TTD

A bold voice for transportation workers

November 1, 2010

Ms. Nilgun Tolek
Director, Office of the Whistleblower Protection Program
Occupational Safety and Health Administration
U.S. Department of Labor
Room N-3610
200 Constitution Avenue, NW
Washington, DC 20210

RE: Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982; Docket Number OSHA–2008–0026; *and*
Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act; Interim Final Rule; Docket Number OSHA–2008–0027

Dear Director Tolek:

On behalf of the Transportation Trades Department, AFL-CIO (TTD) I am writing to express our support for the above captioned interim final rules (IFR) issued by the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA).[1] These rules implement improved procedures for handling whistleblower complaints under the Surface Transportation Assistance Act of 1982 (STAA), the National Transit Systems Security Act (NTSSA) and the Federal Railroad Safety Act (FRSA), as enacted by the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act). TTD believes that these changes provide important protections for transportation workers and we applaud the agency for moving forward with the rulemaking.[2] As detailed below, there are some changes and modifications that would improve this rule and we hope that DOL will incorporate these suggestions in a final rule.

TTD has long advocated for the strengthening of whistleblower provisions to protect rail, transit, bus and other motor carrier employees from retaliation for reporting security and safety concerns. The 9/11 Commission Act strengthened whistleblower protections for these employees, and provided some of the strongest protections in federal law, shielding workers who

1 Attached is a list of TTD's 32 member unions.
2 A number of TTD's affiliated rail unions, in conjunction with other rail unions, are submitting comments on OSHA–2008–0027 which we support.

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report safety violations, accidents or injuries from employer retaliation. A recent survey of Washington Metropolitan Area Transit Authority employees, found that more than 30 percent of employees were reluctant to report safety violations because of fear of retaliation.[3] This is the latest example of why strong whistleblower protections are needed.

Combined, the OSHA interim final rules implement strong statutory protections and will provide workers with a fair and timely process to adjudicate whistleblower complaints. Not only will these rules protect workers reporting safety and security problems, they will protect workers who refuse to work when confronted by hazardous safety or security conditions. OSHA's rule changes establish a framework that will allow workers who prevail in these cases, to be entitled to reinstatement with the same seniority status, back pay with interest, and compensatory damages (including litigation costs, witness fees, and reasonable attorney fees). In addition, workers will now be eligible to be awarded punitive damages up to $250,000.

While we applaud OSHA's IFRs, we believe that the agency needs to clarify several provisions prior to issuing a final rule.

We are concerned that the preamble states that 49 USC § 20109 (c)(1), which prohibits a rail carrier from denying, delaying or interfering with the prompt medical attention for an injured employee, is not a whistleblower provision. This apparently means that a worker who has been denied prompt medical attention in violation of (c)(1) cannot proceed with a claim under this new rule and the statutory procedures established in the remainder Section 20109. We find this result extremely troubling and inconsistent with the Congressional intent to halt this type of employer harassment. Too often, rail carriers have denied or delayed medical attention to injured employees as a way to intimidate or pressure workers into not reporting an accident or injury. Congress understood this connection and properly included a prohibition on denying prompt medical attention as part of the whistleblower protections. It would make no sense for Congress to take this specific step if did not also intend to provide workers with the enforcement rights and procedures provided for other violations of Section 20109.

In fact, the legislative history of this section supports this interpretation. In amending FRSA, Congress explicitly moved the prompt medical attention requirement from a free-standing provision into the whistleblower protections found at 49 USC § 20109. It is important to recognize that Section 20109 is the only section in the FRSA which is assigned to a different agency, DOL. 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 denial of a worker's right to timely and appropriate medical treatment would constitute an act of discrimination and should be considered a form of retaliation by an employer. As such we feel that the above mentioned statement should be modified to reflect that OSHA has jurisdiction over 49 USC § 20109 (c)(1).

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3 Ann Scott Tyson, *Survey: Most Metro workers see safety violations, many do nothing about it*, THE WASHINGTON POST, October 29, 2010, at B1

The agency must also recognize that rail employees have the right to seek relief under both collective bargaining agreements and whistleblower protections set forth in 49 USC § 20109. The interim final rules notes that these whistleblower provisions provide that an "employee may not seek protections under these provision and another provision of law for the same unlawful act of the public transportation agency or rail carrier."[4] A claim or grievance filed by a rail employee for an alleged violation of a contractual agreement, should not bar remedies the employee may seek for employer retaliation under Section 20109.

The Railway Labor Act (RLA) governs labor-management relations in the rail and airline industries. It protects the rights of workers to organize, bargain collectively, and file grievances for alleged violations of contract. These rights are essential to maintaining decent wages, health and retirement benefits, as well as providing a legal remedy for workers who have been wronged by their employers. The right to seek relief for contract violations should not negate the right to seek a remedy under whistleblower protections provided by statute.

Considering the steps Congress has taken to ensure that whistleblowers have a statutory remedy against employer retaliation, it makes no sense that Congress would have intended to strip rail employees of contractual rights. In fact, Section 20109(h) clearly states that nothing in this section "shall be deemed to dismantle the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement". TTD believes that it would be in the best interests of all parties to clarify that the rights and duties created by § 20109 have no effect on any matters covered under the RLA or collective bargaining agreements.

When defining a "public transportation agency" and "railroad carrier", OSHA should make it clear that owners, along with contractors and subcontractors acting as operators, are considered covered employers. This will ensure that all entities that could retaliate against workers for safety complaints will be covered by OSHA's rule change.

We understand Section 1982.102(b)(3)(i) tracks the statute and states that "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."[5] This section should be amended to ensure that a carrier's refusal must be done in good faith with a reasonable basis of medical fact. Without further clarification we are concerned that the carriers could use this return to work provision – by using groundless medical refusals – as a substitute for abusive discipline or other illegal forms of retaliation. This is especially so in cases where the refusal is grounded on the railroad's own medical standards. The final rule should require that these standards be clearly established in the carrier's official policies, medically reasonable, and uniformly applied.

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4 Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act, 75 *Fed. Reg.* 53522 (August 31, 2010)
5 *Id.* at 53529

Thank you for taking the time to consider the views of transportation labor. We look forward to working with you and the Secretary in protecting the safety and security of our nation's transportation system.

Sincerely,

Edward Wytkind
President

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

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