind set. That is all it is for us. Like, he can put as much practices,

as much hard practices, as much repeat 400's in as he can to get us physically ready, but for our race that is on a Saturday morning, it is all mental.

Mike Martin (Coach – Clyde High School): Well, Kenny is a coach. He has a great rapport with the students and it doesn't matter if the students or the athletes are the number one athlete or if they are the ones that are out there, you know, just trying to do their best. Never probably placing in a meet, never probably going to get their name in the newspaper, but I mean, he treats them all the same. He works with them, he tries to improve what they are doing and, you know, that's one thing where he has that personality that he can, you know, try to get those kids to do the best they can no matter, what level they are.

Narrator: The real magic behind Kenny Cheek is the way his influence grows through others.

Diana Cheek (Wife): Kenny's involvement with safety at the railroad has made a big impact on me that I have carried it to my job at Brookwell Corporation. I am part of the safety team there. Ken is a very dedicated person and when he puts his mind to do something, he follows it through all the way in that his safety aspect with the coaching and with the kids at the high school, he just, it just comes automatic to him. They respect him for that and so the kids are careful and they like that about him.

Narrator: If Kenny shares with you the true reason behind his commitment to safety, you become respectfully aware that his commitment is deep and comes from the heart.

Kenny Cheek: Work safe and don't take safety light because it is not something you should take light [illegible] serious of a job, you know, and you [illegible] yourself to work safe. I think I changed my whole outlook on safety, as far as starting to work safer than what I was back in February 8th, 1975, I had a life altering experience. My wife and I had went out to supper and we were over at a friends house playing cards. This has been 30 years ago. My son, my mother called and said your house is on fire and my son was in it and he didn't make it out. And I didn't have a safety plan and I didn't have an escape and he died. So, after that, I started taking safety a whole lot more serious. You know, you lose someone and it takes a long time to get over it. It has been 30 years, and still to talk about it, it hurts a little bit, but when I get these young kids at the railroad, and you see them doing something wrong, you don't want to have to go to their house and say hey mom or dad, your son just got killed at work. And if I see somebody doing something wrong, that can get them into trouble, they're gonna hear from me. It is gonna be in a positive way. If I have to tell them more than once, it is not going to be in a positive way, because I don't believe that you should have to tell them more than once if they are putting their life in danger. They might not know it the first time, so you let them know and you tell them why you are correcting them. But the second time, we are going to the woodshed. We are going to go to the woodshed and talk about it. I have done it before. I've had to do it with young guys and old guys. And I

told them I don't care if you are my boss or who you are, if I see you doing it wrong, I am going to come up and tell you about it. Don't take it the wrong way because I don't mean it to be taken the wrong way. If they see me doing something wrong, come right over and tell me. Stop me right there, because I am not above making a slip. That's how people get hurt. For a split second, they let their guard down and something happens and if somebody sees you let your guard down, and they just turn around and walk away, then they are not a very good co-worker. That's why you'll see me probably more than anybody in the shop come over and talk to you if I see you doing something wrong. I just don't want.....it's too emotional and it's too traumatic to have to go through a funeral for one of your kids and I don't want any parent of the kids that I work with to have their parents to go through it. So that's why probably I take it a little more serious than most people do.

Narrator: Kenny is real. His safety is real. Kenny is uniquely dedicated to ensuring that others maintain not only their own safety, but the safety of others as well.

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C. J. Wehrmeister
Vice President

November 20, 2007

[redacted]
U. S. House of Representatives
Sr. Professional Staff for Oversight & Investigation
[redacted] Ford House Office Building
Washington, DC 20515

Re: The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads (October 25, 2007)

Dear [redacted]

In accord with Chairman Oberstar's request of November 7, 2007, enclosed find my response to additional questions raised in connection with the above-referenced hearing. An electronic copy of my response has also been sent to you via e-mail at: [redacted]@mail.house.gov.

I would also like to take this opportunity to reiterate my invitation to you, Chairman Oberstar and Members of the Committee to join Norfolk Southern as our guests at our Annual Safety Awards Meeting to be held in Norfolk, Virginia on March 4 and 5, 2008. We hope you will plan to attend.

Sincerely,

C. J. Wehrmeister

Enclosure

November 19, 2007

Response of Norfolk Southern Corporation
to
Questions from Chairman James L. Oberstar

"THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS"
OCTOBER 25, 2007

1. **Do you believe the "railroad culture" is too preoccupied with placing blame on individuals more than systems?**
   A: No. Norfolk Southern (NS) disagrees with the hypothesis that "railroad culture" is "preoccupied" with placing blame on individuals. (Though unstated, "blame" is presumably related to responsibility for employee injuries.) We have a duty to our employees and the general public to create a safety program, or "system," designed to facilitate compliance with FRA safety regulations as well as NS operating and safety rules. At NS, we pride ourselves on the maturity and effectiveness of our safety program and culture. If an accident or injury occurs we are also obligated by corporate policy to promptly investigate and take reasonable steps to determine how the accident happened, and to make every reasonable effort to prevent its re-occurrence, which entails a critique of and possible modification to our safety program.

   We do agree with the testimony provided before this Committee on October 25, 2007 that the Federal Employer's Liability Act (FELA) results in an adversarial relationship between the railroad and its employees. The FELA was enacted in 1908 to compensate railroad employees for job-related injuries. Unlike an employee covered by the later enacted no-fault state worker compensation systems, an injured railroad employee must prove blame or fault on the part of the railroad before he or she can recover damages for the injury. Injured railroad employees are encouraged, at times, by their attorneys not to cooperate with the railroad's investigation into the cause of the accident because their potential damage award under the FELA is contingent upon this finding of railroad fault. The lack of candor that this fosters thwarts the railroad's efforts to establish the true cause of the accident. If the railroad cannot establish the true cause or facts behind the accident, it cannot take all appropriate steps to eliminate the cause of the injury. In this regard, the railroad blames a system - FELA.

   We believe replacing the FELA with a no-fault worker's compensation system is a necessary step towards ensuring a cooperative effort between the railroads and their employees when determining causation because the effectiveness of our safety programs can only be as good as the facts upon which they are built.

2. **We've reviewed your safety programs and ICPs, and on the surface they appear to be in compliance with Federal law. How do you explain the widespread underreporting of injuries in FRA audits and investigations and non-compliance with regulations?**
A: The premise that there is "widespread underreporting of injuries" on Norfolk Southern is factually incorrect, as demonstrated by FRA audits of NS employee injury reporting. The FRA agrees. As Administrator Joseph H. Boardman told this Committee in his written statement of October 25, 2007:

> "As I begin this testimony, I want to emphasize that, in the vast majority of instances, employees promptly report injuries to their supervisors on the railroad, and those supervisors make sure that employees receive proper medical attention and that the injuries are correctly reported to the FRA." [Boardman Written Statement at Page 2, Paragraph 2.]

