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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].

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~~ have 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. Jungbauer's prepared statement follows:]

********** INSERT **********

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

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

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.

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

NEW ANTI-HARASSMENT LAW

Effective: August 3rd, 2007 (signed into law by President)

TO WHOM DOES IT APPLY:

Employee of
- Railroad carrier engaged in interstate or foreign commerce,
- a contractor or subcontractor of such a railroad, or
- employee of such a railroad

PROHIBITS
Discharge
Demote
Suspend
Reprimand
any other way discriminate against an employee

If it is due in whole or in part to the following acts done by the employee in good faith

FOR

1) Providing information or directly causing information to be provided to or an investigation stemming from the provided information is conducted by:
- fed., state or local regulatory or law enforcement agency
- member of congress, committee for congress, government accountability office
- person with supervisory authority over the employee or person who has the authority to investigate, discover or terminate the misconduct.

* information must be that which employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, gross fraud, waste or abuse of Fed. grants or public funds intended for rr safety or security.

2) Refuse to violate or assist in violation of fed. law, rule, or reg. relating to railroad safety or security

3) File complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, ch. 51 or 57 of title, or testify in that proceeding.

4) notify or attempt to notify rr of Sec. of trans. of a work-related personal injury or work related illness of employee

5) cooperate with safety or security investigation by Sec. of Trans., Sec. Homeland or NTSB

6) furnish information to Sec. Trans., Homeland, or NTSB or any Fed. state or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation

7) accurately

8) reporting a hazardous safety or security condition

9) refusing to work in a hazardous safety or securty condition if

- refusal is made in good faith and no reasonable alternative is available to employee
- reasonable individual in the circumstances would conclude the condition presents imminent danger of death or serious injury and urgency does not allow sufficient time to eliminate danger
- employee, where possible, has notified the rr of the existence of the condition and intention not to perform further work or not to authorize th use of the equipment track or structures unless condition is corrected immediately or is repaired or replaced

ENFORCEMENT

Complaint pursuant to 49 USC 42121 within 180 days of conduct with Dept. of Labor (OSHA regional office)

Investigation

Preliminary Order - 30 days to file objections to findings or order and request hearing on the record.

Final Order

Failure to comply with order then Sec. of Labor can bring civil action in Fed. Court where violation occurred.

If no final decision by Sec. of labor within 210 days then original action in District Court

Appeal - must be made within 60 days of final order to the United States Court of appeals for the Circuit in which the violation occurred.

REMEDIES

make person whole

- reinstatement with same seniority as they would have had
- back pay with interest
- compensatory damages including litigation costs, expert fees, attorney fees.
- punitive damages, not to exceed $250,000

(G) Any other considerations the Secretary believes would develop an accurate, plausible dispersion model for toxic-inhalation-hazard materials released from a railroad tank car as a result of a terrorist act.

(3) CONSULTATION.—In conducting the dispersion modeling under paragraph (1), the Secretary shall consult with the Secretary of Transportation, hazardous materials experts, railroad carriers, nonprofit employee labor organizations representing railroad employees, appropriate State, local, and tribal officials, and other Federal agencies, as appropriate.

(4) INFORMATION SHARING.—Upon completion of the analysis required under paragraph (1), the Secretary shall share the information developed with the appropriate stakeholders, given appropriate information protection provisions as may be required by the Secretary.

(5) REPORT.—Not later than 30 days after completion of all dispersion analyses under paragraph (1), the Secretary shall submit to the appropriate congressional committees a report detailing the Secretary's conclusions and findings in an appropriate format.

Deadline.

SEC. 1520. RAILROAD THREAT ASSESSMENTS.

Not later than 1 year after the date of enactment of this Act, the Secretary shall complete a name-based security background check against the consolidated terrorist watchlist and an immigration status check for all railroad frontline employees, similar to the threat assessment screening program required for facility employees and longshoremen by the Commandant of the Coast Guard under Coast Guard Notice USCG–2006–24189 (71 Fed. Reg. 25066 (April 8, 2006)).

SEC. 1521. RAILROAD EMPLOYEE PROTECTIONS.

Section 20109 of title 49, United States Code, is amended to read:

"SEC. 20109. EMPLOYEE PROTECTIONS.

"(a) IN GENERAL.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

"(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

"(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452);

"(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

"(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

"(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

"(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

"(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

"(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

"(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

"(7) to accurately report hours on duty pursuant to chapter 211.

"(b) HAZARDOUS SAFETY OR SECURITY CONDITIONS.—(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

"(A) reporting, in good faith, a hazardous safety or security condition;

"(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

"(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

"(2) A refusal is protected under paragraph (1)(B) and (C) if—

"(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

"(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

"(i) the hazardous condition presents an imminent danger of death or serious injury; and

"(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

"(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the

intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

Applicability.

