

=====

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

Railroad Accidents/Incidents: Reports Classification, and
Investigations

AGENCY: Federal Railroad Administration (FRA), Department of
Transportation.

ACTION: Notice of interpretation.

SUMMARY: FRA is issuing this notice of interpretation to inform interested parties of its application and enforcement of the harassment or intimidation provisions contained in 49 CFR part 225, specifically relating to situations in which a supervisor or other railroad official accompanies an injured employee into an examination room. This notice of interpretation informs the regulated community as to when such behavior constitutes harassment or intimidation calculated to discourage or prevent the reporting of an accident, incident, injury or illness. This document is not intended to address or impact statutory provisions related to providing ``prompt medical attention,'' as enforcement of those provisions fall within the jurisdiction of the U.S. Department of Labor.

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS-11, Mail Stop 25, Washington, DC 20590 (telephone 202-493-6255); or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC-11, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6072).

SUPPLEMENTARY INFORMATION:

I. Background

Section 225.33(a) of Title 49 of the Code of Federal Regulations requires each railroad to ``adopt and comply with a written Internal Control Plan'' addressing the railroad's policies and procedures regarding accident/incident reporting. This section further requires that such Internal Control Plans include, at a minimum, a ``policy statement declaring the railroad's commitment * * * to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated * * *.''' The FRA Guide for Preparing Accident/Incident Reports also notes that ``many railroad

employees fail to disclose their injuries to the railroad or fail to accept reportable treatment from a physician because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with the reporting of such injuries.' FRA Guide, Ch. 1, p.8. The FRA Guide goes on to state that supervisory personnel and mid-level managers in some instances ``are urged to engage in practices which may undermine or circumvent the reporting of injuries and illnesses.' Id.

FRA is aware of incidents in which a supervisor or other railroad official (hereinafter collectively referred to as the ``supervisor'') has accompanied an injured employee into an examination room, or other room in which the injured employee received medical treatment (hereinafter collectively referred to as the ``examination room''). While FRA is concerned that injured employees in such situations may not receive complete or prompt medical treatment, responsibility for ensuring that such treatment is afforded has been assigned by Congress to the Department of Labor. FRA is concerned that when accompanied by a supervisor an injured employee may be discouraged or otherwise prevented from reporting an accident, incident, injury or illness. Similarly, a supervisor may influence the type or extent of medical treatment afforded the employee in an effort to affect the reportability of that injury. Although concerns have been expressed as to the need for a railroad to determine the extent of an employee's injuries, FRA does not believe that such concerns outweigh the potential pitfalls and problems associated with the practice of having supervisors accompany injured employees while they receive care from their physicians. Moreover, physicians are in the best position to evaluate the health of injured employees and the presence of a supervisor during such examinations would not, in most cases, add any value to the treatment of an employee and would, in general, be a distraction to both the employee and the physician.

The purpose of this document is to articulate a general principle regarding what behavior constitutes harassment or intimidation in violation of Sec. 225.33(a)(1) in the particular context of supervisors accompanying injured employees in examination rooms. The interpretation contained in this notice reflects the longstanding position of FRA regarding this practice. This document is not intended to address or impact the meaning or application of the statutory provisions contained in 49 U.S.C. 20109 related to providing ``prompt medical attention,' as enforcement and application of those provisions fall within the jurisdiction of the U.S. Department of Labor.

II. Interpretation

A. General Principle

Harassment and intimidation occur in violation of Sec. 225.33(a)(1) when a railroad supervisor accompanies an injured employee into an examination room, unless one or more of the exceptions listed in section II(B) of this notice exists.

B. Exceptions

FRA recognizes that there are limited circumstances in which it is appropriate, and indeed preferable, for a supervisor to accompany an

injured employee into an examination room. Thus, FRA believes that limited exceptions to the general principle articulated in section II(A) of this notice are necessary. Consequently, FRA recognizes the following limited exceptions:

(1) The injured employee issues a voluntary invitation to the supervisor to accompany him or her in the examination room. The injured employee must issue this invitation freely, without coercion, duress, or intimidation. For example, an injured employee may seek the attendance of a supervisor where the supervisor is a friend. This exception does not encompass invitations issued by third parties, including physicians, unless the invitations are made pursuant to the request of the injured employee.

(2) The injured employee is unconscious or otherwise unable to effectively communicate material information to the physician and the supervisor's input is needed to provide such material information to the physician. In these circumstances, the supervisor is assisting the injured employee in providing information to the physician so that the injured employee may receive appropriate and responsive medical treatment.

Issued in Washington, DC, on March 24, 2009.

Jo Strang,

Acting Deputy Administrator, Federal Railroad Administration.

[FR Doc. E9-6953 Filed 3-27-09; 8:45 am]

BILLING CODE 4910-06-P