In a small number of cases, FRA audits have taken exception to decisions by NS not to file an FRA report regarding alleged employee injuries. These involved, almost exclusively, injuries that NS had concluded did not meet FRA reporting criteria or were shown to have been falsified. As to the latter, these highlight another unintended consequence of the adversarial, fault-based FELA which encourages the filing of false (or exaggerated) injuries for financial gain.

3. **In general, do you think your railroads have a problem with underreporting of injuries?**
A: Norfolk Southern does not believe it has a problem with underreporting of injuries to the FRA. All decisions regarding interpretations of FRA reporting guidelines are well vetted before a decision is made to consider a case non-FRA reportable. All reportable injuries are reported within the provided timeframe. In the rare event that we discover an injury has not been properly reported, we take immediate steps to ensure a report is made and that appropriate remedial action is taken to prevent recurrence.

4. **Even though the senior executives of the rail industry appear to take a united stand against the overt harassment and intimidation of employees by supervisors, do you think that more subtle forms of intimidation exist? In other words, is it possible that the common knowledge among rail employees that injury reports lead to increased scrutiny scares them away from reporting?**
A: In early 2003 Norfolk Southern listened to general complaints received from our labor organizations. They told us that employees who reported on-duty injuries were being charged with rule violations as a form of harassment designed to intimidate them, or others, from reporting legitimate injuries. As I testified

before this Committee on October 25, 2007, this type of behavior is a violation of NS policy and will not be tolerated. Nevertheless, to further address union concerns, a special instruction was issued by our senior transportation officer. His instructions changed the ground rules for supervisors considering discipline arising out of an incident that involved an injury. As of January 20, 2003, no formal investigation related to any of the following incidents or charges may be held without his prior approval: (1) failure to provide necessary information or documentation involving a personal injury; (2) falsification or misrepresentation of the facts involving a personal injury; or, (3) rule infractions leading to a personal injury.

When an employee injury is the direct result of his or her own rule violation - one that may have also caused an accident with resulting injury or damage in nearby communities, or to company property, equipment or co-employees - charges are not brought against the employee because he or she was injured, but because in some cases the injury evidences unacceptable inattention and adherence to rules designed to maintain the safety of operations for all concerned. The opportunity to respond to charges of an alleged violation of railroad safety, general conduct, and operating rule violations is part of the "due process" guaranteed railroad employees by the collective bargaining agreement. Management's responsibility to raise these charges is also an important component of our safety program. Safety rules and their enforcement are our first line of accident prevention. Employee and public safety depend on rules compliance.

5. **Even though you claim to discipline supervisors when caught putting pressure on employees not to report, don't you think there are pressures that cause this type of behavior to continue?**
A: No, although in a large organization there may, on rare occasions, be lapses of judgment, such isolated incidents are investigated and promptly handled. The job risk to a supervisor is for failing to properly report an injury; a supervisor places his livelihood at risk by engaging in this behavior. As stated below in my answer to Question 8, this is a disciplinary offense. We have found the labor organizations very willing to bring allegations of such conduct to our attention, and we believe they consider our response to such allegations to be both timely and appropriate.

6. **Most of your operations are so widespread, how can you assure us that you are making every effort than you can to identify front-line supervisors who may be placing pressure on employees not to report injuries?**
A: NS recognizes the need to continuously emphasize, monitor and reinforce compliance with FRA reporting regulations, and we have a formal safety program in place to do so. Following allegations of improper conduct in 2003, our Vice Presidents Transportation, Engineering, Mechanical, Safety and Labor Relations

met with senior operating staff to review our compliance history, and then chaired meetings with first and mid-level operating department supervisors in two-day, off-site sessions. These sessions are now recurring events. Supervisors are given specific instructions regarding the importance of strict adherence to NS' safety program, including our Internal Control Plan and FRA regulations, specifically that they must comply with reporting requirements and avoid any act that may inhibit individuals from seeking or receiving proper medical treatment. I would also like to refer the Committee to the eight-hour training module that includes specific training on Intimidation and Harassment that I presented to the Committee during my testimony on October 25, 2007.

7. **Do you simply rely on complaints after the fact to identify these managers, who are bad actors, or do you make an attempt to investigate management practices on a more proactive basis?**
A: No, we do not rely on complaints alone. We perform audits and issue communications to employees as appropriate in an effort to ensure proper injury reporting and response. For example, reporting officers from NS' Safety Department go to our division offices twice yearly to perform an audit that compares personal injury reports against our casualty claim files to make sure there are no discrepancies. In April 2005, Norfolk Southern addressed the issue of prompt medical care for injured employees by reissuing a May 1999 special "General Safety Information Letter," signed by the vice presidents of our Transportation, Engineering and Mechanical departments and posted on NS Safety Bulletin Boards. This letter makes it very clear to our employees that any activity which delays medical attention or interferes with a physician's determination regarding the method or extent of treatment is a serious violation of NS policy and should be reported to management. Following a recent retirement-related change in senior management this bulletin was again reissued by current NS officers in May 2007.

8. **What policies do you have in place to provide disincentives to supervisors who engage in harassment and intimidation, and to catch this type of behavior?**
A: Norfolk Southern's policy is to consistently discipline employees who have engaged in wrongdoing, which includes engaging in conduct that would discourage or prevent accurate injury reporting. Discipline includes, where appropriate, termination of employment. Our discipline policy is promoted through numerous mechanisms (see my answer to Question 9, below.) One such mechanism is *The Thoroughbred Code of Ethics*, which states that: "Safety is Norfolk Southern's top priority . . . and [employees] must be familiar with and obey" our *Safety and General Conduct Rules*. Regarding a Q&A on injury reporting, the Code provides that: "[e]very incident, no matter how small, must be reported and counted in our safety statistics. In addition to being tracked in order

to meet our regulatory requirements, these incidents can be used to spot safety issues and trends and therefore prevent more serious injury in the future." A violation of the Code results in appropriate disciplinary action, up to and including termination. The Code has been distributed to all employees. While the harassment section of the Code does not deal directly with intimidation tactics to prevent injury reporting, one of the Code's core messages is that employees have a responsibility to report misconduct. This, coupled with the ability of employees to anonymously report alleged misconduct including violations of our Internal Control Plan through such channels as the Ethics & Compliance Hotline, acts as a disincentive for supervisors to engage in activity aimed to prevent injury reporting. Quite simply, there are many avenues for employees and our union representatives to report misconduct. We believe these avenues are utilized and are effective in both preventing and detecting such misconduct, and therefore serve as strong disincentives to anyone contemplating harassment or intimidation.

9. **Couldn't you utilize employee surveys on a routine basis to identify managers that are of concern to employees?**
   A: Although NS has not utilized employee surveys to identify managers that are of concern to employees, there are a numerous other methods available for employees to use to report such concerns. For example, constant contact through audits, meetings, *etc.* also provide ample opportunity for issues to be discussed.

