

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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August 1, 2008

All General Chairmen
All State Legislative Board Chairmen

Dear Sirs and Brothers:

We have received several requests for information and guidance concerning the application of the employee protections set forth in federal rail safety law at Section 20109 of Title 49 of the United States Code, as amended by Section 1521 of the *Implementing Recommendations of the 9/11 Commission Act of 2007*. Pub. L. 110-53 (Aug. 3, 2007), 121 STAT. 266, 444-448. I have attached a copy of the amended statutory language to this Memorandum for your ready reference.

Section 20109(a) protects a railroad employee from discharge, demotion, suspension, reprimand, or any other form of discrimination when the employee lawfully and in good faith does any of the following:

- “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 (sic) 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;”
- refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
- file a complaint, or directly cause to be brought a proceeding related to the enforcement of rail safety statutes or, as applicable to railroad safety or security, hazardous materials and sanitary food transportation statutes, or to testify in that proceeding;



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- notify, or attempt to notify, the railroad carrier or the Secretary of Transportation (including the Federal Railroad Administration) of a work-related personal injury or work-related illness of an employee;
- cooperate with a safety or security investigation by the Secretary of Transportation (including the Federal Railroad Administration), the Secretary of Homeland Security, or the National Transportation Safety Board;
- furnish information to the Secretary of Transportation (including the Federal Railroad Administration), 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
- accurately report hours on duty pursuant to chapter 211.

Section 20109(b) also prohibits retaliation or discrimination against an operating employee who — in good faith and with no reasonable alternative — refuses to perform a task if faced with a hazardous safety or security concern; provided, that a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous condition presents an imminent danger of death or serious injury and the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal. This provision was not changed in 2007.

Section 20109(c) sets forth the process by which the individual's legal rights can be asserted, and begins with the employee filing a complaint with the local office of the U. S. Department of Labor's Occupational Safety and Health Administration ("OSHA"), which is the federal agency Congress has given jurisdiction over these cases. 49 U.S.C. § 20109(c)(1). Thereafter, the complex statutory procedures in place for aviation whistleblower complaints govern the process. *See* 49 U.S.C. § 42121(b), also attached.

If a person fails to comply with an order issued by the Secretary of Labor, the Secretary 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. 49 U.S.C. § 20109(c)(2)(A)(iii). In the event OSHA fails to issue a "final decision within 210 days after the filing of the complaint ... the employee may bring an original action at law or equity for *de novo* review in the appropriate district court of the United States" 49 U.S.C. § 20109(c)(3). Also, any person adversely affected or aggrieved by an order may obtain review of the order in the United States court of appeals for the circuit in which the violation allegedly occurred or the circuit in which the employee 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, and the petition for review shall not, unless ordered by the court, operate as a stay of the order. 49 U.S.C. § 20109(c)(4).

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Section 20109(g) — entitled “Rights Retained by Employee” — provides that nothing in Section 20109 “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.” Therefore, Section 20109 does not supersede any other existing remedy. However, Section 20109(e) — entitled “Election of Remedies” — states that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.”

The statute fails to adequately set forth what action(s) or event(s) may constitute an election of remedy by an employee. I am certain that many initial complaints filed with OSHA are likely to lead to litigation merely over the meaning of the phrase “protection under ... another provision of law,” which some might interpret as including arbitration under Section 3 of the Railway Labor Act.

Assuming such arbitration might be a remedy, along with the agency complaint and review or the filing of a complaint in federal court by the employee’s attorney, how and when is the election made? Would it be made when the employee or his/her Local Chairman appeals the imposition of discipline, or the General Chairman appeals the denial of the initial appeal, or when the General Chairman rejects the denial of the carrier’s highest designated officer and the case is docketed for arbitration? Answers to these questions have not yet been provided, and cannot be expected in the immediate future.

A review of the 49 U.S.C. Section 42121 process establishes that an employee wishing to pursue his/her Section 20109 rights will — in all likelihood — require the assistance of counsel. Indeed, the Section 20109(c)(1) reference to “filing a complaint” with OSHA, and the Section 20109(c)(3) right to “bring an original action at law or equity for *de novo* review in the appropriate district court of the United States” indicate that such issues are to be litigated, in the traditional sense, rather than be handled in a representational manner, as the previous statute provided.¹

That being said, I believe that we have a limited moral obligation, although by no means a legal duty, to our members regarding Section 20109. To be sure, we should warn members considering pursuing a Section 20109 action that we have unresolved concerns regarding the scope of the election of remedies clause. Furthermore, we should caution members that OSHA will not review the carrier’s handling of the case on the property; Section 20109’s scope is limited to

¹ This plain language contrasts sharply with, for example, the appellate provisions set forth in Subpart E of Part 240 of Title 49 of the Code of Federal Regulations, which prescribes procedures to be used in appealing a railroad’s decision to deny or revoke the certification of a locomotive engineer. The latter regulation explicitly provides for the designation of representatives, who are empowered to act on their client’s behalf in the process. Section 20109’s silence indicates that members who wish to pursue its remedies must either retain counsel at an appropriate point, or proceed *pro se*.

