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THE IMPACT OF BACKGROUND AND SECURITY CLEARANCES ON THE TRANSPORTATION WORKFORCE

HEARING

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION

OF THE

COMMITTEE ON HOMELAND SECURITY HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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THE IMPACT OF BACKGROUND AND SECURITY CLEARANCES ON THE TRANSPORTATION WORKFORCE

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
SUBCOMMITTEE ON TRANSPORTATION SECURITY
AND INFRASTRUCTURE PROTECTION,
Washington, DC.

The subcommittee met, pursuant to call, at 10:53 a.m., in Room 311, Cannon House Office Building, Hon. Sheila Jackson Lee [chairman of the subcommittee] presiding.

Present: Representatives Jackson Lee, DeFazio, Norton, Clarke, Perlmutter, Thompson, Conyers, Brown, Lungren, Brown-Waite, and Bilirakis.

Ms. JACKSON LEE. [Presiding.] Good morning. The subcommittee will come to order.

The subcommittee is meeting today to receive testimony on the impact of background checks and security clearances on the transportation workforce.

We are very pleased with our witnesses this morning and our special guests.

The chair also would like to acknowledge the presence of the gentleman from Michigan, Mr. Conyers, the chairman of the full Committee on the Judiciary, in today's proceedings, and Ms. Corrine Brown, the subcommittee chair of the Transportation and Infrastructure Committee.

We welcome them. We understand the interests respectively of their respective committees, joined with the Committee on Homeland Security, on ensuring the importance, but also the consistency of the information of the impact of background and security clearances on transportation workers, and both approached the committee about participating here today.

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PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Before we begin this morning's hearing, I would like to recognize a few special guests that are with us today. I would like the following guests to stand and be acknowledged: Reverend Jesse Jackson and Attorney Tamara Holder.

I want to first thank Reverend Jackson for his leadership on ameliorating the challenges faced by America's working class and these rail workers in particular. I also thank Attorney Tamara Holder for her dedication to the plight of these workers.

I also want to recognize and thank two of the impacted workers for joining us today, Mr. Ron Uccardi and Mr. Arnold Shead (please stand).

Mr. Uccardi worked with H&M International Transportation, Inc. for 11 years. He worked as a spotter, groundman, and performed other functions. Mr. Uccardi is married with five children. Unfortunately, his wife was severely injured in a trucking accident and is unable to work because of her disability. With a son in college and now just one child in private school (the other child was pulled out because of the family's inability to afford the cost), Mr. Uccardi is in need of a fair appeals process and most importantly, he needs his job back. He is the sole breadwinner for his family.

Mr. Shead worked with H&M for 7 years. He is the father of eight children and one of his daughter's is enrolled in Kennedy-King College in Chicago, Illinois. He indicated that he knew he had a great job, and he was consciously doing everything he could to be a good worker. Now, Mr. Shead is trying to raise eight children with one salary—his fiancée's. He too, needs an adequate redress process in place.

Gentlemen, I want you to know that I am personally committed to rectifying the conditions that have led to your present status and your presence here today helps put a face with the issue.

I want to note that today's hearing is focusing on background checks that employers conduct on transportation workers, usually as part of some voluntary program for which DHS and DOT have asked the employer to participate.

However, this particular hearing is not about the Transportation Worker Identification Credential (or TWIC) program for maritime workers. I recognize that some of the protections in the TWIC program for maritime workers—like the right of an appeal to an Administrative Law Judge—may be a solution to some of the problems experienced by rail workers and others we are hearing from today.

While there are many problems in the TWIC program that I intend for this committee to look into, we will focus on those issues at a later date.

The Subcommittee's objectives in holding this exploratory hearing today are threefold:

(1) To ensure a process of redress for workers terminated under the newly implemented background check process;

(2) To assist the Department of Homeland Security in determining the best methods for providing the railroad companies with proper guidance; AND

(2) To assist railroad companies in developing clear, consistent standards for their background check procedures.

While my colleagues and I appreciate the quick responses of both the Department and the industry in addressing this very critical issue—we are here today because there is work left to be done.

I look forward to the witnesses' testimony and working with the Department, industry, and labor to learn more about this situation and others like it that negatively impact transportation workers.

Ms. LEE. So I now ask for unanimous consent to allow Ms. Brown and Mr. Conyers to sit and question the witnesses at today's hearing.

Mr. LUNGREN. Just reserving the right to object.

Ms. JACKSON LEE. Let me yield to the gentleman.

