

Straight Track - A Hoey & Farina Newsletter

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The Hoey & Farina

RAILROAD RETALIATION REPORT

Part 3: CONGRESS STANDS UP FOR RAILROADERS

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To help protect the United States from deadly terrorist actions, the U.S. Congress enacted important new legislation. One goal of the new law is to require railroads to eliminate hazardous conditions, and comply with federal safety and security rules.

However, it is easier said than done. Why? Because it is expensive to eliminate dangerous conditions and abide by safety/security laws. Instead, railroads are inclined to focus like laser beams on increasing profits. After all, money saved by skimping on compliance and making minimal repairs will make railroad executives multimillionaires.

The challenge for Congress - when the 9/11 Commission pointed out that the U.S. rail system is a tempting, vulnerable target for future terrorist attacks - was how to make sure railroads (1) comply with safety and security laws, and (2) spend the money required to eliminate hazardous conditions.

One unpalatable alternative would be to assemble a vast army of federal inspectors, and dispatch them to scrutinize railroad conduct. But paying for enough inspectors to keep railroads in line would be horribly expensive. Plus it probably would not be very effective.

In a perfect world, the government could rely on railroaders to "blow the whistle" when railroads fail to eliminate hazardous conditions and violate safety regulations. But the current Congress learned from hearings and rail labor leaders that railroads have perfected techniques for retaliating against railroaders who report railroad misconduct.

The best solution, Congress decided, was to enact a new law that provides strong protection for railroaders who refuse to tolerate hazardous safety and security conditions. Congress therefore voted to stand behind railroaders who have the courage to stand up to railroads that put profits over safety and security.

Railroaders who are confronted with hazardous workplace conditions have important new protections under amendments to the Federal Rail Safety Act. Among the new provisions, the amended law prohibits railroads from retaliating against employees who refuse to work when confronted with hazardous safety or security conditions. But there are specific statutory requirements that govern this powerful new right.

This is the third in a four-part introduction to 49 United States Code, Section 20109 - as amended on August 3, 2007, by "The Implementing Recommendations of the 9/11 Commission Act of 2007."

The text of the revised version of Section 20109 is available at <http://www.osha.gov/dep/oia/whistleblower/acts/frsa.html>

Refusing to violate safety laws

The new statute prohibits railroads from retaliating against employees for "**refusing to work** when **confronted by a hazardous safety or security situation** related to the performance of the employee's duties" - **if** the employee satisfies several requirements. Section 20109(b)(1)(B).

Additionally, the statute provides protection when an employee who is responsible for **inspecting or repairing** equipment, track or structures **refuses to authorize** use of those items because of a hazardous safety or security condition. Again, however, the statutory protection only applies **if** the employee satisfies several specified requirements. Section 20109(b)(1)(C).

What are these requirements?

A refusal to work under hazardous safety or security conditions is protected only if the following requirements are satisfied:

- (1) The refusal is made in good faith;
- (2) **No reasonable alternative** to refusal to work is available to the employee;
- (3) A **reasonable person** would conclude, under the circumstances confronting the employee, that (a) the hazardous condition presents an **imminent danger of death or serious injury**, and (b) the urgency of the situation does not allow sufficient time to eliminate the danger without the refusal to work; and,
- (4) The employee, where possible, has **notified the railroad** of the existence of the hazardous condition, and of his or her intention not to perform further work until the hazardous conditions are eliminated or corrected. Section 20109(b)(2).

A similar set of requirements applies when someone who is in charge of inspecting or repairing equipment, track or structures refuses to authorize use of such items because of hazardous safety or security conditions. Specifically, in order to qualify for protection, an employee who refuses to authorize use of equipment, track or structures because of hazardous safety or security conditions must prove:

- (1) The refusal is made **in good faith**;
- (2) **No reasonable alternative** to the refusal is available to the employee;
- (3) A **reasonable person** would conclude, under the circumstances confronting the employee, that (a) the hazardous condition presents an **imminent danger of death or serious injury**, and **(b) the urgency of the situation** does not allow sufficient time to eliminate the danger without the refusal; and,
- (4) The employee, where possible, has **notified the railroad** of the existence of the hazardous condition, and of his or her intention to not authorize the use of equipment, track or structures until the hazardous items are repaired or replaced. Section 20109(b)(2).

Reporting hazardous safety or security conditions

Railroads are also prohibited from retaliating against employees who report - in good faith - that there is a hazardous safety or security condition. Section 20109(b)(a)(A).

Security Personnel

When railroad security personnel discover a hazardous safety or security condition, they are protected from retaliation if they report the dangerous situation. However, security personnel are not protected if they refuse to work when confronted with a hazardous safety or security condition. Section 20109(b)(3).

The next issue the Hoey & Farina **RAILROAD RETALIATION REPORT** turns to the remedies and procedures provided by the amended version of Section 20109.