

9/11 COMMISSIONS ACT OF 2007

On August 3, 2007, the Federal Rail Safety Act (FRSA), 49 U.S.C. Section 20109 was amended by *The Implementing recommendations of the 9/11 Commission Act*. The new statute provides many new safeguards and protection for rail workers that had been needed and wanted for years. The new law is commonly referred to as the whistleblower act as there is protection for those who report violations of Federal safety and security laws.

For example, the new law prohibits any kind of retaliation or discrimination against a worker for reporting a personal injury. Carriers may not interfere in any way with the medical treatment and care of an injured employee. A rail worker can report violations of Federal Regulations and refuse to violate a Federal Law or Regulation. The new provisions prohibit falsification of the Hours of Service and many other positive changes. There are powerful new remedies, including enforcement by OSHA, reinstatement with back pay, interest, attorney fees and in some cases punitive damages of up to \$250,000.00 for violations. The provisions pertinent to the safety and protection of the workers were drafted in large part by Mr. Larry Mann, Esq. who serves on the Executive Board of the Academy of Rail Labor Attorneys.

INJURY REPORTING

Pursuant to the Act, “a railroad carrier, 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 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...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.” This is an incredibly broad statute designed to prevent a railroad from taking any kind of discriminatory action against an employee who reports or attempts to report a personal injury.

Note the language provides an unusual provision regarding causation: “in whole or in part.” This means that if the retaliatory action taken by the carrier was even 1% (in part) caused by the employee’s report or attempt to report a personal injury, the carrier is in violation of the statute. In whole or in part is the same language used in FELA causation statute which has been determined by the Supreme Court to be a “featherweight” standard, meaning it is very easy to establish causation.

QUESTIONS AND ANSWERS

1. Q. Employee informs a manager of his/her injury. The manager suggests the employee wait until the following day to see if there is really an injury. Is this conduct a violation?

A. This is a violation as the manager is discriminating against the employee by suggesting that a report not be made of the injury. GCOR 1.3.3 provides that “in all cases of personal injury” an immediate verbal report to a manager must be made and the prescribed form completed. Although the GCOR rule does not provide a time for completing the prescribed form it would clearly be improper for a manager to attempt to dissuade an injured worker from completing the form.

2. Q. An employee reports a personal injury and submits the prescribed form. Thereafter, the carrier charges the employee with dishonesty, or some other rule violation in connection with the injury. Is this a violation?

A. This is a violation if the employee can establish that the charges were caused “in whole or in part” (1%) due the employee’s good faith report of the personal injury.

3. Q. An employee is hurt on Monday, but does report the injury until Thursday. The carrier accepts the report of injury, but then charges the employee for late reporting of the injury. Is this a violation of the law?

A. Probably not. Clearly the employee late reported the injury and thus the cause of the discipline was not due “in whole or in part” of the report of injury and thus no violation.

MEDICAL TREATMENT AND CARE

Two important provisions regarding the medical treatment and care of an injured worker are now codified: (1) the carrier cannot interfere with an injured worker’s medical treatment; and (2) the carrier must provide transportation to the nearest hospital where the injured employee can receive appropriate medical care. These two provisions prevent the carrier from instructing the injured worker to see a company doctor for an exam or treatment and from taking the injured worker to a company doctor or a “doc in the box.”

Specifically the new law provides: “A railroad carrier or person covered under this section may not **deny, delay, or interfere** with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the **nearest hospital** where the employee can receive safe and appropriate medical care.” Further the law provides: “A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, **or for following orders or a treatment plan of a treating physician.**” Thus, it is unlawful for a railroad to refuse to allow an injured worker to seek medical care; to ask or demand that he/she continue working or even fill out the prescribed injury form, or to suggest or demand that one see a doctor other than the one the employee desires to see.

These provisions have basically been the law of the railroad industry for years, but never been precisely codified and certainly has never had the enforcement provisions of the RSIA. For example, Public Law Board awards have historically held that an injured worker had the right to see his own doctor for treatment and care and the right to select the means of transportation when injured. In 1996 the Federal Railroad Administration adopted a new rule that required railroad to prepare an “Internal Control Plan” with respect to the reporting of injuries. The intent of the rule was to provide accurate reporting to the Federal Government of all accidents and injuries to provide a true record of the amount and types of injuries. The regulation provided that the Internal Control Plan contain a provision stating “that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated.” In connection with the regulation the FRA interpreted the regulation in March 2009 providing that a supervisor could not go into the examination room of an injured employee without a “truly voluntary invitation.”

