

October 31, 2010
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OSHA Docket Office
U.S. Department of Labor, Room N-2625
200 Constitution Ave., NW
Washington, DC 20210

Re: Docket Number OSHA-2008-0027

Before the Occupational Safety and Health Administration

Joint Comments of —

**American Train Dispatchers Association (ATDA)
Brotherhood of Locomotive Engineers and Trainmen/Teamsters (BLET)
Brotherhood of Maintenance of Way Employes Division/Teamsters (BMWED)
Brotherhood of Railroad Signalmen (BRS)
International Brotherhood of Boilermakers (IBB)
National Conference of Firemen and Oilers/SEIU (NCF&O)
Transportation Communication Union (TCU)
Transport Workers Union (TWU)
United Transportation Union (UTU)**

The nine (9) railroad labor organizations (“Rail Labor”) identified above are the collective bargaining representatives of the vast majority of railroad industry workers engaged in train operations, train dispatching, and the inspection, maintenance, testing, and repair of locomotives, rolling stock, track, signals, electronics, and related railroad infrastructure and equipment. Our collective membership of approximately 170,000 rail workers is employed on Class I, shortline, passenger and commuter railroads nationwide. Rail Labor and its collective membership have a vested interest in the procedures for handling retaliation complaints under the Federal Railroad Safety Act (FRSA) and the National Transit Systems Security Act (NTSSA). Rail Labor is filing these joint comments in response to the Interim Final Rule (IFR) and request for comments published in the Federal Register on August 31, 2010. *See* 75 Fed. Reg. 53522, *et seq.*

These comments, in the order presented, are not intended to reflect any sequential priorities of Rail Labor. Rail Labor supports many of the provisions of the IFR. Rail Labor purposely is not addressing every item in the interim rule but waives no objections to unaddressed items at a later date.

The exclusion of OSHA whistleblower procedures for enforcement of 49 U.S.C. §20109(c)(1) is in error and a regulation to provide enforcement of that provision is necessary.

The IFR erroneously states that “Section (c)(1) is not a whistleblower provision because it

prohibits certain conduct by railroad carriers and other covered persons irrespective of any protected activity by an employee,” 75 Fed. Reg. 53522, and based on that error, fails to provide enforcement regulation of that provision.

OSHA jurisdiction over Section (c)(1) is completely consistent with the statutory provision. The absolute prohibition against a railroad denying, delaying and/or interfering with medical or first aid treatment to a railroad worker who suffers an injury on the job, coupled with the unconditional duty of a railroad to promptly arrange to have an injured worker transported to the nearest hospital where he/she can receive safe and appropriate medical care, creates a statutory right to both timely and appropriate medical treatment when an on-the-job injury occurs.

Rail Labor does not read Section (d) as limiting OSHA’s jurisdiction to situations involving a “protected activity” only. Rather, the plain language of the section empowers OSHA to take enforcement action whenever “discharge, discipline, or *other discrimination* in violation of subsection (a), (b), or (c)” occurs. (emphasis added) Inasmuch as a railroad worker injured on the job has a broad statutory right to timely and appropriate medical treatment, any denial or infringement of that right in violation of Section (c)(1) constitutes an act of discrimination, *per se*, against that worker — vis-à-vis other workers injured on the job whose Section (c)(1) rights are afforded — which OSHA has the jurisdiction and the duty to pursue.

The Congressional history of the amendment completely supports Rail Labor’s position on this issue. The prompt medical attention provision (which is now codified at 49 U.S.C. §20109 (c)(1)), was originally included in the House passed version of the Rail Safety Improvement Act of 2008 (H.R. 2095) as Section 606. This section was a free-standing provision that would have been codified under Subchapter II – Particular Aspects of Safety and not enforced by DOL. Instead, as the final legislation was being negotiated it was agreed to specifically move Section 606 into the whistleblower provision of §20109. It is important to recognize that §20109 is the **only** section in the FRSA that is not assigned to the Federal Railroad Administration (FRA); rather, it was deliberately shifted to a different agency, the Department of Labor (DOL). DOL/OSHA enforcement is dramatically different and more effective than routine safety enforcement by civil penalties levied by the FRA. Further, amended Section 20109, in its’ entirety, is assigned to the DOL/OSHA Office of Whistleblower Enforcement to be enforced pursuant to FRSA. *See* §20109 and incorporated Section 42121 of AIR 21.

