

HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE

TESTIMONY OF JAMES BRUNKENHOEFER
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Good Morning. My name is James Brunkenhoefer. I serve as the National Legislative Director for the United Transportation Union (UTU) in Washington, D.C. We appreciate the Transportation and Infrastructure Committee scheduling this hearing on an important discussion of harassment and intimidation.

First, I want to thank the Committee for including whistleblower protection in the rail security legislation which passed Congress. Also, we appreciate the prompt medical treatment amendment contained in H.R. 2095, which passed the House last Thursday. Both of these provisions will help prevent, though sadly not eliminate, the serious problem of harassment and intimidation in the rail industry.

What I am about to present to you is not rhetoric. In your consideration of the rail safety legislation, we provided the Committee with numerous examples of harassment and intimidation in the rail industry. Additionally, we are aware of an investigation being conducted by the FRA on one of the nation's largest railroads covering complaints by the UTU and the BLET. I am confident the FRA will find what we have been alleging—unchecked harassment and intimidation, including violations of the accident reporting regulations for failure to report injuries, general disregard for the safety requirements, noncompliance of the railroad's own Internal Control Plan, officials repeatedly questioning the injured employee while being transported to a hospital, officials "suggesting" that if the injury is reported, it will be an adverse impact on his/her employment, subsequent to being treated the employee is frequently taken back to the railroad's offices for further interrogation, and subjecting an injured employee to excessive alcohol and drug testing even though there is no evidence of such use. We urge the FRA to further conduct similar investigations of the rest of the rail industry. The bottom line is that this practice has been rampant throughout the industry for many years, and the FRA has not had the necessary personnel to measure the problem. The time to address the problem is long overdue. The time to curb this cancer is now. With thousands of new employees being hired because of retirements in the industry, there will never be a better time to instill a positive culture for the employees.

I am sure the railroad officials testifying here today will tell you how they are taking measures to reduce this problem. However, as soon as the dust settles on this hearing, I know that again it will be business as usual. We have endured the false promises by management for too many years.

With management trying to manipulate the injury and accident numbers along with intimidated employees, both customers and commerce are adversely affected, because no one can be confident of the true safety problems which exist. The public, investors and rail customers would be shocked to learn from rail employees that a culture of lying, denial, and fraud is not only accepted in the railroad industry, it is rewarded, well rewarded. It is a problem that has become as much a part of the industry as the rail itself. It has existed the several decades that I have been involved in the rail industry. When the methods being used against their own employees is accepted practice, and in some cases well rewarded, should the investment community believe that the line on honesty and integrity, much less compassion, is drawn there? Incredibly, one railroad had in its 2006 Safety Action Plan a provision that orders supervisors to identify "bad actors" due to injuries at each on-duty location.

Let me briefly review with you a typical example of what we see as a major problem. A UTU member is injured and, under railroad rules, he/she is required to report that injury promptly. Although, under federal regulations, the railroad itself has 30 days to make a report to the FRA. If the UTU member does not promptly report, then the employee can almost be assured that there will be a formal railroad investigation, and he can expect to be disciplined, and in many cases fired. It does not matter that the injury may take hours or possibly days to manifest itself. Frequently when an employee contacts the responsible party appointed by the railroad, he/she is "unavailable" for a lengthy period of time, and the injured employee must make several attempts to report. The railroads demand reporting of the injury to management, and this exceeds the importance of getting the injured employee quick and proper medical treatment. It is curious that the railroads want to know about the injury, but they do not want the FRA to know about it.

In railroad culture; when an injured employee contacts is the appropriate person, that manager frequently initially urges that the employee delay filling out the carrier's required form. It is suggested that the employee delay reporting, since he "might feel better in the morning." The manager wants the employee to believe he is doing the employee a favor. The manager illegally tells the injured employee that he/she "knows what happens" when a formal report is filed. What this means is that the employee knows that a reportable injury will be a mark on his/her record and will have an adverse impact on the person's career. There will be a formal investigation or hearing and, that most of the time, the employee will be disciplined, with an overwhelming number being dismissed.

If the injury has not improved "overnight," and the employee calls again and asks for the manager to formally report what happened, the first manager is usually unavailable. If he is, the injured employee is lectured that he was not told to not report the injury. It is a no win situation for the injured person. If the first manager is unavailable, then the new manager will ask why the reporting was delayed, and if the UTU member then reports, he will be charged with a rules violation for late reporting of the injury, plus the some rules violation connected with the injury. The employee is offered various incentives if he doesn't report the injury. He is offered "safety days" or "leave days," or encouraged to use vacation days if he agrees not to make a report. In other words, the manager commits fraud by enticing the employee to withhold a report required by the FRA.

If the employee chooses to go ahead and report, then the manager attempts to use a form of extortion. The manager appears to be his friend and is just trying to help, saying things will be bad if the paper work is filled out and the process is started. The employee is told then others will get involved, meaning that if the employee wants to keep his job, which he needs to support his family, make payments on his house, have health care for his family and attain retirement credits, then he better not report. If the employee reports and requests to mark off, the employee frequently is instructed to mark off either "sick" or "suspended." This violates the FRA reporting regulation because the days off are improperly recorded, but the carriers don't care. Additionally, it is common that the injured employee who reported will be placed under much more scrutiny with repeated observations and more efficiency testing. We also have instances where injured employees were improperly subjected to Federal reasonable cause testing, even though reasonable cause did not actually exist. This is just additional forms of harassment. Obviously, each of these practices by the railroads deters one from reporting.

