



U. S. House of Representatives
Committee on Transportation and Infrastructure
 Washington, DC 20515

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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 Office¹ ("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 less than two-tenths of one percent of all accidents and incidents involving railroads" [emphasis added].⁵ From 2002 through 2004, FRA inspectors identified 7,490 critical safety defects out of 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.

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

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

⁹ FRA Guide for Preparing Accident/Incident Reports, FRA Office of Safety, DOT/FRA/RRS-22, Msy, 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.

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 why 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.

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.