Mr. LUNGREN. Madam Chair, we have worked in the spirit of cooperation on the full committee, as well as the subcommittee, both in the last Congress and this Congress and I hope that we will continue to do that.

I would just ask if we could have the courtesy of being informed ahead of time if we are going to have additional members of Con-

gress participate in our hearings, so that we can appropriately operate.

And I thank you very much for informing me that we were going to have the presence of the chairman of the Judiciary Committee here with us and we had discussed that and that is obviously something that we would agree to.

And the chairperson of the subcommittee dealing with rail is obviously an important person to be involved in these issues, but I wish we had been informed ahead of time so that we could do that, as we try to do.

As we try to make an accommodation on both sides to have a fair hearing in which all sides are explicated, it makes it difficult when we add members on one side without prior knowledge to the other, such that, at the end of a hearing, you see that we have lopsided time and perhaps not a full rounded presentation.

So with that, I would remove any objection, but I know that you and I will be working, as well as the full committee chair and the full committee ranking member, on making sure that we have a spirit of cooperation that continues to prevail in this committee and on this subcommittee.

Ms. JACKSON LEE. Reclaiming my time or at least the time I began this hearing.

Let me thank the ranking member for both his inquiry and his removing of the objection.

You are right, we noticed the full committee chair of the Judiciary Committee. Congresswoman Brown's schedule was just altered early this morning and there was an indication that she might be able to attend this hearing.

In the collegiate spirit in which this Congress works, respecting members of different committees and, as well, respecting their interests and their particular jurisdiction, as you well know, we collaborate, on this particular committee, with a number of different committees.

I am very appreciative that you have recognized Mr. Conyers and now appreciative, as well, that you recognize the untowardness, if you will, or the erraticness of member schedules and the request of Ms. Brown to participate and your acceptance of that, with the notation that we will continue to work in a manner where we are consulting, and we thank you so very much for yielding to that.

Therefore, we will again acknowledge the presence and participation of both Representative Conyers and Representative Brown.

Without objection, it is so ordered.

Consistent with the rules and practices of the committee, we are pleased to honor the request of both Chairman Conyers and subcommittee Chairwoman Brown.

Mr. Conyers and Ms. Brown will be recognized for questioning once all our members have been recognized, in accordance with the rules of the committee.

Then I would like to ask unanimous consent to have the entire statement of Chairman John Conyers to be submitted into the record.

Without objection, the statement is included.

Ms. JACKSON LEE. Let me also acknowledge, before I start, the participation of Mr. Thompson, the full committee chair; Ms. Elea-

nor Holmes Norton, a member of the committee; Mr. DeFazio was present; Ms. Clarke, a member of the committee; and Mr. Perlmutter, a member of the committee. We thank you. And Mr. Bilirakis's presence is noted, as well the ranking member, Mr. Lungren.

One of the issues, as I begin my opening statement and welcoming the witnesses, that the Department of Homeland Security has had as its challenge is the acceptance of the responsibility of securing the homeland and protecting and recognizing the civil liberties and civil rights of the constituents which we protect.

We hold that challenge very dear, enormously important for those who are being secured by this homeland to recognize that they are, in fact, participants both in terms of industry and, as well, in terms of those who work for the various sectors that this committee has the responsibility of securing.

So I would like to have the opportunity to acknowledge those individuals who have a cause and who are representative of the many, many employees around the nation who, in some way, might have felt the hand of security in an unfair manner.

I would like to recognize our special guests that are here with us today and I would like the following guests to stand and be acknowledged.

In particular, first, Reverend Jesse Jackson, who has been a focal point of challenging the system to have the capability of securing the homeland, but addressing the civil liberties and civil rights of those they are securing.

Reverend Jackson, would you stand to be acknowledged? Thank you for your presence here this morning.

We are also pleased to have Attorney Tamara Holder, who has a long list of individuals who have been subjected to scrutiny in a manner that may not be consistent with responsibilities of the Department of Homeland Security, of which this fact-finding hearing will try to probe.

Ms. Holder, would you stand and be acknowledged?

I would like to thank Reverend Jackson again for his leadership on ameliorating the challenges faced by America's working class and rail workers, in particular.

I also thank Attorney Tamara Holder for her dedication to the plight of these workers.

I would like to recognize and thank two of the impacted workers for joining us today, Mr. Ron Yicardi and Mr. Arnold Shed. I believe they are at the table. Would they please stand?