The Committee has reports of managers who tell those that have received an injury report to cancel 911 calls from the field until such time that the manager can "check it out" and the injured employee is left in the field in pain without prompt medical care. Injured employees, who are in pain and need immediate medical attention, are held at the scene or at a company facility for questioning and interviews, sometimes for hours. Sometimes the injured employee is interviewed, not once but several times, before he is transported for medical attention. Your prompt medical treatment provision in H.R. 2095 will significantly help alleviate this problem. Still, if the injured employee's statement varies at any point during the process, then the employee can be charged with lying.

Frequently, while the employee is being transported to a medical facility, in many cases being steered to a medical facility or a doctor favored by the railroad, the questioning continues all the way to the door of the emergency room. Since the passage of the HIPPA, the number of instances of managers demanding to enter the treating room has decreased. But the employee is again questioned on the return trip. On some occasions the employee who has been medicated and/or have stitches, is not allowed to leave company property. There is more paper work and more questions, and in some cases, the poor victim is transported back to the scene of the accident, many hours after the accident, for a reenactment under the guise of the manager wanting to know exactly what happened to prevent it happening again in the future. This is just another opportunity to get the medicated employee, who is in pain, to make a mistake in explaining what happened so that he may be charged with lying. Sometimes the managers will tell the employee not to take prescription medicine and, instead, to take over the counter medicine instead so that the injury will not need to be reported. The result is that the victim experiences a delay in healing and/or additional pain in order that that the manager involved will not have a reportable injury on the territory and most time gets their safety bonus.

When an injured employee reports an injury, they can expect, while they are convalescing, the game to go on. The railroad will use the threat of being fired to force the employee to return again and again to the railroad's chosen doctors, no matter how much pain the individual is enduring. Sometimes a family member must miss work or school to go to a medical facility far from his home that was selected by the railroad. Many times the company's chosen doctor's opinion disagrees with the UTU member's treating physician. The member is encouraged or threatened to disregard his physician's opinion and return to work or else. After returning to work, some injured employees are tested repeatedly for possible rules violations, so they can be fired without that action being attributed to the injury. To create fear in the workforce, many of the actions create an environment so that managers have numerous examples to point to at every location if the UTU member do not play and go along to get along.

The railroads also use bonuses for managers whose record falls below a certain target on the number of accidents reported in their assigned territory. Many times, these bonuses are in the multi-thousands of dollars. Instead of this being motivation to cut down on injuries, it is instead motivation to avoid reporting injuries. This allows those at the top of a corporation to claim that managers are being motivated to be safe. This is a damn lie – and they know it. The manager, given the choice of being fired, demoted and/or losing his bonus, and maybe the bonuses of other managers, has motivation on the wrong side. How is this different from the bonuses paid to those who perpetrated Enron and reaped millions in bonuses? Yes, when there is a lay down case presented to upper management of a cover-up, the manager could be fired, demoted or transferred. UTU would also support the transfer of managers who engage in such lying, denial, fraud and reward schemes. I would suggest that they get transferred to such places as San Quentin, Sing-Sing or Leavenworth. Many current railroaders, and former railroaders, are still suffering with untreated injuries. If such action on the part of railroad management is not a crime, it needs to be.

No American should have his medical treatment delayed or denied. Railroad managers use the threat of taking away an employee's job for not doing what is required by federal law. How is this not extortion or fraud? I very much expect that the industry representatives will try to severely mislead this Committee. They will attempt to deny that the problems are as serious as the evidence that has been received by Committee staff shows, or just give them another break because they did not know it was this bad and they will fix it. If they do that, it will be a lie. They have told us the same thing at hundreds of meetings. I believe that it is time to learn from the railroads and threaten them as they have treated others. Get tough, really really tough. This activity must be made criminal.

Why would corporations engage in such activity? The answer is simple. In order to save money, much of this problem revolves around the Harriman Award. An award that the industry gives to itself. It claims that it uses "FRA statistics". But where do these statistics come from? They come from the railroads. Garbage in and garbage out. Many years ago, labor chose not to be a part of this shame but yet it goes on. We have been told that the game goes on because the poor unknowing insurance companies use this award as part of the calculations on its premiums.

FRA Oversight

Regarding federal enforcement of this problem, the FRA needs to be much more active in this area. The FRA's investigation of the railroad, which I previously mentioned, was long overdue. I recognize that the FRA is understaffed and, most importantly, does not have enough tools to adequately handle the situation. The UTU appreciates your Committee in H.R. 2095 authorizing more safety inspectors for the FRA. Railroads do not do business behind a fence or a locked door. It operates in almost every community in our nation. As long as they are allowed to play the lie, deny fraud and reward game, the regulators will not get accurate data as to the true safety situation of this industry. This should be a concern of everyone. If the data, on safety is not collected accurately because of the cover-up railroad culture, then it cannot be evaluated and precautions incorporated. To allow this endemic problem to go unchecked is a threat, not only to railroad workers, but the stockholders, bond holders, and most importantly to the public as a whole. If such conduct were to happen outside this industry, it would be criminal.

There are some that would like the Committee to believe that the problem is a law known as FELA. The railroads do not like this law and have convinced themselves that is ok to act the way outlined. In other words, they believe that if you don't like a law that applies to them, it is ok to torture your employees until they demand to repeal a law. This is as wrong as torturing someone until they convert because you don't like their religion. Then the torture will stop. There is no justification for the railroad actions – none.

I also want to assure the Committee that this situation has absolutely nothing to do with contract negotiations. There is nothing that the railroads can offer at the table that can get this union to approve of this torture.

In conclusion, railroad culture needs a dramatic change when it comes to harassment and intimidation. We are hopeful that the Committee and Congress will do its part in addressing this issue and making such activity criminal.