

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

**Straight Track #260**

# The Hoey & Farina

## **RAILROAD RETALIATION REPORT**

### **Part 10: GOVT REPORT SLAMS RAILROAD MISCONDUCT**

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When trying to prove a retaliation claim under Section 20109 of the Federal Rail Safety Act, **government reports** may provide useful evidence.

The Federal Railroad Administration, for example, has been investigating complaints that one of the major railroads has harassed its employees in an effort to keep them from reporting injuries. And according to a draft version of the FRA report: "**certain [a major railroad] officers were creating an atmosphere or culture that tends to have a chilling effect on employee injury/illness reporting and which ultimately sends a message to employees that if they report an on-duty injury, they would be subject to adverse consequences.**"

A preview of the upcoming FRA report is contained in a memorandum that was issued as part of a hearing held last October by the United States House of Representatives' Committee on Transportation and Infrastructure. The subject of the Congressional hearing was: "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads."

A memo from the Committee's Majority Staff noted that "the FRA recently conducted an extensive audit into allegations that **[a major railroad] frequently harasses and intimidates employees and found numerous violations of Federal law.**" [LINK](#)

According to the Majority Staff, a draft version of the FRA reports on this railroad states: "**The consensus of the investigative team was that certain [a major railroad] officers were creating an atmosphere or culture that tends to have a chilling effect on employee injury/illness reporting and which ultimately sends a message to employees that if they report an on-duty injury, they would be subject to adverse consequences.**" *FRA Draft Report, page 4, October 17, 2007.*

When trying to prove a retaliation claim against a railroad, such reports might be **relevant** and **admissible** - under an important exception to the **hearsay rule**.

## The Rules of Evidence

To get some idea of how a government report might be used to help prove a retaliation complaint, you need to know a bit about some of the Federal Rules of Evidence. [Copies of the rules we discuss are included at the end of this article.]

**Relevant evidence** is evidence that has some tendency to prove a fact that is of consequence to the proceedings. And relevant evidence is generally **admissible**. However, a judge can exclude evidence for various reasons, such as when evidence is "**unfairly prejudicial**." So, you cannot be sure that any particular piece of evidence - any specific "brick" in the wall you are building - will be admitted during a trial.

A famous rule of evidence that you have probably heard about, from some movie or television show, is the **hearsay rule**. The hearsay rule usually applies when a witness testifies about what **someone else** said.

For example, if Tom Testifier swears in court that he **heard** Ike Eyewitness say that he (Ike) saw Danny Defendant rob a bank, the hearsay rule would bar Tom's testimony about what Ike supposedly said. What Tom says he heard Ike say is improper because it is **hearsay**. Testimony from Tom about what Ike supposedly says he saw is not a proper substitute for testimony from Ike.

The hearsay rule also applies to some documents. So, for example, if a police report says that Ike Eyewitness told Officer Friendly that Ike saw Danny Defendant rob the bank, then the hearsay rule would keep the jury from hearing about the police report. The police report is not a proper substitute for testimony from Ike.

Under the Federal Rules of Evidence, there is an important exception to the hearsay rule for official government reports. If there is a plane crash, for example, and a government report concludes that the cause of the accident was negligence by a pilot, then the government report can be used at trial in a negligence case against the airline.

Similarly, in cases where a railroad employee alleges retaliation under Section 20109, a government report might be relevant and admissible to prove that the railroad has a habit or custom of retaliating against employees. And a government report might be relevant and admissible on the question of whether to impose punitive damages against the railroad for a pattern of outrageous conduct.

Evidence that a defendant engaged in some bad conduct on a prior occasion usually is not admissible to prove that the defendant acted the same way in your case. However, evidence that a company has a custom or practice of engaging in certain conduct is admissible to prove that the company engaged in the same conduct in another case. Plus, evidence that a company has a habit of engaging in wrongful conduct might be relevant in proving that the conduct in a particular case was outrageous enough to call for punitive damages.

Proving your case is like building a wall. You construct it **one brick at a time**. And a government report might be a solid brick.

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We have included the Federal Rules of Evidence that are referred to in this article:

### Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

**Rule 406. Habit; Routine Practice**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.