These gentlemen here are representing, if you will, some of the many, many stories that have come to our attention.

Mr. Yicardi worked with H&M International Transportation for 11 years. He worked as a spotter, ground man, and performed other functions. Mr. Yicardi is married, with 5 children.

Unfortunately, his wife was severely injured in a trucking accident and is unable to work because of her disability. With a son in college and now just one child in private school, the other child was pulled out because of the family's inability to afford the costs.

Mr. Yicardi is in need of a fair appeals process and, most importantly, he needs his job back. He is the sole breadwinner of his family and he has been informed that because of particular ele-

ments of his background, that due to homeland security requirements, he has lost his job.

Mr. Shed worked with H&M for 7 years. He is the father of 8 children and one of his daughters is enrolled in Kennedy King College in Chicago, Illinois.

He indicated that he knew he had a great job and he was consciously doing everything he could to be a good worker. Now, Mr. Shed is trying to raise 8 children with one salary, his fiance's.

He, too, needs an adequate redress process in place and, also, his undoing was because of representations that DHS, Department of Homeland Security, was involved.

Gentlemen, I want you to know that I am personally committed to rectifying the conditions, but I also believe that this committee is very interested in balancing the requirements of securing the homeland, as well as providing a fair and just system.

We would like to understand this process and the witnesses that will be testifying today should give us the sense to understand and to have a better understanding and we would like to be able to address the question of your status and your presence here today helps to give us a faith to this very important issue.

I want to note that today's hearing is focusing on background checks that employers conduct on transportation workers, usually as a part of some voluntary program for which Department of Homeland Security and DOT have asked the employer to participate.

However, this particular hearing is not about the transportation worker identification credential, or TWIC, program for maritime workers. Those hearings are forthcoming in this committee and I know that we will look forward to a detailed set witnesses on that question.

I recognize that some of the protections in the TWIC program for maritime workers, like the right of an appeal to an administrative law judge, may be a solution to some of the problems experienced by rail workers and others we are hearing from today.

While there are many problems in the TWIC program that I intend for this committee to look into, we will focus on those issues at a later date.

The subcommittee's objectives in holding this exploratory hearing today are threefold—to ensure a process of redress for workers terminated under the newly implemented background check process, to assist the Department of Homeland Security in determining the best methods for providing the railroad companies with proper guidance, and to assist railroad companies in developing clear and consistent standards for their background check procedures.

While my colleagues and I appreciate the quick responses of both the department and the industry in addressing this very critical issue, we are here today because there is work left to be done and, frankly, I think it will be very important for some of the solutions that have been offered by the industry and some of the clarifications expressed by TSA, they need to be put on the record and the employees and subcontractors or contractors working with the industry and employees that are working with the industry need to have a clarification once and for all.

I look forward to the witnesses' testimony and working with the department, industry and labor to learn more about this situation and others like it that negatively impact on transportation workers.

This is a question that I believe is solvable. It is a question that we hope will make whole some of those whose stories we have heard, hardworking Americans who are simply trying to protect and support their families.

They, too, can be part of the frontline defense of homeland security, as long as we do our business in the right way, provide clarification and detail and understanding. We can work together.

With that, I will yield back my time.

And I am pleased to yield to the ranking member of the subcommittee, Mr. Lungren, for 5 minutes.

Mr. LUNGREN. Thank you very much, Madam Chairwoman.

I think we are all concerned whenever we enact legislation in Congress as to how it impacts the general public or the various commercial interests involved and how it impacts individuals.

However, the use of background checks and security clearances are important Department of Homeland Security tools to protect the public and our critical infrastructure.

In testimony given to our Homeland Security Committee, the full committee, yesterday, Deputy Secretary Michael Jackson reiterated Secretary Chertoff's five core goals of the department.

The first three are relevant to our hearing today: first, protect the nation from dangerous people; secondly, protect the nation from dangerous goods; and, third, protect our critical infrastructure.

Individuals with malicious intent pose the greatest risk to the public, as well as our critical infrastructure.

Without doing background checks, DHS is powerless to identify such individuals. Identity screening programs are currently being conducted by DHS at our borders, our airports and seaports, attempting to identify individuals with ill intent.

This is part and parcel of our overall effort to try and thwart those who would attempt to commit acts of terrorism against our nation.

If it were easy, we wouldn't have to worry about it. If the enemy weren't smart, we wouldn't have to do things which many of us find as inconveniences and even beyond that.

