

## ***Straight Track - A Hoey & Farina Newsletter***

**Straight Track #260**

# The Hoey & Farina

## **RAILROAD RETALIATION REPORT**

### **Part 2: CONGRESS STANDS UP FOR RAILROADERS**

By James L. Farina, Alan J. Fisher and Steven P. Garmisa

Following up on urgent recommendations from the 9/11 Commission for protecting the United States from future terrorist attacks, Congress has provided critical new protection for railroaders who "blow the whistle" on railroad failure to eliminate hazardous conditions and comply with federal safety and security rules.

Amending the Federal Rail Safety Act, 49 United States Code, Section 20109, the new law prohibits railroads from retaliating against employees for railroad misconduct in several common situations. And, it gives federal administrators a heavy stick to penalize railroads that step out of line. The complete text of the new version of Section 20109 is available at <http://www.osha.gov/dep/oia/whistleblower/acts/frsa.html>

Here are some basic questions and answers regarding the new law.

#### **Q. What do you have to prove to win a case under Section 20109?**

**A.** Under the new statute, you have to prove that (1) you engaged in **protected activity**; (2) the railroad **knew or suspected** you engaged in protected activity; (3) you suffered some kind of **adverse or detrimental action** from the railroad; and, (4) there was a **connection** between the adverse employment action and your protected activity.

#### **Q. Is the new statute limited to situations where an employee was fired?**

**A**

**No.** The new statute does not just apply to an employee who is fired. As amended on August 3, 2007, Section 20109 says that a railroad "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 various specified protected activities. *Section 20109(a)*.

After numerous Congressional committee hearings and meetings, it became evident to the members of Congress that railroads will plot an infinite number of ways to retaliate against employees who engage in protected activities. So the new law was broadly written to cover every conceivable type of adverse employment action.

#### **Q. What kinds of actions by railroaders are considered protected activities by the new statute?**

**A.** There are four major categories of **protected activities** under the law:

(1) **Reporting** violations of federal safety laws, injuries, hours on duty, hazardous conditions, and accidents. *Sections 20109(a)(1), (4), (6) and (a)(7); plus Section 20109(b)(A).*

(2) **Declining** to violate or assist in the violation of any safety or security law. *Section 20109(a)(2).*

(3) **Cooperating** with federal investigations. *Section 20109(a)(5).* And,

(4) **Refusing** to put up with **hazardous conditions**. *Section 20109(c)(1).*

**Q.**

**What is "reporting" activities are protected by the new law?**

**A.** The protected reporting activities include (1) reporting **violations of federal safety or security laws or regulations**; (2) reporting **personal injuries**; (3) accurately reporting **hours worked**; (4) reporting **hazardous conditions**; and (5) reporting **accidents**. *Sections 20109(c)(1), (4), (7), and Section 20109(b)(A).*

Significantly, the protection for reporting violations of federal safety or security laws is not limited to situations where an employee reports violations of the Federal Rail Safety Act. Instead, Section 20109 protects railroaders who report that their employer violated **any** federal safety or security law, rule or regulation. *Section 20109(a)(1).*

Even if it turns out that the railroad was **not** engaged in any violations, a railroader who blows the whistle is protected **if** he or she **reasonably believed** that the railroad breached federal safety or security laws or regulations. *Section 20109(a)(1).*

**Q. What constitutes "assisting in an investigation"?**

**A.** The new statute prohibits railroads from retaliating against employees who assist in federal investigations into whether the railroad violated any federal safety or security laws. *Section 20109(a)(1).*

**Q. Where do I report a violation of the new statute?**

**A.** The new statutory protection applies when a railroad employee reports violations of federal safety and security laws to **federal, state, or local** regulatory or law enforcement agencies. *Section 20109(a)(1)(A).*

Greatly strengthening this statutory protection, the amended law also applies when a railroad employee reports the railroad's violation of any federal safety or security law to "**a person with supervisory authority over the employee** or such other person who has the authority to investigate, discover, or terminate the misconduct." *Section 20109(a)(1)(C).*

In other words, the amended statute provides protection when reports of violations of federal safety or security laws are submitted to **railroad supervisors**.

**Q. What happens if I report a personal injury? Is there any protection for me under the new statute?**

**A.** The new statutory protection applies when a railroad retaliates against an employee for notifying or attempting to notify "the railroad carrier or the Secretary of Transportation of a **work-related personal injury or work-related illness** of an employee." *Section 20109(a)(3).*

**Q. How does the new statute apply to "reporting hours on duty"?**

**A.** The new protection further applies when a railroad retaliates against an employee for accurately

reporting hours on duty. *Section 20109(a)(7)*.

The next issue of Straight Track, Part 3 of our introduction, will examine the important new protections that Congress provided for employees who refuse to tolerate **hazardous workplace conditions**. And, Part 4 of the Hoey & Farina **RAILROAD RETALIATION REPORT** will discuss procedures, remedies and defenses under the new law.