   We recognize that, in some instances, an employee may not want to report a concern about his or her supervisor to that individual; thus, we have a hotline that enables the employee to report such concerns directly to the Safety Department. NS also has a Human Resource EEO Hotline and an Ethics & Compliance Hotline that permit employees to make anonymous reports. Concerns are also reported to NS by labor representatives. Indeed, for several years we have had an arrangement in place with our largest union (UTU) that provides for such concerns to be investigated and addressed. We have found this to be a very constructive and effective avenue for the reporting of alleged misconduct surrounding injury reporting and have received positive feedback from the UTU regarding this reporting mechanism.

10. **Have you recently fired or demoted front-line supervisors for failing to report accidents, or for harassing and intimidating employees to not seek the proper medical care? How did you uncover these cases? Was it through an audit or a complaint, or some other means?**
    A: Yes, but not for failure to provide prompt medical care. The cases were "uncovered" both through employee/union representative complaints (via the reporting channels noted above) as well as standard management review.

11. Do you have an "availability policy" that requires that an employee be available to work for a specific number of days per year, which include days lost due to injury and sickness?
A: No. While we expect our employees to be full time employees, we do not have a published attendance standard. We handle attendance problems appropriately through the use of progressive discipline if employees are excessively absent without good cause. This discipline may be challenged under labor agreement appeal procedures and ultimately decided by a neutral arbitrator under the Railway Labor Act. Labor agreements also require employees to work a specified amount in one calendar year to qualify for vacation in the following calendar year. For purposes of qualifying for a future year's vacation benefits, agreements also credit up to 45 days of service that an employee misses because of an on-duty injury.

12. Are you moving more towards a (Confidential Close Call Reporting System) C3RS environment – addressing human factors causes in accidents? Have you implemented such programs on at least a trial basis? If so, how?
A: NS is a participant on the C3RS Steering Committee, but is not moving towards establishing a pilot site at this time. We believe that FRA, the railroads and labor should first review the results of the Union Pacific Peer Review Team (PRT) pilot project established at North Platte, Nebraska, to determine the efficacy of such a program in the railroad environment.

As part of our long standing safety culture, NS actively encourages employees to report close calls or any other unsafe situation to supervisors as well as their co-workers. Open communication and responsible behavior to address safety concerns are strongly encouraged. Our culture incorporates the premise that we are all our brother's and sister's keeper. We want all employees to handle any situation that could result in an accident responsibly. Some of the ways we encourage this participation include the following:

- Superintendent hotlines for reporting any unsafe condition (*e.g.*, a switch that is difficult to operate.)
- Employees also have the option to submit safety suggestions or items directly to the NS Safety Department via the safety department website. An automatic email notification is sent to safety department personnel when an item has been submitted.
- Field employees are encouraged to directly report items to the Dispatching Office of their division.
- Division, shop, or territory safety committees meet monthly to discuss events that have occurred in the last 30 days.
- Shift safety meetings, after lunch breaks, *etc.*, provide an opportunity for employees to report unsafe items.

- Open communication is actively encouraged at NS to help establish trust between employees and supervisors.
- Supervisors follow up with employees that report unsafe situations to advise them of the handling given to the situation.
- Safety Committees conduct site visits to engage employees in open discussion.
- The Operations Division Safety Steering Committee (ODSSC) chaired by the Vice-Chairman and Chief Operating Officer makes monthly visits to locations across the system to discuss safety issues and interact directly with field employees and local union chairmen. Questions received from employees are addressed either on the spot or formally recorded so that answers can be sent back to the person asking the question.
- Safety audits are conducted weekly by supervisors to identify any potential unsafe work habits or conditions that could potentially lead to a close call or accident. Agreement (union) employees often participate with the supervisor in such audits.

13. If you have implemented such programs, how have you seen that affecting employees on the ground?
A: Not applicable.

14. Where do you stand on the implementation of C3RS system-wide?
A: Please refer to my answer to Question No. 12, above.

15. The FRA has a standard 7-day reporting deadline for filing a report for a "reportable" injury. Do you have a different internal standard?
A: FRA does not have a seven-day reporting deadline. FRA recordkeeping regulations require the completion of appropriate forms covering reportable and accountable injuries and illnesses "...no later than seven working days after receiving information or acquiring knowledge that an injury or illness..." has occurred. (See 49 CFR §225.25 (f)) The FRA rule on reporting requires that a qualifying injury be submitted within 30 days after expiration of the month during which the injury occurred. (See 49 CFR §225.11)

The Norfolk Southern Internal Control Plan incorporates our General Rule N and Corporate Procedure 403.1 requiring the reporting of all accidents resulting in injury, death, or damage to property to the proper authority by the quickest communication available. If the injury to the employee is of such a nature that the employee is unable to make the report, then the report must be completed by the injured employee's immediate supervisor.

16. **Do you all have a confidential "ethics hotlines" where an employee can call in and report anything that they are uncomfortable with?**
A: Yes. NS has a confidential Ethics and Compliance Hotline which has been in place for many years. To help ensure awareness of the hotline, it is prominently referenced in *The Thoroughbred Code of Ethics* which has been sent to all employees, appears on the NS website, in the NS Annual Report, and in other corporate communications.

    a. **How are hotline cases pursued?**
    A: All hotline calls are fully investigated and documented, typically by Internal Audit (which reports directly to the Audit Committee of the Board.) All hotline calls are summarized and reported regularly to the Audit Committee.

    b. **Can this system really be confidential?**
    A: All hotline calls may be made anonymously and without fear of retaliation. Investigations are conducted in the most confidential manner possible.

17. **Do supervisors have any portion of their bonuses based on injury statistics in their management area? (If yes) What is the maximum amount that he/she could earn based on injury statistics alone?**
A: No. Norfolk Southern employee bonuses are based on corporate performance, not injury statistics.

18. **It's pretty clear that you have good corporate policies on harassment and intimidation and also safety. However, there seems to be a "disconnect" when these policies are implemented by front-line supervisors. Why do you think this is occurring? And, what are you doing to make sure that your corporate policies are being implemented correctly at the "local" level?**
A: Norfolk Southern does not agree that there is any "disconnect" except in isolated cases that are quickly identified and investigated, with appropriate action being taken. For a discussion of Norfolk Southern's proactive efforts regarding implementation of corporate policy at the local level, please see my responses to Questions 6 and 7.

19. Are you motivated by the Harriman Award to drive down your injury statistics? Though this may appear to be a good thing, do you think that it's creating pressures in railroad management to not report injury statistics? Do you think that any of the metrics of the award should be changed to incentivize reporting?

A: The first and most-critical component of NS' Corporate Vision is to be the *safest* transportation company in the world, which is why Safety is the first of our Core Values. We are motivated by a commitment to preserve the safety and well-being of our employees, their families, the environment, and the public we serve, not to win an award. At the same time, we recognize the need to consistently communicate that the reason we are proud of this award is because of the safe behavior that resulted in it being awarded to NS. It is only this safe behavior that is rewarded. Other behavior that is driven by numbers, only, is not acceptable and consequently not rewarded.

