

October 23, 2007

BRIEFING MEMORANDUM

TO: Republican Members, Committee on Transportation and Infrastructure

FROM: Republican Staff, Oversight and Investigations and Subcommittee on Railroads, Pipelines and Hazardous Materials

SUBJECT: Hearing on “The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroad.”

PURPOSE OF THE HEARING

On Thursday, October 25, 2007 at 10:00 a.m. in 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure will meet in an oversight hearing to examine the alleged impact of railroad injury and accident reporting, and discipline policies on rail safety. An investigation of injury reporting practices and railroad anti-harassment/intimidation policies has been conducted by the Oversight and Investigations (O&I) staff.

The allegations, as set forth in the Democrat summary of subject matter, address Railroad policies which allegedly have unintended consequences (underreporting, harassment, and intimidation). It is alleged that harassment and intimidation are tactics regularly used by lower level supervisors on employees in hopes of discouraging them from reporting on the job injuries. There are no indications that any senior management intentionally supports, condones, or encourages these practices.

RAIL INDUSTRY SAFETY RECORD

The rail industry’s overall safety record has improved remarkably over the past thirty years. According to the FRA, there has been a 71 percent decline in train accidents since 1978. Total rail-related fatalities declined 46 percent and total employee cases (fatal and nonfatal) have dropped 91 percent. According to the Bureau of Labor Statistics, **the rail industry is currently rated safer than trucking, construction, aviation and even grocery stores.**

Since 1994, the year FRA was last reauthorized, train accidents not involving highway grade crossings have held steady or improved. The year 2006 was the safest on record.

The attached Table, entitled “Employee Nonfatal Conditions” comes from the FRA’s safety database. The data indicates a steady decline in the total number of employee injuries

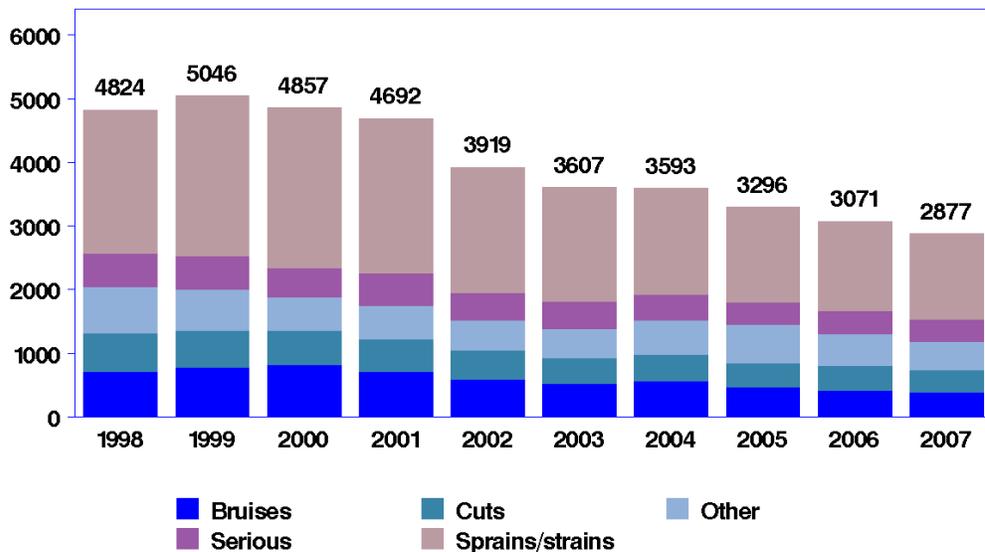
over the past decade. Employee work hours were relatively steady during this time period, ranging from 504 million hours in 1996 to 485 million hours in 2006.

It is interesting to note that the greatest decline in injuries is apparently in the area of sprains/strains. The number of bruises is also markedly lower. Serious injuries such as fractures, amputations, loss of eye, etc. are substantially down since 1996, as are worker fatalities. Slip, trip and fall injuries remain one of the largest sources of injuries over the years and the industry has approached this with a number of preventive measures including:

- **Engineering:** In shops, lifting has been reduced by locating heavy parts at waist level and greater use of lifting devices. Railroads have introduced improved designs of turnouts including easier to use handles or motorized switches in yards. Improved designs of non-skid footwear have been introduced in recent years to improve winter walking conditions.
- **Training:** There has been a greater emphasis on proper lifting techniques and other strategies such as warming up prior to commencing labor. A number of locations use “peer observation” programs where a trained peer surveys workplace activities and identifies risk factors and possible countermeasures encourage greater compliance.
- **Housekeeping:** In recent years there has a greater emphasis on cleaner worksites with items properly stored and refuse and tripping hazards removed.