The real problem is or the challenge is how do we protect ourselves without violating the rights of American citizen.

If transportation workers who serve our ports and haul hazardous materials are subject to background screening, why shouldn't rail workers handling the same materials?

As a matter of fact, we had a hearing recently where there was comment on both sides of the aisle of the lack of maturity of an overall program in the area of rail.

Once identified, malicious individuals can be denied access to hazardous of security-sensitive materials and our critical infrastructure assets. While not without problems, identity screening programs which employ background and security checks provide a necessary layer for homeland security.

However, it should be done fairly and expeditiously, with a right of appeal afforded the disqualified worker.

I hope this hearing is not signaling that somehow there is a lack of support for background checks on transportation workers as a DHS tool for securing our homeland and I hope that today's hearing is broader than just looking at a single incident, which appears now to be in a mode of resolution by the railroads agreeing to provide a private right of appeal, private right of appeal, as I understand it, and hopefully we will be able to get into that.

Background screening involves many important issues which impact individual workers and I think that in the last Congress, the now chairman of the full committee, Mr. Thompson, and I and our staffs worked very diligently to try and come up with legislation dealing with transportation workers.

And one of the concerns we had at the time was have we a list of disqualifying crimes, which is too broad for the purpose, and does it make sense to have the list that we would want for people that would have access to security-sensitive materials be extended to those who are, for instance, HAZMAT drivers.

And I think the gentleman from Mississippi and I agreed that that was too much of a reach and we were attempting to try and figure out what made the most sense, how do we do that, and we made progress in the last Congress, but we didn't complete that task and I hope that this subcommittee will work diligently on that.

Background screening, as I say, involves many important issues which impact transportation workers, including the list, that is, what should be on the list of crimes which disqualify a candidate from service.

There is also the question of duplicative requirements between the differing background checks. In addition, the cost of screening programs to the worker is a major concern that I hope we will address, particularly as these programs expand.

I hope the subcommittee will have time to consider these additional issues which are critically important to developing an effective background screening process.

There is no one in this Congress that wishes to disqualify people for insubstantial reasons and there is no one in this Congress who doesn't believe we ought to have rights so that if a mistake is made, a worker might appeal in an expeditious manner and have that resolved.

But I hope that this hearing or other hearings do not in some way suggest that we do not need background checks nor that background checks are irrelevant or immaterial to the important issue of providing security to our vulnerable infrastructure.

And so, Madam Chairwoman, I look forward to working with you on this and working with the full committee chair, as well.

And I thank you for the time.

Ms. JACKSON LEE. I thank the ranking member.

It is my pleasure now to be able to recognize the ranking member of the full committee for an opening statement for 5 minutes.

Chairman Thompson?

Mr. THOMPSON. Thank you very much, Madam Chairman.

Let me, from the outset, be very clear. Background checks are important, but objectivity, due process and all those things guaranteed every citizen of this country is absolutely fundamental.

You can't dodge any problem by saying homeland security said it. We are here today because somehow objectivity did not take place and, hopefully, from this hearing and going forward, we can have background check, we can make sure that systems are correct.

But in the process of doing it, we want to make sure that we are not disenfranchising workers who have been good workers, workers who have satisfied the duties and responsibilities on the job, become good providers for their families, and somehow because of quirks in the law, they lose their job.

So, Madam Chairman, I want to thank you for calling the hearing.

I want to thank our witnesses who are here today. I look forward to their testimony.

Reverend Jackson, it is good see you again.

Mr. Yicardi and Mr. Shed, I met you, I appreciate the opportunity to have met you. I wish it were under different circumstances, but we will move on and look at that issue.

In addition, we are here today because the department issued unclear voluntary guidance to transporters of hazardous material. That guidance suggested that railroads should conduct background checks of all employees and remove those fail the checks, and this led us to several firings in the Chicago area.

And when we learned of those firings, we sat down with Secretary Chertoff and Assistant Secretary Hawley to discuss these issues. Staff on the committee met. Congressman Conyers, Congresswoman Brown and others became intricately involved in many of those meetings.

After the meeting with the secretary, he agreed that we would clear up the unclear guideline. The secretary gave me his word that he would do it.

And, Madam Chairman, I would ask unanimous consent to enter into the record the new guideline issued by the secretary through TSA with respect to the hearings and due process for today.

Ms. JACKSON LEE. Without objection.

Mr. THOMPSON. In this post-9/11 world, I recognize the paramount importance of protecting our nation's critical infrastructure, such as railroads and transportation avenues, but I know we must approach homeland security with common sense.