The use of the term "metrics" is unclear. If it is intended to refer to a change in the "weighting" of employee injuries, *i.e.*, serious versus minor, Norfolk Southern's response is that the current values should not be changed. Our focus is on preventing all injuries, not those that may be characterized subjectively as more serious than others. Studies have shown that the outcome of an accident (a minor versus serious injury) is not indicative of safety performance. Safety performance is a measure of the frequency of accidents in the work environment that result in injury. Serious injuries are a subset of overall injuries. Therefore, a reduction in serious injuries occurs by achieving a reduction in the frequency of all injuries. Weighting serious injuries actually distorts the frequency measurement.

20. Do you all have audit processes that links medical claims with injury reports? What do you do if someone puts in a claim but there is no injury report on file for them?

A: We perform both monitoring and auditing activities to ensure that medical claims are compared with injury reports. Our monitoring consists of a real-time review of claims that are made alleging an injury arising from an incident. If there is no corresponding injury report, the handling claim agent contacts appropriate supervision to alert them of the alleged injury and incident in order that supervision has an opportunity to investigate and report the injury as appropriate. The railroad then makes every reasonable effort to investigate the alleged incident, and when appropriate, provide a report to the FRA. In addition, twice a year NS' Safety Department conducts audits comparing Claim Department files with injury reports and information that has been provided to the Safety Department concerning on-duty injuries. All non-reportable injuries are audited to determine if an employee has received medical attention. Claim files as well as the medical department database are reviewed for any indication that medical

attention was provided to the employee. It should be noted, however, that in some cases timely completion of an injury report cannot be fully accomplished because some FELA personal injury attorneys routinely advise their clients not to cooperate with the employing railroad's investigation and not to provide the railroad any details regarding the alleged injury or incident.

21. Do you have policies which prohibit management from accompanying injured workers into their emergency room and with trying to affect what type of medical treatment that they receive?

A: Yes. In my testimony on October 25, 2007 I mentioned Norfolk Southern's "Six Point Action Plan for Safety of Operations," calling it the keystone of our safety process. That document, conceived almost 20 years ago, includes very specific instructions regarding a supervisor's primary responsibility when an employee is injured. In a separate section identified as "Medical Attention" it's made very clear that:

> "When an employee is injured, the line supervisor's immediate and primary concern is to ascertain the need for medical attention and obtain that attention immediately." [Emphasis added.] Although an NS supervisor will often accompany the injured employee to an appropriate medical facility, the "Six Point Action Plan" also makes it clear that: "He should not, however, go along to the examining room unless asked by the attending physician and with the consent of the employee."

22. Do you believe these types of point systems create "unintended consequences"?

A: Norfolk Southern does not employ a "point system."

23. Human factors research has shown that rarely is an accident ever due to a single individual or causal factor. Do you agree, and if so how should we incorporate this notion into FRA regulatory policy?

A: Human factor incidents may occur for a variety of reasons, some singular and some the result of numerous missed opportunities. In its investigation, recording, and review of each human factor incident, NS applies numerous processes towards their prevention. Human Factor incidents are addressed on NS through initial training that includes classroom and field exercises. Employees are trained and then required to demonstrate proficiency in performing structured hands-on tasks. New employees are coached both by their supervisors and their peers. NS employs constant remedial training and exposure to rule understanding and compliance through training videos, annual rules exams, annual safety workshops, one-to-one contacts between officers and craft employees, quarterly contacts on specific safety data/rules understanding, safety meetings, efficiency checks, train

rides, an alternate approach to discipline after a rule violation, job briefings and numerous other mechanisms. These processes have been in effect for many years and are constantly reviewed for improvement. There is no need for additional regulatory policy.

24. Do you have "Light Duty" type programs where instead of marking off an employee for being injured, they come to work and basically do nothing but sit in a room all day? Do you consider this practice to be harassment?
A: NS policy prohibits allowing or requiring an injured employee who is unable to perform essential job functions to remain in a work status in order to avoid classifying the incident as reportable. NS does have a policy, consistent with the Americans with Disabilities Act (ADA), the Rehabilitation Act and various state laws, of granting reasonable accommodations to injured and other employees with medical conditions so that the employees can return to work as quickly as is reasonably possible. This is fundamentally different from the above-referenced "Light Duty" type program and in no way involves requiring employees to do nothing but sit in a room all day. Under NS policy, where medical information provided by the employee's physician or other involved medical professionals indicates that the employee is restricted from performing one or more duties of his or her job, a determination is made as to whether any precluded job duty is an essential or marginal job function. Where the precluded functions are determined to be only marginal job functions (*i.e.*, a job function that is not fundamental to the involved position,) the employee can be cleared for return to work notwithstanding his or her inability to perform the marginal job function. Where one or more precluded functions are determined to be essential, NS attempts to find mitigating devices or other accommodations that would enable the employee to perform the essential function(s).

In some cases, an employee with a temporary medical restriction, who likely would not be considered "disabled" under the ADA or other relevant laws, can also be cleared for return to work where his or her restriction relates only to marginal job duties. However, these decisions arise typically days and weeks, if not months, after an employee is injured and reportability has been resolved.

25. Do you honestly think that <u>no</u> intimidation exists?
A: NS is a large organization, and we don't claim to be perfect. We do claim to have established a robust safety program. We have done so by dedicating ourselves over the last 30 years to establishing a culture of safety. However, we recognize that no matter how robust or effective our safety program is there will be times when an NS supervisor fails to comply with NS policy. This is the exception and not the rule. NS has done a significant amount of training to ensure that supervisors and employees know what is expected of them and we have procedures in place to address the occasional exception (and indeed have done so

in an appropriate manner.) In fact, one of our largest unions, the United Transportation Union (UTU), recognized this in its testimony before this Committee on October 25, 2007. Specifically, as I mentioned in my own testimony, NS has encouraged UTU to bring to our immediate attention any instance in which it believes an employee injury has not been handled appropriately, or in accordance with NS policy. In recent years they have done so on the average of three or four times a year, communicating directly with NS' chief labor relations officer. His office conducts a thorough investigation of all available records. All supervisory officers involved in the case, and in some instances the complaining employees themselves, are interviewed personally by Norfolk Southern's Executive Vice President-Operations and Vice President-Labor Relations. Thereafter Norfolk Southern discusses the results with the UTU and sends a written summary. In many of the cases referred by the UTU, Norfolk Southern determined the handling of the employee injury had been appropriate and complied with NS policy. However, where we found that it had not, appropriate discipline was assessed against our supervisory officers. Norfolk Southern believes this process has been constructive and UTU has told us that it believes so as well.

26. How do you explain all the cases that FRA finds for underreporting?
A: This question states a conclusion that has no factual basis on Norfolk Southern and, accordingly, we do not accept the premise. Please refer to my answer to Question No. 2, above.