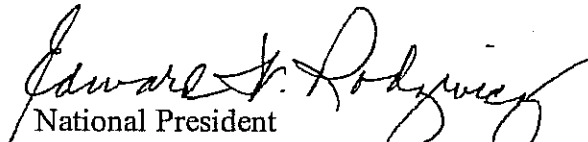
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whether the carrier's conduct violated Section 20109 *only*, and relief may not be ordered if the carrier demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the illegal conduct. *See* 49 U.S.C. § 42121(b)(2)(B)(iv). We also can offer advice on filing a complaint, including providing the address and telephone number of the OSHA regional office that would have jurisdiction over the complaint. Likewise, we can counsel our members to avoid making statements in a complaint that conflict with their testimony at a disciplinary investigation.

When a particularly anti-labor President occupies the White House — such as the current resident — I also think we have a moral obligation to caution our members not to expect justice from this venue that we have been unable to win elsewhere. The broad expansion of Section 20109 last year was long overdue, and an absolute necessity during this post-911 era, when civil liberties have been forced to take a back seat to heightened security concerns. It will not, however, be a silver bullet with which we can snuff out carrier harassment and intimidation of injured workers overnight.

Attached for your guidance is draft release language that General Committees may use in the event a member wishes to direct the BLET to take no further action on his/her behalf in order for the member to pursue a Section 20109 remedy. Please direct any other questions or requests you may have concerning this matter to my office.

Fraternally yours,


National President

enclosure

cc: Paul T. Sorrow, First Vice President
William C. Walpert, National Secretary-Treasurer
Advisory Board
All Local Chairmen
Harold A. Ross, Esquire, Interim General Counsel
National Division Executive Staff

DIRECTIVE AND RELEASE

I, _____, hereby request, authorize and direct the Brotherhood of Locomotive Engineers and Trainmen, its General Committee of Adjustment, Local Divisions and their officers, employees, representatives, agents and assigns (hereinafter collectively referred to as "BLET") to discontinue and terminate any handling and the taking of any further action in processing my claim/grievance to set aside my dismissal and/or other disciplinary action taken by the Carrier, _____, in regard to the exercise of my rights under Section 20109 of Title 49, U.S.Code, on _____. I ask that BLET not process this claim/grievance in order that I may exercise my rights to seek administrative and/or judicial remedies for relief as provided in Section 20109, either by me or through my attorney or other representative of my choice.

I take this action freely of my choice and with full knowledge that by discontinuing the processing of my claim/grievance I have waived it and that I may not reinstate it at a later date and will not be able to take any subsequent action under the collective bargaining agreement relative to my afore-described dismissal/disciplinary action. By this directive and request, I further release BLET from any and all claims and causes of action whatsoever under federal or state law that I may have now or at a later date relative to and concerning my claim/grievance, and of its filing, handling and processing at each and every step and level by BLET.

DATED: _____, 200_

at _____, _____

WITNESSTH:

UNION PACIFIC RAILROAD COMPANY ACCIDENT, INCIDENT, INJURY, ILLNESS REPORTING

Effective: January 01, 1997
Revised: September 1, 2007

POLICY STATEMENT

Union Pacific Railroad is committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. This includes compliance with Company, Federal Railroad Administration, and other regulatory agency reporting requirements. Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness. Persons who report alleged violations of this policy are also protected from harassment or intimidation. Disciplinary action, as provided in applicable collective bargaining agreements or in the Union Pacific Guidelines on Ethics and Business Conduct, will be taken against any employee, including supervisors, managers, or officers of the Company, who commit such harassment or intimidation.

COMPLAINT PROCEDURES

Following are the steps for addressing alleged violations of Union Pacific Railroad's harassment and intimidation policy related to reporting accidents, incidents, injuries and illnesses:

- Step 1 Any alleged violation of the Accident, Incident, Injury, and Illness Reporting Policy must be reported to the Union Pacific Values Line at 1-800-998-2000. The complaint will be forwarded to the Company's General Director-Ethics and Compliance for follow-up and response.
- Step 2 The General Director of Ethics and Compliance will forward the complaint to the highest-level safety officer for the functional area, i.e. Regional (Service Units), Engineering, Mechanical, etc.
- Step 3 The safety officer will conduct an internal investigation which will include interviewing the complainant, interviewing the individual against whom the complaint was made, interviewing any witnesses to the alleged violation, and gathering all pertinent facts.
- Step 4 The safety officer will forward the information gathered in step 3 to the appropriate department head for review.
- Step 5 The department head will determine if the complaint has merit and, if so, what corrective actions are to be taken. Where corrective actions are warranted, the department head will initiate those actions. In all cases, the department head will notify the safety officer of the findings and of any actions taken.
- Step 6 The safety officer will notify the General Director of Ethics and Compliance of the results, and the General Director of Ethics and Compliance will notify the complainant of the results of the investigation.