Employee deaths and serious injuries are down, and lesser injuries are down as well. There is no credible evidence to substantiate the claim that the injury rate is down because railroads are suppressing reporting.

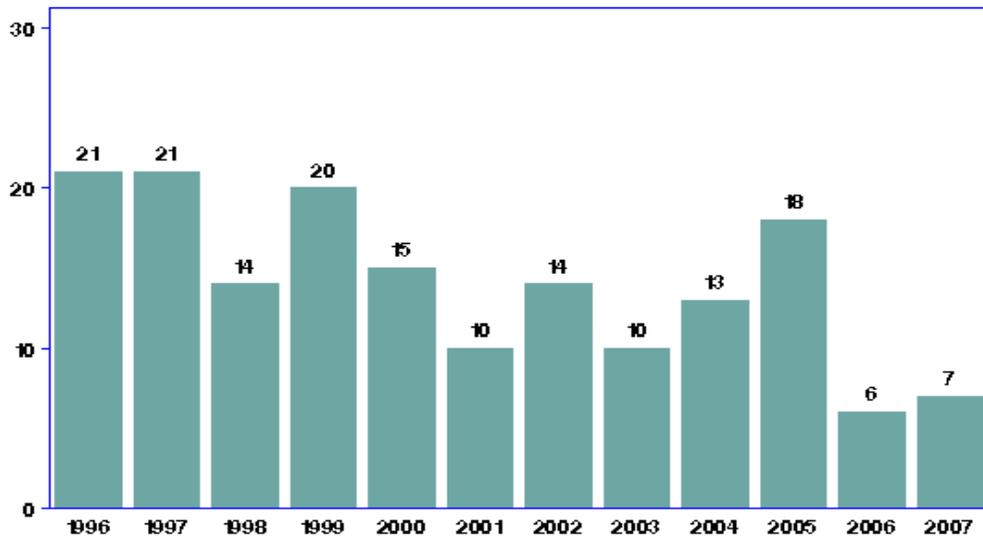
5 – EMPLOYEE NONFATAL CONDITIONS, JAN – July (2007 preliminary)



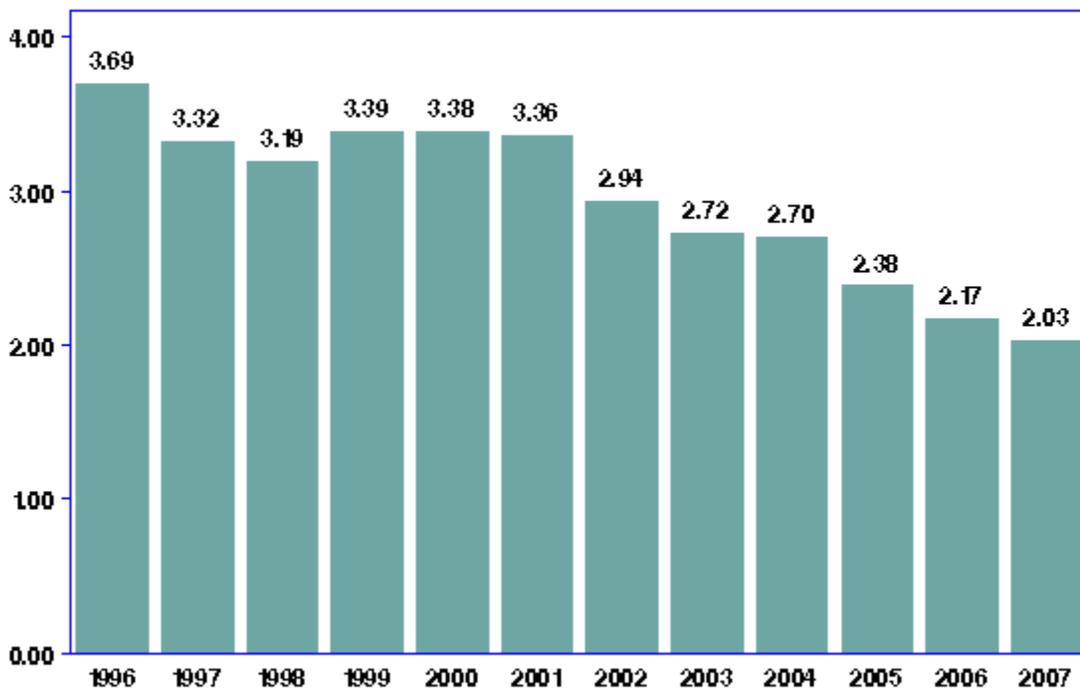
Serious — amputations, fractures, hemias, concussions, loss of eye, dislocations, internal injuries