27. Mr. Wehrmeister, how is it that Norfolk Southern keeps winning the Harriman Award year after year?
A: Norfolk Southern employees have won the E. H. Harriman Memorial Safety Award because they have fewer injuries. Our employees genuinely desire to be involved in the safety process, and be each others brother's and sister's keepers. They embrace the safety process, participate, and involve themselves in a culture that promotes safety first.

28. Mr. Wehrmeister, are your employees rewarded for going injury-free every year? How?
A: Norfolk Southern employees reward themselves for going injury free every day by going home safely to their families. From time to time, field supervision and/or local safety committees choose jackets, caps, key rings or other small items of recognition that they distribute to employees who remain injury free. NS also has a stock unit award program for those winning FRA establishment locations that are in first place within their winning internal groups.

29. Mr. Wehrmeister, do you have any concerns at all that these rewards might motivate employees to not report injuries?

A: I have no concerns that such rewards as we offer motivate employees not to report injuries. They are designed to encourage a safety-focused esprit de corps and build pride. We learned long ago, internally, but also from our safety consultant, DuPont, that you can't buy safety and shouldn't even try.

Grant L. Becker
403 Bridlewreath Way
Mount Airy, MD. 21771
301-829-2399

Attention: [redacted]@mail.house.gov

Subject: CSXT various unsafe

To Whom It May Concern:

This letter is in reference to our conversation on Wednesday 28, 2007. I write this letter as a plea for the Oversight Committee and Congress to continue to work for public and railroad employee safety. Hopefully, the following information can assist your investigations.

I was a CSXT Yardmaster from February 1999 till November 2007, when I was terminated for violating a rule for conduct unbecoming of a CSXT employee. To this date, CSXT can't answer the question what action violated the rule. Or what behavior was unbecoming. This letter isn't an attempt for revenge, but since I can no longer protect the public or fellow employees, instead is a plea for Congress to protect the public and railroad employees. My record with CSXT is spotless and I always tried to protect: the public, my fellow employees, and CSXT. I can supply references that will confirm my character and the following information. Mr. Ray Wezka, (cell phone number 410-370-2703), is Local 1949 Chairman who can easily confirm the absurdity of CSXT's action in handling my case.

I. The intimidation of injured railroad employees.

In my opinion trouble with CSXT can be traced back to July 16, 2006, when I refused to cancel an ambulance call for an injured employee. The injured employee was a CSXT Engineer Mr. Howard Barr, who was operating the Y20216. Mr. Barr was injured outside of my yard limits. I received a call on the radio requesting help for Mr. Barr who was experiencing "numbness traveling up his arm." A request for an ambulance was made, and the train was moved to Waterview Avenue so emergency personnel could reach the crew. Terminal Trainmaster Walter Smith was located and updated. Terminal Superintendent Terry Turner called and requested me to cancel the ambulance request. I refused to cancel the ambulance because: Mr. Barr was initially injured by a thrown rock but was now experiencing numbness traveling up his arm, Mr. Barr could be experiencing a heart attack, and Mr. Matt Sanders (Conductor on Y20216) nor Mr. Barr were first aid qualified. I wasn't able to reason with Terminal Superintendent Turner who abruptly ended the conversation. A second call from Mr. Turner requested the ambulance to be cancelled, and because he was on the scene he would drive Mr. Barr for medical treatment. I refused to cancel the ambulance and contacted the conductor. Mr. Barr was already moved to the ambulance. Mr. Turner wasn't even on the scene or he would have seen the ambulance. At the end of my shift, I stopped by Harbor View Hospital to check

on Mr. Barr's condition. I was approaching the emergency room where Mr. Barr was located when Mr. Turner loudly announced, " you don't need to be here." I tried to explain, my reason for checking on Mr. Barr's condition. Present at the hospital were: Baltimore Terminal Superintendent Terry Turner, Assistant Balto. Terminal Superintendent Moran, and Trainmaster Beccio. Mr. Moran and Mr. Beccio wouldn't talk to me and my presence was obviously aggravating them; so I departed after receiving assurance Mr. Barr would be taken care of. I turned to leave when, Mr. Beccio and Turner announced that it was only a minor hand injury and that Mr. Barr was fully recovered. A discussion with Mr. Barr two weeks later revealed that he still was experiencing numbness and hadn't fully recovered.

Starting in July of 2006, I was experiencing intermittent chest pains. I was awaiting results from a Nuclear Stress Test and the opinions from my doctors. This is mentioned as reference.

A month later on August 17, 2006 I tried to call relief due to chest pains. A brief summary of events. Due to the office equipment not working on the upper two floors, I traversed the stairs numerous times. Calculated later to be equal to eighteen stories. I experienced chest pains and had to sit down. I called relief around 1600. During the three hour wait for relief Trainmaster Trainee Brenda Crosby twice approached, and asked if I still wanted relief. Ms. Crosby then stated that if I still wanted relief, I couldn't return to work without a doctor's note. Ms. Crosby didn't make this decision to violate the UTU Yardmaster Agreement and CSXT's written policies, but was ordered by Baltimore Terminal Management. Taking me out of service without a hearing is a violation of Article 21 of the UTU National Agreement. Article 27 was violated, because if the company felt I was medically unable to perform my duties then an impartial physician should have examined me. The company requires a MD-3-RRM form to be filled out by an attending physician if the employee misses at least ten days or the illness can affect their safety performance. A MD-3-RRM form was never requested. The doctor note I provided was never reviewed or commented, nor would anyone state what information they wanted from my doctor. During a visit to Curtis Bay, Division Manager Don K. Jones warned me against putting things in writing. Mr. Jones referred to my letter about the doctor note request and an e-mail about leaking ethanol tank cars. The following reasons support why taking me out of service was retaliation:

1. Three other employees that same week called relief, two engineers and a Yardmaster. The three other employees weren't taken out of service nor were they required to provide doctor notes.
2. Assistant Superintendent Moran claimed responsibility for taking me out of service. Mr. Moran, an ex-yardmaster, refused to answer why he would violate the UTU Yardmaster Agreement that he previously worked under.
3. Why wasn't CSXT's written procedures followed.
4. In my eight plus years of employment with CSXT, I have only tried to call relief one other time. The other time I was instructed to lie to fellow employees. The reason for not wanting to lie to fellow employees is because this would be an ethics and rule violation.

I filed a complaint with the CSXT Ethics Hotline, and was told the Ethics Hotline was unaware of the issue of managers intimidating injured employees.

The Arbitration Board awarded me the back pay on December 1, 2006.

Two other examples of CSXT Management handling employee injuries. A conductor reported being injured after assembling his train. He reported that while walking in the yard he kicked an air jack spraying his face with ice. The ice caused various cuts and bleeding on his faee. The conductor refused medical treatment, and only wanted to notify me. I explained once you report injuries, management must be notified. Management was notified, and Trainmaster Dave Hermes arrived and talked to eonductor. No paperwork or statements were ever filed and the train was allowed to depart.