The intent of Congress is unmistakably clear. The original coverage for prompt medical attention would have been completely outside the whistleblower section of Title 49. Congress rejected treating this as an ordinary part of regulatory law because it was determined to remedy this problem by characterizing it as whistleblower protection. The compelling expansion of remedial provisions (for example, liquidated or punitive damages went from \$20,000 to \$250,000) and many other far more powerful enforcement powers and provisions in the new railroad “whistleblower” protections leave no room for doubt that Congress was wholly unsatisfied with the prior law’s inability to control railroad intimidation and retaliation directed at employees with injuries, and employees reporting unsafe conditions. Congress, through testimony and other evidence introduced at oversight hearings, was well aware of the fact that FRA enforcement of 49 C.F.R. Part 225, revised in 1997, was ineffective in curbing the carriers’ retaliatory behavior related to prompt medical attention, because the anti-harassment and anti-

intimidation provisions contained in Part 225 are wholly inadequate and provide no meaningful protection, except in the most outrageous cases of carrier misconduct.

The proposed exclusion from whistleblower coverage makes no sense when applied to the real world. The IFR Background section comment — that “Section (c)(1) is not a whistleblower provision because it prohibits certain conduct by railroad carriers and other covered persons irrespective of any protected activity by an employee” — assumes there is no protected activity involved in Section (c)(1), an assumption that makes no sense. Section (c)(2) acknowledges that it is protected activity for a railroad worker to request medical treatment and to follow the medical treatment plan of a treating doctor. Because it is absolutely protected activity for a rail worker to seek medical treatment and to follow the medical treatment plan of a treating physician, it makes no sense that activity under Section (c)(2) to request medical treatment and to follow a medical treatment plan is protected, but activity under Section (c)(1) would not be protected. After all, a railroad cannot deny, delay, or interfere with an employee’s medical treatment unless that employee first requests medical treatment and starts to follow a medical treatment plan. In other words, unless an employee first engages in the protected activity of requesting medical treatment and following a medical treatment plan, a railroad cannot deny, delay, or interfere with that medical treatment.

Section (c)(1)’s prohibition against denying, delaying, or interfering with a worker’s medical treatment is necessarily predicated on the fact that an employee first engages in the protected activity of requesting medical treatment and following a medical treatment plan. There is no logical or practical foundation for the IFR’s conclusion that there is no protected activity involved in Section (c)(1). It does not make sense that under Section (c)(2) Congress would bar railroads from disciplining employees for following medical treatment plans and yet under Section (c)(1) allow railroads to interfere with that medical treatment. That would allow a railroad to avoid disciplining an employee simply by interfering with the employee’s medical treatment in order to bend the treatment to the railroad’s will. In other words, the IFR would permit a railroad to avoid potential § 20109 liability for violating Section (c)(2) [by disciplining an employee for following a medical treatment plan] by simply interfering with a worker’s ability to obtain timely and proper access to the medical treatment plan itself, because the IFR proposes to not institute an enforcement action against a railroad’s violation of Section (c)(1). Section (c)(1) cannot be interpreted in a vacuum, ignoring the purpose of the FRSA and the text of Section (c)(2). Statutory construction is a “holistic endeavor,” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 542 U.S. 50, 60 (2004), and “in expounding a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

Accordingly, Rail Labor urges that the final rule be amended to correct the statement of non-coverage of Section (c)(1) and to provide a regulation to enforce that section. Rail Labor suggests the following language:

“The Secretary finds that Subsection (c)(1) is enforceable as a whistleblower law. The plain language of the statute is clear and needs no interpretation: it is explicitly placed in a whistleblower law with no language indicating it should be enforced as

any other sort of law. The legislative intent is equally clear; the subsection had earlier been drafted as part of the whistleblower law, was later re-drafted as a wholly separate section of the RSIA (to be Section 20162) which would have been enforced by FRA as an ordinary safety regulation, but prior to passage it was amended into final form, where (c)(1) was put back into the whistleblower, 49 USC Sec. 20109, passed, and enacted into law. The Department has no discretion to refer enforcement responsibility of (c)(1) to any other agency, or other office or form of enforcement within OSHA. This subsection must be enforced by the whistleblower office as it was written, in compliance with 49 USC Sec. 42121.”

The IFR provides inadequate supplementary information concerning how §20109 should be interpreted to govern the relationship of this law with other federal and state laws.

Additional, limited commentary on four aspects of this supplementary information would be beneficial in this background discussion for purposes of reference in the likely event of litigation generated by carriers contesting the validity or interpretation of § 20109.

First, OSHA correctly notes under § 20109(f): “The whistleblower provisions of NTSSA and FRSA provide that an employee may not seek protection under those provisions and another provision of law for the same allegedly unlawful act of the public transportation agency or railroad carrier.” Rail Labor suggests the following be inserted after that quote:

“This has been referred to as the ‘election of remedies’ clause. The Department has concluded that disqualifying elections of remedies do not include claims made by the complaining employee under the Federal Employer’s Liability Act, or the Railway Labor Act, but could include many claims made under state public policy doctrines such as those in *Hysten v. BNSF Railway*, 530 F.3d 1260 (10th Cir. 2008), as well as under state whistleblower statutes or regulations.”