However, the new provisions now have enforcement teeth that were never available to protect the worker. In the past, an injured worker disciplined for refusing to see a doctor had one recourse and that was arbitration under the Railway Labor Act. Generally, the remedy for this wrong was reinstatement and pay for time lost. Recently OSHA has rendered some powerful decisions penalizing railroads for retaliatory conduct and counsels for railroad managers are privately advising them to stop the old ways of retaliation when reporting.

QUESTIONS AND ANSWERS

1. Q. Can the manager take me to a “doc in the box” instead of a hospital?

A. No. The law specifically provides that the injured employee must be taken to the **nearest** hospital where safe and appropriate medical treatment and care can be obtained.

2. Q. Can the carrier demand that the injured worker complete an accident report (prescribed form) before being taken to the hospital?

A. No. The law specifically provides that the employee is to be transported “promptly.” While the law does not define promptly it is clearly the intent of the law that the employee’s medical condition be given first priority. Further, GCOR does not require an immediate completion of the prescribed form and therefore the injured worker should simply insist on prompt medical attention.

3. Q. Does the injured worker have to accept transportation from the railroad?

A. No. The injured worker is not required to accept transportation by the railroad to a doctor or hospital. The law gives the employee the right to be taken to the nearest hospital where safe and appropriate medical care can be obtained, but this is not required. The injured employee may drive himself to a medical provider, have a friend or co-worker drive them or simply not go at all. There is no law or requirement that an injured worker see a medical provider for treatment of the injuries.

4. Q. An employee injured his back at work and was advised by his treating doctor to remain off work for two months to undergo physical therapy. After one month off work the company doctor wrote the injured worker and advised that he/she was fit for duty (or light duty) and to mark up or face discipline. Is this a violation?

A. Yes. The law specifically provides that the carrier cannot interfere with the treating physician’s treatment plan. The treating doctor has recommended two months of therapy and the railroad cannot interfere or threaten discipline for following the treatment plan of the doctor.

5. Q. Does the injured employee have to see the company doctor for any reason in connection with the injury?

A. No. The industrial law of the railroad has always provided the injured worker the right to select their own doctor. Further, the new law recognizes this right by providing that it is unlawful to interfere with the treatment plan of the “treating physician.” The only time an injured worker might be required to see a company doctor is on return to work. A railroad always has the right to know that an employee is physically and mentally able to do their work. Thus, if when reporting for duty after being cleared by his/her treating doctor, the employing railroad could require that the worker be seen by a company doctor for a physical exam to determine their fitness for duty.

REPORTING VIOLATIONS OF FEDERAL LAW, RULE OR REGULATIONS

The Act contains powerful protection for an employee who reports a “good faith” violation of a Federal Law, rule or regulation relating to safety, or security, or gross fraud, waste, or abuse of Federal grants or other public funds. Under this provision, the employing railroad may not retaliate against an employee who reports what they believe in good faith to be a violation of any Federal Law or Regulation. This does not mean the actual incident must be a violation of a Federal law, rule or regulation, but only that the employee believes in good faith that it is a violation.

For example, there are numerous Federal Regulations that deal with the condition of locomotives. One requires that there not be “oil, water, waste or any obstruction that creates a slipping, tripping hazard.” Should an employee report in good faith that the locomotive was not in compliance (even though it was) it would be unlawful for the railroad to retaliate against the employee. Thus, should the employee make the good faith report to a supervisor in March and later in April be charged for a frivolous rule violation, one could certainly file a complaint with OSHA alleging retaliation due to the charges. While one must prove the charges, the causation standard is a “featherweight” standard, “cause in whole or in part” which makes the case much easier to establish.

Specifically the law states:

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.;

(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.

QUESTIONS AND ANSWERS

1. Q. What constitutes a violation of a Federal law, rule or regulation?

A. There are thousands of Federal laws, rules and regulations applicable to the safety of the railroad industry. This broad statute encompasses any of commonly referred to “FRA” violations and OSHA regulations, such as those dealing with the condition of the on and off duty facilities.”