Trainmaster Beccio contacted me and wanted details because he was severely disciplined by CSXT and had his bonus reduced. (I believe the figure given was over twenty thousand dollars) Mr. Beccio was handling a derailment at Bennings Yard when an employee at Jessup reported twisting his knee. Mr. Beccio spoke to the employee at Jessup by phone and the employee indicated he was okay. The next day the employee from Jessup sought medical attention with his private physician and treatment was prescribed. Thus the injury was now FRA reportable. The employee never called Mr. Beccio, so he wasn't able to take the employee to Concentra. Mr. Beccio was officially disciplined for not filling out paperwork when the employee reported the injury. Mr. Hermes was never disciplined for not filling reports on the conductor at Curtis Bay. The conductor at Curtis Bay never sought medical attention. Mr. Beccio asked if he could use my information as a witness.

I reported to work this spring to find the parking lot filled with various members of CSXT Baltimore Management. A Mr. Bey was injured when an air hose from a train line struck his leg. Mr. Bey was sitting on a railroad tie wall surrounded by management with a bag of ice on his leg. Mr. Bey appeared to be in obvious pain with tears, and his leg was twice its normal size. I relieved yardmaster Danny Wagner, I asked where Mr. Bey's train was located figuring on having to finish the work or yard the train. Mr. Wagner reported: the injury happened over two hours ago, train was yarded, and Mr. Bey was sitting on the wall with the ice bag all this time. Mr. Bey remained on the wall for another forty minutes of my shift before being moved for medical treatment.

The company charged and fired me based on the events of September 20, 2007. Returning from vacation in October, I was advised that I had to attend an investigation on October 10,2007. Due to the holiday weekend I didn't receive the actual charges until October 9,2007. I was never contacted prior to charges being filed. The investigation was scheduled for 0900 on October 10, 2007, which gave me less than a day to prepare. I can provide the details of September 20,2007 and of the investigation on October 10,2007. The transcripts were received from the investigations on October 30,2007. I immediately notified my union representative (Mr. R.P.Degenova) about the differences between the transcripts and my tape recordings of the investigation. After my two scheduled off days, I arrived to work on November 1,2007 to be advised by Trainmaster Mike Beccio that I couldn't work my shift and CSXT was going to issue time off. Mr. Beccio who was the company official ordered to run the investigation stated that in his opinion the investigation didn't reveal any conduct that should result in CSXT disciplining me with time off. I notified my Local Chairman, Mr. Wezka, who informed the rumor was company was going to terminate my employment versus time off.

Mr. Degenova, the required UTU Representative, was contacted and he stated Mr. Jones didn't know anything about discipline or attempts to fire. The next morning an overnight letter was received from CSXT terminating my employment, signed by Don Jones. The following are reasons that support the absurdity of CSXT's actions and support my belief this is the second time the company has tried to silence me.

1. The transcript, with its inaccuracies, and letter from the Transportation and Security Administration Inspectors show the only questionable behavior was the allege slamming of the phone. Please note, the phone is made of plastic and the company concedes there is no damage to the phone.
2. I can't find another employee on CSXT who was ever fired for a first offense!!
3. My employment record is completely clear. In just seven months at Curtis Bay, my immediate supervisors (Trainmasters Munley and Yanky) issued five "spot awards". The awards are given for exemplary service or accident prevention and consist of: hats, Cross pens, Maglight flashlights, and etc.
4. There were no injuries, accidents, equipment damaged, or trains delayed on September 20,2007. If my behavior was so unbecoming or serious, why was I allowed to continue to run Curtis Bay with all the various trains handling numerous loads of hazardous chemicals?
5. CSXT will not answer the question what alleged act or behavior is so serious to require termination.
6. A CSXT Police Officer was the main witness, and he alleges that various office items were thrown in front of the Transportation and Security Administration Inspectors. A letter from TSA Inspector (Mr. Crymble, Badge Number 5878) confirms only the phone was slammed. The other inspector present a Mr. Lee, TSA Badge Number 5849, was interviewed later by UTU Local Chairman Mr. Wezka confirmed the only questionable behavior was the slamming of a phone.
7. The week of my termination a Yardmaster (Mr. Gerry Welborn) and a Carman were involved in a heated argument. No charges were issued against either employee. CSXT's management called them in for a conference.

Mr. Wezka, Local 1949 Chairman, was contacted by CSXT and told I could have my job back if I didn't seek legal representation. Baltimore Superintendent Terry Turner promised Mr. Wezka numerous responses; the last promise was for an answer on the week of Thanksgiving. Mr. Turner advised Mr. Wezka to call him on Monday and they would review my status. Mr. Wezka diligently called that Monday, only to be told Mr. Turner was on vacation that week. I received a call on December 4,2007 from both UTU Union Representatives stating CSXT was willing to allow me to return to work as long as I signed a letter which would be entered into my permanent employee record. The letter was to state that I committed a wrong act, and CSXT was allowing me return based on their generosity. I would be required to attend a meeting and sign the letter in front of CSXT management and be available for work that day. "Wrong act" wasn't defined nor was the letter available for me to review. I requested the letter to be: E-mailed, facsed, or overnight express mail at my expense. The request was denied. I refused to agree to sign a letter that wasn't available for my review, and counter offered to work for CSXT until the mandatory arbitrator rendered his decision. I wouldn't admit guilt nor would CSXT. My counter offer was rejected. The other

reason for rejecting CSXT's offer was my personal safety. I wonder how many CSXT employees will not report close calls and accidents per the new FRA program, out of fear of being silenced?

The health of employees shouldn't be jeopardized waiting for a decision by management to allow emergency medical treatment. The delay could easily result in death or maiming of the employee in cases of heart attack or stroke. Also, no injured employee should suffer waiting for medical treatment to relieve his or her pain! I worry that more employees will be forced to suffer or worse, because who will dare endure the wrath of CSXT management. How can any data on safety be accurate or relevant if all occurrences aren't reported, and who will be intimidated from reporting by CSXT management? Will other yardmasters be intimidated from protecting fellow employees, when faced with the knowledge of how CSXT silenced me? I hope, Congress will continue to pursue railroad employee safety in this twenty first century and not allow the industry to regress to nineteenth century attitudes of disposable employees.

II.

In my opinion, the actions of CSXT's management were aimed at silencing my voice of concern over employee and public safety. Reading the above account you may find it hard to believe, until you actually review the facts. CSXT publicly pronounces safety is the first priority. the reality is quite different. I have tried to protect: my fellow employees, the public, environment, and CSXT at all times, by trying work for a safer CSXT. All employees are charged with notifying management of unsafe conditions and where practical to take steps to prevent loss or injury. The following are just a couple of examples to show that I am not an alarmist.