Second, OSHA correctly notes under § 20109(g): “The whistleblower provisions of NTSSA and FRSA also provide that nothing in those provisions preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.” Rail Labor suggests the following be inserted after that quote:

“The Department has concluded that rights and duties created by § 20109 have no effect on the Federal Railroad Administration’s 49 C.F.R. Part 225 jurisdiction to investigate, make findings, and to levy and enforce penalties against regulated carriers for prohibited behavior.”

Third, OSHA correctly notes under § 20109(h): “The whistleblower provisions of NTSSA and FRSA further provide that nothing in those provisions shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement and that the rights and remedies in the whistleblower provisions of NTSSA or FRSA may not be waived by any agreement, policy, form, or condition of employment.” Rail Labor suggests the following be inserted after that quote:

“The Department has concluded that the rights and duties created by § 20109 have no effect on any matters covered under the Railway Labor Act or collective bargaining agreements. The whistle-blower protection rights created by § 20109 are not a proper subject of either mandatory or permissive bargaining under the Railway Labor Act and are not subject to waiver through bargaining or otherwise. See, *Livadas v Bradshaw*, 512 U.S. 107 (1994). The rights and duties created by § 20109 do not create any overlap between the Railway Labor Act and the FRSA.”

Fourth, the IFR states “Prior to the amendment of FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act which included whistleblower proceedings before the National Railroad Adjustment Board, as well as other dispute resolution procedures. The amendment changes the procedures for resolution of such complaints and transfers the authority to implement the whistleblower provisions for railroad carrier employees to the Secretary of Labor.”

Rail Labor suggests that the following be added:

The Railway Labor Act and collective bargaining agreements within the railroad industry do not provide a whistleblower protection and enforcement mechanism. Traditional pre-discipline investigation and disciplinary decision cases do not address whether employer actions violate whistleblower laws or public policy. The National Railroad Adjustment Board is limited to the record before it and has no jurisdiction to interpret or apply laws external to the Railway Labor Act.

Section 1982.105 related to issuance of preliminary orders should be supplemented.

Section 20109 provides that the Secretary may enter preliminary orders identifying all relief necessary to make the employee whole, including provisions requiring the carrier to abate the violation; reinstatement with the same seniority status; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney’s fees. The preliminary order may also require payment of punitive damages up to \$250,000.

The power of DOL/OSHA to order temporary reinstatement is likely to provoke a contest with rail carriers over the relationship of the Railway Labor Act to § 20109. The discussion in the IFR does not directly address the foresight shown by Congress in drafting the statutory language and the protection provided to the carriers. Rail Labor requests that OSHA supplement this paragraph by adding the following:

“It is anticipated that there may be some cases where a rail carrier is ordered by the Secretary to reinstate a whistle-blowing employee on a preliminary basis, but where the employer is asserting that such reinstatement will endanger the public, its property, or other employees. The Secretary has determined that sufficient discretion is provided to the Department pursuant to § 1982.105 to balance the potentially competing interests of the public, the employees, and the carrier. Moreover, the full range of remedies is available.”

Section 1982.101 related to interpretation of definitions should be supplemented.

OSHA cites the definitions of the NTSSA, 6 U.S.C. § 1131(5), which defines a public transportation agency as a publicly owned operator and those of the FRSA, 49 U.S.C. § 20102(2), which defines a railroad carrier as a person providing railroad transportation.

There are substantial retaliation problems by owners of railroads that are not operators of railroads. For example, Metrolink, a publicly owned commuter line in Los Angeles, is an owner that has retaliated against its workers for safety complaints. Similarly, railroad holding companies such as the Class III conglomerate known as Watco, are short line owners who hold themselves out as not being operators of railroads. Rail Labor suggests the following language be included in the final rule:

“The Secretary has determined that it is in the public interest and consistent with Congressional intent to find that joint employer behavior will suffice to bring owners into the definitions of covered employers to the extent that the elements of traditional joint employer status in transportation cases are satisfied on the facts of each case.”

The Section 1982.104 definition of adverse employment action should be amplified.

The IFR provides a discussion of the legal basis of its decision as to how NTSSA and FRSA burdens of proof are allocated. The Secretary refers to an excellent case, *Allen v. ARB*, 514 F.3d 468, 475-76 (5th Cir. 2008), but the case’s critical point is that this “independent burden-shifting framework” contrasts to civil rights cases in that a contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Case No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993)). The employee is entitled to the relief provided by § 1514A(c) if the [employee] “demonstrates that [her protected activity] **was a contributing factor** in the unfavorable personnel action alleged in the complaint.” 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added).