"(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

"(c) ENFORCEMENT ACTION.—

"(1) IN GENERAL.—An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a) or (b) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

"(2) PROCEDURE.—

"(A) IN GENERAL.—Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b), including:

"(i) BURDENS OF PROOF.—Any action brought under (c)(1) shall be governed by the legal burdens of proof set forth in section 42121(b).

"(ii) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a) or (b) of this section occurs.

"(iii) CIVIL ACTIONS TO ENFORCE.—If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121.

"(B) EXCEPTION.—Notification made under section 42121(b)(1) shall be made to the person named in the complaint and the person's employer.

"(3) DE NOVO REVIEW.—With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

"(4) APPEALS.—Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b), may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

Deadline.

"(d) REMEDIES.—

"(1) IN GENERAL.—An employee prevailing in any action under subsection (c) shall be entitled to all relief necessary to make the employee whole.

"(2) DAMAGES.—Relief in an action under subsection (c) (including an action described in subsection (c)(3)) shall include—

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) any backpay, with interest; and

"(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(3) POSSIBLE RELIEF.—Relief in any action under subsection (c) may include punitive damages in an amount not to exceed $250,000.

"(e) ELECTION OF REMEDIES.—An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

"(f) NO PREEMPTION.—Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

"(g) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

"(h) DISCLOSURE OF IDENTITY.—

"(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions.

"(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosures shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur. Notification.

"(i) PROCESS FOR REPORTING SECURITY PROBLEMS TO THE DEPARTMENT OF HOMELAND SECURITY.—

"(1) ESTABLISHMENT OF PROCESS.—The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities. Regulations. Notice.

"(2) ACKNOWLEDGMENT OF RECEIPT.—If a report submitted under paragraph (1) identifies the person making the report,

the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

"(3) STEPS TO ADDRESS PROBLEM.—The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.".

6 USC 1170.

SEC. 1522. SECURITY BACKGROUND CHECKS OF COVERED INDIVIDUALS.

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) SECURITY BACKGROUND CHECK.—The term "security background check" means reviewing, for the purpose of identifying individuals who may pose a threat to transportation security or national security, or of terrorism—

(A) relevant criminal history databases;

(B) in the case of an alien (as defined in the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)), the relevant databases to determine the status of the alien under the immigration laws of the United States; and

(C) other relevant information or databases, as determined by the Secretary.

(2) COVERED INDIVIDUAL.—The term "covered individual" means an employee of a railroad carrier or a contractor or subcontractor of a railroad carrier.

(b) GUIDANCE.—

(1) Any guidance, recommendations, suggested action items, or any other widely disseminated voluntary action items issued by the Secretary to a railroad carrier or a contractor or subcontractor of a railroad carrier relating to performing a security background check of a covered individual shall contain recommendations on the appropriate scope and application of such a security background check, including the time period covered, the types of disqualifying offenses, and a redress process for adversely impacted covered individuals consistent with subsections (c) and (d) of this section.

(2) Within 60 days after the date of enactment of this Act, any guidance, recommendations, suggested action items, or any other widely disseminated voluntary action item issued by the Secretary prior to the date of enactment of this Act to a railroad carrier or a contractor or subcontractor of a railroad carrier relating to performing a security background check of a covered individual shall be updated in compliance with paragraph (1).

(3) If a railroad carrier or a contractor or subcontractor of a railroad carrier performs a security background check on a covered individual to fulfill guidance issued by the Secretary under paragraph (1) or (2), the Secretary shall not consider such guidance fulfilled unless an adequate redress process as described in subsection (d) is provided to covered individuals.

(c) REQUIREMENTS.—If the Secretary issues a rule, regulation, or directive requiring a railroad carrier or contractor or subcontractor of a railroad carrier to perform a security background check of a covered individual, then the Secretary shall prohibit the railroad carrier or contractor or subcontractor of a railroad carrier from making an adverse employment decision, including removal

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§ 42121. Protection of employees providing air safety information

(a) Discrimination Against Airline Employees.— No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor Complaint Procedure.—

(1) Filing and notification.— A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.—

(A) In general.— Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor

shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.—

(i) Required showing by complainant.— The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.— Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by secretary.— The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.— Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final order.—

(A) Deadline for issuance; settlement agreements.— Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy.— If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints.— If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) Review.—

(A) Appeal to court of appeals.— Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack.— An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by secretary of labor.— Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.—

(A) Commencement of action.— A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees.— The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.