1. Working Locust Point Yard, I submitted numerous PI-82s, (A PI-82 is a company document for stating safety concerns) and request to management to fix safety concerns. Locust Point Yard was built over a swampy area early last century, muddy clay works it way up through the West End High Ladder. The clay can be slick as ice. Employees and visiting public had slipped when trying to cross the ladder to reach the office. Numerous requests to fix the problem were ignored. A Mr. Cliff Eubanks tried to cross the ladder slipped and broke his knee, and has never returned to work.
2. The walking conditions and brush surround the track leading too customer Clean Harbors. Numerous requests from the crews to have the walking conditions improved and the brush removed were ignored. A Mr. Hovater rode a car into the industry because the walking conditions were so bad and was knocked off by the brush. Mr. Hovater has never returned to work.
3. As seen on television last year. I was on the East end of Curtis Bay Yard protecting switches from being thrown by vandals and discovered the south side of the diamond tracks appeared to have excessive vertical motion. The ties appeared to be rotten with the majority of the support coming from bolts to the frogs. I removed the track from service. A CSXT Track Inspector, (name with held for his protection), confirmed my findings and told me the MOW was aware of the problem but manpower and the special ties to fix the problem weren't available due to budget concerns. The track was placed back

in service. A couple of weeks later, a Y322 crew switching out ordered cars derailed over the suspect track with the result of the cars hanging over the side of the middle Pataspco Street Bridge. CSXT was trying to place the blame on train handling.

4. How accurate are the safety figures presented to the FRA if all incidents aren't presented for review. A major source of concern is the lack of reporting incidents involving remote control equipped crews. An example, a damaged tank carload of chlorine was found by a switch crew before they coupled to the track. The last crew to handle the car and track was the third shift remote equipped crew. The following were damaged or torn off: safety railings, intrusion bar, ladder, and outer jacket had a hole, all from sideswiping another car. No statements were required nor was the incident investigated. A third shift remote equipped crew at Curtis Bay derailed three cars and tore down a light tower. The FRA Train Accident Data doesn't even show this incident.
5. I have pleaded for increased training of new hire employees and actual testing to identify deficiencies requiring more training. The training program produces employees that are a liability. CSXT Baltimore Management cut off the mentoring program due to budget concerns, and placed the duties of the mentors on the Trainmaster. I haven't found one new hire employee who has received a mentoring call or visit. New hire employees lack of ability to properly handle or identify crossovers, was one of the skills identified as lacking in the new hires. The final report isn't available on the new hire CSXT employee killed in Kentucky, but the facts known show the new hire employee crossed over light power into the side of another train.

III. Why I ask for Congress to continue to protect the public, railroad employees, environment, and CSXT.

This letter isn't for revenge; I truly believe the United States must have a safe and efficient rail network. The following is another example of un-safe behavior in my opinion, which could damage the: public and railroad industry. Three years ago, I discovered some of the cars classed, as "General Car Foreman", are cars that tripped the new wheel defect detectors. Cars classed, as "General Car Foreman" may not be removed from outbound trains, because the cars passed an inspection from car inspectors. General Car Foreman cars can be cars only requiring a visual inspection of potential defects or notification of upcoming required air brake certifications. In defense of the car inspectors, who may have two minutes or less to inspect all of the appliances of a rail car, obviously the defect detector has the advantage in detecting wheel defects. Every "General Car Foreman" car that I have ever discovered showing a wheel defect, required shopping due to wheel defects. Yardmasters didn't have access to Car Department computer screens, which would allow us to see which General Car Foreman cars, were flagged by the wheel defect detectors. I asked for changes in how the cars were classed and for access to screens. The changes never happened. I passed the information along to my fellow yardmasters to try and prevent future problems. Around September of 2007, I again discovered the above situation arising and notified management. October 29,2007 which turned out to be my last day of employment, this problem was still occurring. I was now able to access the Car

Department screens, which show why a car was classed as a General Car Foreman. Presenting the above concern, to a management employee I was told budget concerns prevented action on the "General Car Foreman" cars and that the cars were just "noisy bearing" cars. This last part of the statement was incorrect; the computer flags distinguish between "noisy bearings" and "wheel defects". Why jeopardize: the public, environment, employees, and CSXT with a problem that should have been corrected three years ago.

CSXT has effectively silenced me, hopefully Congress will continue to work towards protecting the: public and railroad employees. Thank you, for your time in reviewing my concerns and your efforts.

Respectfully

Grant L. Becker

TESTIMONY OF CHRISTOPHER BELANGER

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BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

Dear Mr. Oberstar & Committee

I am writing this letter in reference to the congressional hearing that I watched over the internet on October 25, 2007, which discussed the railroads' harassment and intimidation tactics and surprisingly turned into the consideration of the termination of FELA for Workman's Compensation. I feel this would be detrimental to all railroad employees. We rely on the FELA to protect our jobs, health, and sanity. I believe the FELA gives us a voice and a leg to stand on in this sometimes-brutal industry. I would like to tell you my story, which is just one of the many which are taking place every day on these railroads.

I hired out with the BNSF in Seattle, Washington on October 21,1996, and have just completed eleven years. The BNSF refers to me as a "red employee". In my eleven-year career, I have had close to 330 operations tests and to my knowledge have failed 3. One for wearing my wedding ring, second for my conductor not making a cut of cars behind a spray-painted line, and the third for the BNSF's availability policy. The railroad uses the availability policy as a harassment tool. I was investigated for violating the availability after my on-the-job injury. In my last employee review I had two trainmasters take me into a room and close the door and continue to tell me that it will take 3 years to clear up my record and that I am going to be watched and to be careful.

The BNSF's Availability Policy mandates that employees be available 75% of all time, on call 24 hours a day, 7 days a week, 365 days a year. When I hired out there was no availability policy. I work with an employee whose name is Buddy Hall, he worked 270 hours in one month and did not comply with the availability guidelines and was investigated by the railroad. He was forced to either sign alternative handling, which is admitting guilt, or be on probation for 3 years. This is wrong and more than harassment, it is criminal. And they say safety is there number one goal.

My "red" status is all due to two separate injuries that were both on BNSF property and both on their locomotives. The first one was on March 28, 2001. My crew took pictures of the scene before the company could get to it. The second injury was in April of 2006, when I was caused to slip and fall on round metal pellets that were on the engine walkway. This fall resulted in stretching my ACL and tearing my medial meniscus in which surgery was required to repair. We took pictures with my camera phone. After my deposition, the BNSF produced pictures that showed zero pellets. These injuries are due to the company's negligence per the Locomotive Inspection Act, which states they are to keep these locomotive's safe and clean of debris. If I have any sort of mishaps my career is in jeopardy.

This is the same company that keeps taking my vacation and personal sick days every time I lay off, Family Medical Leave. They lost in 3 different Courts including the Seventh Circuit of

Appeals and continue to do as they please. The BNSF abides by no law except for their own harassment and intimidation laws.

After hearing you ask the railroads if they would be up for a Workman's Compensation being drafted, one company official answered yes, before you had even finished asking the question. My fellow trainmen and I beg of you, not to even consider this. It would cripple and ultimately destroy any leverage that we have over this railroad regime. Without FELA we are finished and are at their total mercy.