Rail Labor believes it is important to re-emphasize that in applying AIR 21, the ARB adopted the expansive definition of “adverse employment action” set forth in the recent Supreme Court case of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). See *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, 2007 WL 352447, at *4-*5 (ARB Jan. 31, 2007). Thus, we urge the Secretary to adopt a similar definition of “adverse employment action,” and incorporate the above definition of “contributing factor” in the final rule.

Section 1982.111 provisions relating to settlement approval should be supplemented.

The IFR provides for approval of settlements at the investigative and adjudicative stages of the case. This provision raises important questions concerning the relationship of FELA, RLA and § 20109 case settlements. It is not difficult to conceive that all three types of cases could be maintained simultaneously. There may be separate representatives for the cases or one attorney handling all of them. There may be ancillary but related cases, including, but not limited to,

subrogation claims, divorces, bankruptcies, and multi-party tort cases. No case can be unilaterally dismissed once filed. DOL is involved in the approval process unless there is a 210 day opt out by the complainant. Rail Labor suggests the following guidance be inserted into the final rule:

“The Secretary recognizes that § 20109 cases may be maintained simultaneously with related claims of identical parties and third parties. The Secretary finds that it is necessary for the Department to engage in a meaningful approval process to review requests to permit withdrawal of complaints and/or requests to approve proposed settlements. The Secretary finds that individual cases may have important public policy issues implicating the goals of whistleblower protection and that individual cases should not be permitted to adversely impact the success of congressionally directed programs.”

Section 1982.112 relating to judicial enforcement should be supplemented.

FRSA expressly authorizes district courts to enforce orders issued by the Secretary under 49 U.S.C. § 20109(d)(2)(A). The FRSA permits the Secretary to bring an action to obtain such enforcement. *See* 49 U.S.C. § 20109(d)(2)(A)(iii). However, there is no provision in FRSA permitting the person on whose behalf the order was issued to bring such an action.

One of the most disturbing aspects of the IFR is the assertion that the statute precludes any private enforcement by a complainant, with which we respectfully disagree, and that the Secretary’s unrestricted discretion to enforce a favorable award (or decline to enforce) is assured by statutory use of the term “may.” Assuming for the moment that the interpretation is correct, Rail Labor urges the Secretary to include the following language in the final rule:

“The Department has concluded that the clear remedial intent of the statute necessarily creates an implied duty to exercise this enforcement discretion in such a manner as to effectuate the intent of Congress by restricting use of its option to decline enforcement of an order to the most extreme or unusual circumstances. Where a respondent refuses or unreasonably delays compliance with a final award, the Secretary would, in all but the most extraordinary circumstances, enforce that award.”

Section 1982.115 relating to waivers in special circumstances should be deleted.

The IFR proposes that the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of NTSSA or FRSA requires.

Rail labor believes that this provision is not only unwise; it creates serious due process issues. It should be deleted. The Secretary determined that while “... this rule is procedural rather than substantive,” it is “a significant regulatory action.” It is difficult to imagine any waiver that would not work to one party’s advantage and, conversely, to the other party’s significant disadvantage. Furthermore, the waiver process itself is something that Rail Labor has experienced in other federal agencies, and learned that the waiver process itself creates a drain on limited resources, provides limited input from affected stakeholders, and is often viewed by

those excluded as a secret or backdoor process, with a resultant loss of confidence in the agency.

OSHA should adopt an interpretative regulation in Section 1982.102(b)(3)(i) to remove any possible ‘safe harbor’ arguments concerning employer medical standards.

The prompt medical attention protection in § 20109 provides an exception: “(i) A railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of FRSA if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty.”

This provision provides a “safe harbor” for carrier medical return to work refusals, which created immediate concerns among Rail Labor after its adoption. The concern was, and remains, that the carriers would abuse this return to work provision by using groundless medical refusals as a substitute for abusive discipline or other illegal forms of retaliation.

This has in fact proven to be the case. Rail Labor has observed a significant increase in unreasonable delays and denials after an injured employee’s treating physician has released the employee to return to his regular duties, almost to the point of becoming routine, except when a railroad seeks to reduce its exposure to FELA damages.

Congress did not intend this provision to provide an unrestricted safe harbor for retaliation. Rail Labor suggests the following language be adopted in the final rule:

“The Department finds that a carrier’s refusal under this provision, particularly where a treating physician has released an employee to return to work, must be done in good faith with a reasonable basis of medical fact. Where the refusal is grounded on the railroad’s own medical standards, these must be clearly established in the carrier’s official policies, medically reasonable, and uniformly applied.”

Rail Labor appreciates this opportunity to provide these comments to OSHA’s Interim Final Rule.

Respectfully submitted,

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