Date of run: Fri, Sep 28, 2007

**TOTAL EMPLOYEE ON DUTY DEATHS, ALL ACCIDENTS/INCIDENTS
FOR ALL RAILROADS, January – July (ALL YEARS)**



**NUMBER OF REPORTED EMPLOYEE CASES PER 200,000 HOURS WORKED
FOR ALL RAILROADS, January – July (ALL YEARS)**



CURRENT EMPLOYEE PROTECTIONS

In accordance with the requirements of 49 CFR 225.33 which was implemented by the Federal Railroad Administration (FRA) on January 1, 1997 railroads are now required to adopt a detailed Internal Control Plan (ICP) which specifically prohibits the carrier from threatening or harassing its employees. During the course of our investigation the O&I staff requested the ICP's and safety programs from all the major Class I railroads. We received this documentation from six of the eight Class I railroads all of whom comply with FRA regulations. Additional protections for injured railroad employees include:

- The Federal Employee's Liability Act (FELA) (35 Stat. 65) was passed in 1908 by Congress. FELA makes a railroad liable to an employee injured or killed as a result of railroad negligence, no matter how small a part that negligence plays in the injury or death. Under the FELA, injured railroad employees sue their employers in a federal or a state court and seek to prove that the negligence of the employer or other employees caused the plaintiff's injury. When the jury finds that the employee has satisfied these requirements, it then awards damages based on its determination of such factors as the lost wages, medical care costs, and pain and suffering of the employee.
- If a supervisor fails to report injuries, subjects an employee who would like report an injury to harassment or intimidation, or interferes with medical treatment, may be liable for up to \$25,000 in fines and can be permanently disqualified from holding a safety sensitive railroad job in the future. Furthermore, a railroad official can be subject to criminal prosecution for willfully filing a false accident or injury report to the FRA; and
- The FRA offers an employee hotline for reporting any intimidating or harassing acts by a supervisor over the filing of injury reports; and
- The railroads appearing before this Committee today also offer an anonymous hotline to their employees encouraging them to report intimidating or harassment claims against supervisors; and
- All railroads are required by law to report any and all employee injuries to the FRA that result in treatment beyond first aid. Railroads are also required to keep a list of all employee injuries that do not meet any of the FRA's reporting criteria. As a result, all employee injury records are available to the FRA for inspection during a Part 225 Audit; and
- The issue of employee protections was the subject of a provision contained in the 9-11 Bill, Public Law 110-53, enacted on August 10, 2007. The legislation imposes draconian penalties on any rail carrier which discharges, demotes, suspends, reprimands, or discriminates against an employee who attempts to notify his employer or the Secretary of Transportation of a work-related personal injury or work-related illness; and

The employee's rights may be enforced by either the Secretary of Labor or in a civil suit filed by the individual employee. If successful, the employee may be awarded compensatory damages, back pay, costs & attorneys' fees, plus punitive damages of up to \$250,000.

FELA vs. WORKERS COMPENSATION

- Rail employees are covered by the Federal Employers Liability Act (FELA), not Workers Compensation.
- FELA is a tort based system which requires employees to sue every time they are injured.
- If the railroad is not at fault the employee can't collect under FELA.
- FELA could be counterproductive by creating a highly adversarial relationship in the workplace – since both sides must seek to place blame on the other – thereby hampering the railroads' ability to investigate accidents to determine their causes.
- Virtually all other workers in the United States are covered by no-fault workers' compensation systems, under which they are compensation for work-related injuries without regard for negligence.
- Workers comp is a no fault system – any injury occurring at work gets compensated even if the employer didn't cause the injury.
- Plaintiff's win 75% of the FELA Railroad injury cases that go to trial do to the low standard of proof regarding negligence by the employer.
- The vast majority of FELA railroad injury cases settle without a trial. However, the average length of time from the filing of the FELA suit (not the claim) is 22.5 months.
- On the contrary, only 5% of workers comp claims ever involve the issue of a summons at Court and only 0.3% of the 5% ever get to Court. For an average claim, it will take 6-12 months to resolve.
- As a result, the average FELA award for railroad injury lawsuits resolved by a jury verdict is about \$500,000 while the median is \$180,000 (Source: Inter-University Consortium for Political and Social Research).