Mr Oberstar, you talked about your father who worked in the mines, if he didn't have the protection he had it would have been devastating for your Family. We in the railroad industry are fathers, mothers, grandparents, sisters, and brothers; we are human beings who need some protection from these huge companies who would love to see FELA go away forever. These are very serious issues that are taking place all over the system as I write this letter. Those officials were good talkers in front of you people, but injured people such as myself strongly disagree with their testimony. Please feel free to contact me any time and please hear our stories. They are real and most of all they are true. Thank you for your time.

Sincerely,

Chris Belanger,
BNSF Railroad Engineer

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

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October 9, 2007

The Honorable James L. Oberstar
United States Representative
2365 Rayburn House Office Building
Washington, DC 20515

Re: ***Injured Railroad Workers – Harassment and Intimidation and Denial of Prompt Medical Attention***
H.R. 2095, Sections 606 and 301

Dear Representative Oberstar:

I understand that on October 25, 2007, the House Transportation and Infrastructure Committee will hold a hearing on "the impact of railroad injury, accident, and discipline policies on the safety of America's railroads." I further understand that this hearing will address the need for proposed legislation, Sections 606 and 301 of H.R. 2095, to protect rail workers from harassment and intimidation and to prohibit railroads from denying prompt medical attention to injured employees or disciplining, or threatening to discipline, employees for requesting or receiving medical care. Please accept this letter for inclusion in the hearing record.

In its 2005 session, the Minnesota Legislature heard extensive testimony about railroads denying medical or first aid treatment to injured rail workers and about common practices by railroads to harass or intimidate injured rail workers to discourage them from receiving medical attention. The testimony showed these problems are widespread in Minnesota. The Minnesota Legislature responded by enacting Minn. Stat. § 609.849, which made it a crime for a railroad or person employed by a railroad to intentionally (1) "deny, delay, or interfere with medical treatment or first aid treatment to an employee of a railroad who has been injured during employment" or (2) "discipline, harass, or intimidate an employee to discourage the employee from receiving medical attention or threaten to discipline an employee who has been injured during employment for requesting medical treatment or first aid treatment." *Id.* subd. (a)(1)-(2). Section 606 of H.R. 2095 mirrors these provisions of Minn. Stat. § 609.849.

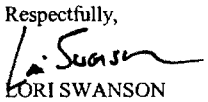
The railroads brought suit in federal court, claiming the Minnesota statute is preempted by the Federal Rail Administration regulation that requires a railroad's internal control plan for accident and injury reporting to include a policy statement against harassment or intimidation of injured employees. 49 C.F.R. § 225.33(a)(1). Judge Michael Davis struck down the second clause of the Minnesota statute as preempted by this regulation but upheld the first clause of the statute because it prohibits the withholding or delaying of medical attention without any element of harassment or intimidation. *BNSF Ry. Co. v. Swanson*, 2007 WL 1994042, No. 06-1013 (D.

Minn. July 3, 2007). The railroads have appealed Judge Davis' decision to the Eighth Circuit Court of Appeals, Case No. 07-2784, relying on the reasoning of a recent case that struck down a similar Illinois statute in its entirety based on preemption. *BNSF Ry. Co. v. Box*, 470 F. Supp.2d 885 (C.D. Ill. 2007).

All can agree that railroads should not deny prompt medical attention to injured rail workers and should not discipline or otherwise harass and intimidate them. While it is my strong belief that our state law is not preempted, I nevertheless urge the Congress to act to ensure that rail workers throughout the nation, and not just in Minnesota, are provided prompt medical care and not subjected to harassment and intimidation.

I thank you and the Committee for considering these comments.

Respectfully,



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UTAH STATE LEGISLATIVE BOARD
OF THE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

December 19, 2007

EEO Department
1400 Douglas Street
Stop 0310
Omaha, NE 68179

Recently in Milford Utah, there has been a list taped to several desks in the employee crew room listing Transportation Employees names that the local manager considers as "*the worst*" or problem Employees. Attached for your files and information is a photo of the list.

After reviewing the Union Pacific Railroad's "Statement of Policy on Ethics and Business Conduct", and the "EEO" policy, it is this board's belief that Union Pacific Management is in direct violation of both policies.

Item 2, of the "Statement of Policy on Ethics and Business Conduct", section E, numbers 4 & 6 describe that everyone is entitled to a "*respectful work environment*" and an environment free of "*retaliation*".

The Union Pacific Railroad EEO (Equal Employment Opportunity) Policy explicitly outlines the "*Prohibition of Offensive Behavior and Remarks*" and also addresses "*Violence and Abusive Behavior in the Work Place*". Upon further review of the EEO Policy attachment "A", it states clearly that it is against company policy for any employee, whether agreement or managerial to *Threaten, Intimidate, Bully or Abuse another person.*

It is obvious that the reason that these lists are posted in the Milford Yard Office is to directly Intimidate, Harass and Humiliate the employees whose names appear upon these lists.

As the Utah State Legislative Board Chairman, representing railroad transportation employees in the state of Utah, I am asking you to look into this matter and take corrective action to assure that this type of intimidation and harassment does not happen again and that the rights of all Union Pacific Employees are protected under our own company policies and federal laws.

Sincerely,

Jeff Worthington
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cc: John Tolman, Vice President & National Legislative Representative
Tim Donnigan, General Chairman
Randy Jeppson, Local Chairman

10 WORST

Average of CT_TD Minutes	Call Circ7		
Conductor	CX236	CX479	UP076
STEVENS, JA	95		
WESTLEY, DJ	108		
BANKS, MC	92	108	
JENSEN, RL	115		
BELL, JE	116		
HERNANDEZ, AC	128		
OLSEN, CW	139		
MCNEIL, JL	89	61	
ROBERTS JR, MW	119		
PECTOL, JL	86		

CONTINUED PRACTICE COULD RESULT IN DISCIPLINE

Average of CT_TD Minutes	Call Circ7							
Conductor	CX236	CX479	UP076	UX293	UY993	UZ029	(blank)	Grand Total
STEVENS, JA	95					129		104
WESTLEY, DJ	108					101		105
BANKS, MC	92	108						98
JENSEN, RL	115					132		122
BELL, JE	116					133		126
HERNANDEZ, AC	128							128
OLSEN, CW	139				47			78
MCNEIL, JL	89	61						70
ROBERTS JR, MW	119							119
PECTOL, JL	86							86

Count of TRAIN ID		Worst
Conductor	Grand Total	Offender
STEVENS, JA	11	1147
WESTLEY, DJ	10	1052
BANKS, MC	10	983
JENSEN, RL	8	972
BELL, JE	5	631
HERNANDEZ, AC	3	384
OLSEN, CW	3	233
MCNEIL, JL	3	211
ROBERTS JR, MW	1	119
PECTOL, JL	1	86