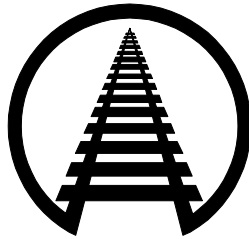


STATEMENT OF
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U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON TRANSPORTATION SECURITY
AND INFRASTRUCTURE PROTECTION

HEARING ON THE IMPACT OF
BACKGROUND AND SECURITY CLEARANCES
ON THE TRANSPORTATION WORKFORCE

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Introduction

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to discuss issues surrounding criminal background checks for those seeking access to railroad property, including contractors and employees of contractors. AAR members account for the vast majority of freight railroad mileage, employees, and traffic in Canada, Mexico, and the United States.

Nothing is more important to railroads than the safety and security of their operations. It is an unfortunate reality of our times that the threat of terrorism has become a major concern. Each year, railroads are required by the federal government to carry potentially dangerous commodities — for example, 1.7 to 1.8 million carloads of various types of hazardous materials (including 100,000+ carloads of toxic inhalation hazards) and thousands of carloads of various military ordnance and explosives — that must be kept secure.

Railroads, unlike their competitors in the trucking industry, cannot refuse to carry hazardous material. Railroads also carry vast quantities of high-value products that criminals covet. Bands of robbers riding up on horseback to steal valuables from passengers and the mail car have given way to sophisticated gangs with night vision goggles, high-tech radios, bolt cutters, and SUVs seeking cigarettes, electronics, designer clothes, and virtually anything else they can steal from containers and box cars in rail yards and on trains.

Overview of Criminal Background Checks

Railroads have an obligation to their employees, their customers, the communities they serve, and their shareholders to keep their operations and facilities as safe and secure as possible. Railroads take this obligation, which has taken on a new dimension in the post-9/11 world, very seriously. And like all other industries, railroads employ a variety of risk

management tools to achieve this goal. One such tool is the use of criminal background checks of prospective employees and contractors seeking access to railroad property.

For any firm, the basic purpose of a criminal background check is to reduce the likelihood that a prospective employee will engage in workplace crime. Even when a conviction is not directly related to the potential duties of a position (*e.g.*, a conviction for embezzlement by an applicant for an auditing position), the conviction may be considered an indication that a necessary personal qualification (integrity, reliability, self control, etc.) is missing. Convictions of particular concern to railroads include crimes against persons, crimes involving weapons, crimes involving theft or fraud, and crimes involving drugs or alcohol.

There are also important liability considerations behind criminal background investigations. These include protection against lawsuits for “negligent hiring” and “negligent retention.” Courts have ruled that employers can be held liable for the damaging actions of their employees, if, based on the employee’s previous actions, he or she should have been disqualified for the position. Similar liability can arise from the actions of contractors and employees of contractors.

The above points all hold true for railroads. In addition, as a consequence of the nature of their business, railroads face a growing body of legislative and regulatory requirements and recommended “best practices” related to homeland security that directly or indirectly call for criminal background checks for persons with access to railroad property. These requirements and recommended practices emanate from the Department of Homeland Security (DHS) or one of its agencies, such as the Transportation Security Administration (TSA), the Coast Guard, or the U.S. Customs and Border Protection (CBP); from the Department of Transportation (DOT) or one of its agencies, such as the Federal Motor Carrier

Safety Administration or the Pipeline and Hazardous Materials Safety Administration; or from another government entity. For example:

- On June 23, 2006, DHS and DOT released their *Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials*. “Establishing procedures for background checks and safety and security training for contractor employees with unmonitored access to company-designated critical infrastructure” was one of the recommended voluntary best practices for the rail industry in this report. On February 12, 2007, DHS and DOT released a supplement that affirmed this guidance.
- DOT regulations (Title 49, Part 1572) require that employees who perform locomotive servicing or track maintenance and are required to operate motor vehicles that contain a certain minimum amount of hazardous materials must have a hazardous materials endorsement (HME) on their commercial driver’s license. To obtain an HME, a criminal background check must be performed.
- Railroad employees who require access to port facilities will soon be required to hold transportation worker identification credentials (TWIC), a credentialing process required by DHS. Eventually, DHS plans to require a TWIC card for all transportation workers, including contractors, whose job may require unescorted access to a secure area or transportation industry. TWIC credentialing includes a criminal background check.
- The Customs-Trade Partnership Against Terrorism (C-TPAT) program, a part of the SAFE Ports of 2006 Act that was signed into law in October 2006, is a voluntary government-business initiative to strengthen and improve overall international supply chain and U.S. border security. C-TPAT gives strong emphasis to background checks for rail employees, contractors, and others who have access to rail facilities.

Under C-TPAT’s minimum security criteria for railroads, “background checks and investigations shall be conducted for current and prospective employees as appropriate and as required by foreign, federal, state and local regulations. ... Once employed, periodic checks and reinvestigations should be performed based on cause and/or the sensitivity of the employee’s position.” Rail carriers “should strongly encourage that contract service providers and shippers commit to C-TPAT security recommendations,” which state that “Temporary employees, vendors, and contractors ... are subject to the same background investigations required of the Company’s permanent employees.”