RAILROAD ENFORCEMENT

Each railroad testifying before the Committee today has its own system for encouraging a safe working environment and discouraging the practice of intimidation and harassment. They will testify before this Committee on the policies they have implemented to prevent the aforementioned from occurring. Based on documentation provided by the railroads to O&I staff it is apparent that incidents of this nature which may occur are not sanctioned by management and are certainly not tolerated. The railroads will testify that intimidation and harassment is not

tolerated and as a result managers who violate safety policies are in fact subject to dismissal or discipline. For example, UP has disciplined 61 managers for safety policy violations, including the dismissal of four high level operating managers in the last few years.

The FRA regularly audits all railroads for compliance with Section 225.33 safety reporting requirements otherwise known as a Part 225 audit. Railroads with compliance errors are often required to submit late FRA injury reports to correct errors. Non-reporting of accidents and injuries results in civil penalties being levied on railroads. Many of the cases reviewed during 225 safety reporting audits reference injuries that the railroads allege were pre-existing conditions, unrelated to the employee's work, or fabricated. Several of the injuries that go unreported to the FRA can be attributed to a dispute over the nature of the incident. While these injuries were properly documented by the railroad, the FRA disagrees with the classification of the injuries as non-reportable.

WITNESS BACKGROUND

It has been standard practice for this Committee to avoid interfering with ongoing litigation. As it stands right now two of our witnesses are plaintiffs in ongoing litigation against the railroads and one has his counsel testifying on the same panel. Accordingly, this presents a potentially unethical and awkward position for the defendant railroads who will not be able to respond or comment on any questions pertaining to these two cases. It is important to highlight the background of some of the witnesses who will appear before the Committee's second panel.

- 1. Mr. William Jungbauer** is President and a senior partner in the firm of Yaeger, Jungbauer & Barczak. He practices in the field of personal injury litigation which includes Federal Employers' Liability Act (FELA) injury, collision, and wrongful death cases. According to his website he claims to have collected more than \$100,000,000 on behalf of his clients from railroad and insurance companies. **He is currently representing Charles Ehlenfeldt who is also testifying on the same panel today. This case is currently scheduled for trial on November 13, 2007.**
- 2. Mr. David Cook** is a **current** CSXT employee working in and around Orlando, Florida. He has been on a medical leave of absence since September 2006. He will testify that he was a victim of retaliation by his employer in 2006 for (1) his union activities (2) reporting unsafe working conditions (3) complaining that employees were being forced to work excessive overtime, and (4) complaining that CSXT falsified certain records on employee testing. **Litigation is currently pending on this case.**
- 3. Mr. Charles Ehlenfeldt** is a former BNSF Conductor based in Post Falls, ID. He is currently involved in litigation with BN and is being represented by William Jungbauer.
- 4. Sherman "Tiger" Joyce** is the Republican witness and is President of the American Tort Reform Association. He will provide an unbiased legal comparison of the adversarial FELA process and the no fault workers compensation program.

WITNESSES

PANEL I

The Honorable Joseph Boardman
Administrator
Federal Railroad Administration
Washington, DC

PANEL II

Mr. William Jungbauer
Attorney
Minneapolis, MN

Mr. James M. Brunkenhoefer
National Legislative Director
United Transportation Union
Washington, DC

Mr. John Tolman
Brotherhood of Locomotive Engineers and Trainmen
International Brotherhood of Teamsters
Washington, DC

Mr. David Cook
Former CSX Locomotive Engineer
Sumter County, FL

Mr. Gregory Haskin
Former Union Pacific Conductor
Shawnee, KS

Mr. Timothy Knisely
Former Norfolk Southern Conductor
Fort Wayne, IN

Mr. Charles R. Ehlenfeldt
Former Burlington Northern Santa Fe Conductor
Post Falls, ID

PANEL III

Mr. David Brown

Vice President and Chief Transportation Officer
CSX Corporation
Jacksonville, FL

Mr. Mark Schulze

Vice President of Safety, Training and Ops Support
Burlington Northern Santa Fe Corporation
Fort Worth, TX

Mr. C. J. Wehrmeister

Vice President, Safety and Environment
Norfolk Southern Corporation
Roanoke, VA

Mr. Robert Grimaila

Senior AVP Safety, Environment, Security
Chief Safety Officer
Union Pacific Corporation
Omaha, NE

Ms. Faye Ackermans

General Manager, Corporate
Safety & Regulatory Affairs
Canadian Pacific Railway
Calgary, Alberta

Mr. Ed Hamberger

President
American Association of Railroads
Washington, DC

Mr. Sherman Joyce

President
American Tort Reform Association
Washington, DC