2. Q. What if the report is later deemed to not be a violation of a Federal Safety law, rule or regulation? For example, the employee reports brake piston travel that is later determined to be in compliance. Does the employee making the good report have protections?

A. Yes, the employee still has protection, so long as the report is made in good faith. The premise of the statute is to enforce compliance with the safety laws for the protection of the employees and public.

3. Q. Who should the report be made to in order to have the protection?

A. The regulation provides the report may be made to a supervisor (a person with supervisory authority over the employee); a Federal, state or local regulatory group, such as the FRA; or any member of Congress or a Congressional Committee.

4. Q. Does the reporting employee have to be able to prove a complaint was made in order to invoke the protection?

A. Of course. The best way to establish a complaint was made is to make the complaint in writing. Of course, one can record a verbal complaint with a recording device such as a cell phone. Generally it is legal to record a conversation one is having with another without the other's permission.

5. Q. What is the protection afforded by the Rail Safety Improvement Acts for reporting a good faith violation?

A. The protection is reinstatement with back pay and interest, attorney fees, expert fees and punitive damages up to \$250,000.00. Remember one is not required to establish that the railroad's actions were solely due to the complaint, but rather the actions were "caused in whole or in part." Thus, if 1% of the railroad's conduct was due to the complaint, the law was violated and the employee wins.

THE RIGHT TO REFUSE TO VIOLATE A FEDERAL LAW, RULE OR REGULATION

The Act provides a rail worker with a powerful new right: The right to refuse to violate or assist in the violation of a Federal law, rule or regulation. Thus, if the employer demands that a train be taken from the initial terminal that has not undergone the required air brake test or an engine was not in compliance with a safety regulation, the engineer/conductor could refuse to go and he/she would have the protection of the law. As before this is a very broad remedial safety statute whose purpose is to protect the employees and the public. Simply stated if the activity involves the violation of any Federal law, rule or regulation, the employee can now refuse.

Specifically the law provides:

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--**refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security.**

Under this provision, the employee's refusal must be based on a **violation** of a Federal law, rule or regulation and not a good faith **belief** that there is a violation. Consequently, should an employee refuse to use an engine because he/she thought the piston travel was too long, when in fact it was not, there would be no protection. Thus, before refusing, one must be sure the activity is a violation of a Federal law, rule or regulation. However, since there are so many intricate Federal laws, rules and regulations that govern rail safety, there is probably one that deals with the involved activity.

QUESTIONS AND ANSWERS

1. Q. How do I find out what Federal laws, rules and regulations might apply to a specific activity?

A. The best place to start is with the Federal Regulations dealing with the rail industry. These are codified as 49 C.F.R. part 200-part 244. These are available on the web at GPO access (and many other sites) <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=%2Findex.tpl> . Of course this is just a starting point. You should also contact your Designated Legal Counsel and your Local Chairman for information as to what Federal laws, rules and regulations might apply.

2. Q. What if the employee refuses to perform an activity that is a violation of a railroad GCOR rule. Would the refusal be protected under the RSIA?

A. No. The law provides that an employee has protection when he/she refuses to violate a Federal law, rule or regulation. This does not include a GCOR rule. However, if the rule is based on a Federal law, rule or regulation, protection would be afforded. For example, GCOR prohibits making a shoving move before the engineer is given the distance of the shove. This rule is based on 49 C.F.R. 220.49 and thus should the engineer refuse to begin the shove without the distance being specified, he/she would invoke the protection of the RSIA.

3. Q. An engineer refuses to depart the terminal because the lead locomotive does not have operative sanders. The manager instructs both the engineer and conductor to depart and both refuse. Would the conductor have protection?

A. Of course. The regulations regarding sanders apply to the operation of the train and not to a particular crew member. Thus, the regulation applies to the conductor as well as the engineer. Remember that even if the regulation somehow only applied to the engineer, the RSIA provides it is unlawful for one to **assist** in a violation.

REPORTING A HAZARDOUS CONDITION/REFUSING TO WORK WHEN CONFRONTED BY A HAZARDOUS CONDITION

The Act provides that an employee can report a hazardous safety or security condition with protection. Further, an employee can refuse to work when confronted by a hazardous safety or security condition. These provisions are aimed at activities that are not covered by a Federal law, rule or regulation, but none the less, a hazardous condition.