- Regulations governing the transport of hazardous materials (49 CFR, Part 172.802) require carriers of certain hazardous materials to develop and implement security plans. These plans must address personnel security by implementing measures to confirm information provided by job applicants for positions that involve access to and handling of hazardous materials covered by the security plan.

Background checks involving railroads are also sometimes a shipper requirement. For example, the Responsible Care program is a major chemical industry initiative designed to, among other things, enhance security in chemical manufacture, transportation, and use. Criminal background checks are one of the tools the Responsible Care program uses. The program encourages chemical companies to extend their Responsible Care best practices to their business partners. Thus, the program encourages its member companies to require their vendors, contractors, and transportation providers to perform criminal background checks. Dow Chemical, for example, which is the largest U.S. chlorine producer, requires any transportation provider that moves its products to be Responsible Care members.

Railroad Contractors

As discussed above, performing criminal background checks on railroad contractors and others who would have access to rail property is desirable and necessary for a number of reasons. To date, however, not all contractors working on railroad property have been conducting criminal background checks on their employees.

To help close this gap, several Class I railroads recently teamed with eVerifile, a background investigation firm, to create an industry-wide security and safety initiative known as e-RailSafe. The e-RailSafe program is designed to facilitate background screening and credentialing of Class I freight railroad contractors and contractors' employees.

There is some limited variation from railroad to railroad, but in general e-RailSafe “flags” for further review contractor employees who have had a felony conviction within the previous seven years or who have been released from jail for serving a felony conviction within the last five years. The police division of each railroad reviews the criminal records of contractor employees who are flagged and then indicates to the contractor the names of individuals whose convictions are “disqualifiers” — *i.e.*, individuals who are denied access to

railroad property. It is a contractor decision, not a railroad decision, whether or not to continue to employ an individual who has been denied access to railroad property.

The e-RailSafe program began in late 2005. To date, four of the seven Class I railroads are participating. Others have signed contracts with e-Verifile but have not yet initiated the program.

Railroad police are examining the disqualifiers used by individual railroads under the e-RailSafe program. However, railroads believe that disqualifiers under the e-RailSafe program should not necessarily be the same as disqualifiers under government-sponsored programs or programs covering different firms or industries.

For example, under TWIC, individuals are permanently disqualified if they have ever been convicted of a felony involving treason, espionage, sedition, a terrorism-related action, a crime involving a transportation security incident, improper transportation of a hazardous material, unlawful possession of explosives, murder, making threats about explosives, or racketeering.

Interim disqualifying felonies preclude an individual from obtaining a TWIC card if the conviction occurred within the previous seven years or the individual was released from incarceration within the previous five years. Interim disqualifying felonies include a long list of offenses such as unlawful weapons charges, extortion, fraud, immigration violations, bribery, robbery, and others. Felony theft, however, is not a disqualifier under the TWIC program, but is — and should be — under e-RailSafe.

It has come to our attention through the good work of this committee that there has been a certain amount of confusion among some railroads and contractors as to the rationale for the e-RailSafe program and as to the recourse available to contractor employees who are denied access privileges.

First, some may have erroneously conveyed the impression that the e-RailSafe background check program is required by the federal government. That is not the case. The e-RailSafe website, where contractor employees are directed to submit their information, states that the program is designed to meet a variety of “internal and regulatory requirements of the railroads.”

Second, many contractor employees may not be aware that their employer has had the right to appeal their case back to the railroads.

To help alleviate confusion, Class I railroads have agreed to adopt new practices, which we are pleased to present to you today. Henceforth, the following applies to individuals who are employed by railroad contractors or are applicants for employment by railroad contractors but have been denied access to railroad property through e-RailSafe:

1. *Both* the contractor and the contractor employee/applicant will have the right to appeal the initial denial of access through e-RailSafe. Previously, appeals were made by the contractor on behalf of the employee.
2. Directions on how to appeal the access decision will be clearly described on the e-RailSafe web site.
3. The e-RailSafe program will also send a letter to the affected contractor and employee/applicant clearly describing the appeals process.
4. The appeals process will provide the contractor and the contractor employee/applicant an opportunity to supply information pertinent to the appeal in a timely fashion.

A chart illustrating the e-RailSafe appeals process is attached to the end of this testimony.

Railroads are hopeful that these changes will alleviate confusion regarding the e-RailSafe program and the procedures to be followed in light of railroad decisions designed to create the safest and most secure work environment possible.

Conclusion

Today, like most other industries, railroads perform criminal background checks of prospective employees and seek similar background checks of employees of other firms who will be accessing railroad property. These criminal background checks are a recommended practice by DHS and are likely to be made mandatory at some point in the future. The nature of railroading, as well as liability and other concerns, requires railroads to be especially vigilant regarding security issues.

Railroads have been and continue to be in the forefront among all industries in adopting prudent measures to enhance safety and security. They are always willing to work constructively with members of this committee, other policymakers, communities, employees, and others to seek effective ways to make this happen.

e-RailSafe Appeals Process