The law specifically provides:

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.

This provision makes it very complicated and cumbersome for one to refuse to perform a hazardous safety condition. In order to have the afforded protection, one must make the refusal in good faith without a reasonable alternative; and a reasonable person 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; and where possible the involved employee has made the railroad aware of the hazardous condition and of his/her intent not to work when confronted by the condition. This is a lot to comply with, in order to get the protection. However, the law makes it illegal for a railroad to discharge, demote, suspend, reprimand, **or in any other way discriminate** against the employee who refuses. Thus, the law is slated in favor of the employee.

This has basically been the law since 1970 when the Rail Safety Act was initially enacted. However, under the old law, the remedy for the aggrieved employee was to file a time claim and arbitrate the dispute as a routine Railway Labor Act dispute. At least, under the new law one can file with OSHA. This provision of the Act was seldom used, although the few times it was used proved very successful. One of the largest awards ever rendered was under the Rail Safety Act for a group of Springfield Terminal employees who refused to work when confronted with hazardous working conditions.

Although the law is somewhat cumbersome on this issue, it is still a very powerful weapon for a railroad worker. However, one should always attempt to resolve the matter without a direct refusal to work. The best solution is to remind the manager that the law does not require an employee to perform hazardous work and that if someone is hurt, the manager will suffer serious repercussions. A direct refusal is typically a last resort solution as the age old rule of the railroad industry is “comply now and grieve later,”

OTHER IMPORTANT PROVISIONS

The Act contains several other important provisions as follows:

1. 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:

a. 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--

i. a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978)

ii. any Member of Congress, any committee of Congress, or the Government Accountability Office; or

b. 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;

c. to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

d. 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

e. to accurately report hours on duty pursuant to chapter 211.

2. 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.

ENFORCEMENT AND REMEDIES PROVIDED BY ACT

For the first time in railroad history, OSHA was given the authority to enforce a safety regulation specifically designed for the rail industry. Prior to the passage of this law, the Federal Railroad Administration had been the enforcing agency. At the time of the passage of the new Act, OSHA was the enforcing agency for nineteen other whistleblower statutes in other industries, such as the airline industry. Thus, it was thought OSHA had the experience to enforce the new statute.

Under the statute an employee who believes that he/she has been wronged has a right to file a complaint with OSHA. The complaint must be filed within 180 days of the railroad's wrongful act. For example, if one is discharged on May 1, 2009 the complaint must be filed with OSHA within 180 days or by November 26, 2009. The complaint should be in writing and should be sent certified to the proper OSHA office. The complaint should provide as many details of the incident as possible and include copies of any exhibits pertinent to the complaint, such as the charge letter. One should consult with designated legal counsel before filing a complaint for assistance.

OSHA should render a decision within 210 days of the filing of the complaint. If OSHA does not render a decision within 210 days of the filing the person may file an original lawsuit in the appropriate Federal District Court. A decision rendered by OSHA may be appealed in the appropriate Federal Court of Appeals within 60 days of the decision.

The remedies provided by the Act are much better than ever before. An aggrieved employee has the right of reinstatement with back pay and interest on the wage loss; attorney fees; expert fees; compensatory damages including compensation for special damages; and punitive damages up to \$250,000.00. In one recent decision, OSHA awarded the aggrieved employee his wage loss with back pay, damages because he lost his house; pain and suffering; damages because his credit was destroyed; and punitive damages. These damages are much better than those under the Railway Labor Act arbitration, which are typically limited to reinstatement with wage loss.

Lastly there is an election of remedies provisions in the Act. The idea of the provision is to prevent one from obtaining a double recovery. Thus, the issue that quickly arose was whether an aggrieved railroad worker could bring a claim under both the Railway Labor Act and the new provisions of the RSIA. While a final and binding decision has not yet been made, OSHA recently opined in amicus curiae brief that one can basically bring the same claim under both the statutes. OSHA rightfully argues that claims brought under the Railway Labor Act are contractual matters governed by the labor agreement, whereas claims brought under the new Act are more of a legal matter. Until this matter is finally resolved one should seek advice of designated legal counsel before filing a claim under either or both statutes.

This document was prepared by Steve Young of Tavormina & Young DLC
www.tavorminayoung.com

syoung@tavorminayoung.com