As the chairman of this committee, I will not stand for compromising workers' rights just because it is convenient. We must strike a careful balance between protecting this great nation and protecting the civil rights of the citizens that make our nation great.

Together, meaning the department, labor, industry and this committee, we must determine how to best strike this extremely important balance.

First, we must ensure due process for all workers terminated because of the newly implemented background checks. We must work to extend this protection to all transportation industries, not just rail and maritime workers.

Secondly, we must develop clear and consistent standards for those types of checks and the department must provide clear guid-

ance for implementing background checks and security clearance standards, including protecting due process.

So, Madam Chairman, I look forward to receiving the testimony of the people here today and hopefully hearings of this nature won't be needed after today.

I yield back.

Ms. JACKSON LEE. Let me thank you very much, Chairman Thompson, and thank you very much for the submission of that clarification into the record.

And one of the reasons that there is a representative from TSA is to ensure that that clarification is also enunciated or clarified through testimony here today.

We want to acknowledge present at the hearing Congresswoman Ginny Grown–Waite of Florida and we thank her for her presence.

Other members of the subcommittee are reminded that under the committee rules, opening statements may be submitted for the record.

Let me again welcome our panel of witnesses and we will ask both Mr. Yicardi and Mr. Shed, if they would, there are two seats for you, if you would join the audience on the first row at this time, both Mr. Shed and Mr. Yicardi. Thank you. Don't go far away. Just stand by nearby. There should be two seats for you, should be, on the front row, two seats. Thank you very much.

Let me welcome our panel of witnesses. Our first witness, Ed Hamberger, serves as president and CEO of the Association of American Railroads.

Mr. Hamberger, welcome.

Prior to joining the AAR in July 1998, he was a managing partner at the Washington, D.C. office of Baker, Donaldson, Bearman and Caldwell. He went to the firm in 1989, after having served as assistant secretary for governmental affairs at the Department of Transportation.

Our second witness, Larry I. Willis, is the general counsel for transportation trade, AFL–CIO, a Washington, D.C.-based labor organization, representing several million workers in the private and public sectors of transportation, including mass transit and rail.

Before joining TTD in 2003, Willis was the director of legislation and is an associate with the international law firm of Weil, Gotshal and Manges, LLP.

Our third witness, Santos Marinez, is the trustee business agent for Local 705 of the Teamsters Union, representing over 1,200 rail yard crane operators, drivers and inspectors in the Chicago area.

Marinez was first elected to this position in December 2003 and was reelected in December 2006. Prior to his elected service with the Teamsters, Marinez spent over 30 years of driving and operating rail yard cranes.

And, Mr. Marinez, is that correct, you do not have a "T?" Is that correct? All right, thank you.

Our final witness, Robert D. Jamison, is the deputy administrator of the Transportation Security Administration.

Mr. Jamison, you have been before this committee before, been in this room, and we thank you.

Mr. Jamison was appointed in October 2005. Mr. Jamison previously served as the deputy administrator of the FTA at the U.S. Department of Transportation.

Without objection, the witnesses' full statements will be inserted into the record.

I know ask each witness to summarize his statement for 5 minutes, beginning with Mr. Hamberger.

Mr. Hamberger, again, welcome.

STATEMENT ED HAMBERGER, PRESIDENT AND CEO, ASSOCIATION OF AMERICAN RAILROADS

Mr. HAMBERGER. Thank you, Madam Chairwoman, Congressman Lungren, Chairman Thompson, Chairman Conyers, and our industry's very own Chairwoman Corrine Brown.

It is a pleasure to be here today on behalf of the members to get into the issue of criminal background checks for employees of rail contractors.

Obviously, there has been some confusion around our program, which was implemented a little over a year ago, and I am pleased to have the opportunity to clarify on the record the origin of this program and to announce today the implementation of an improved appeals process.

As you know, railroads have an obligation to their employees, their customers and the communities we serve to keep our operations and facilities as safe and secure as possible.

One of the risk management tools railroads have used for over 10 years to achieve this goal is the criminal background check of prospective employees that the railroads do themselves.

Railroad concerns go beyond terrorism, however, and I think it is important for this committee to understand that when we take a look at the background of a prospective employee, we do not just through the prism of terrorism, but also through the prism of workplace security, workplace safety and the protection of the goods and products entrusted to our care by our customers.

In 2005, our security committee recognized that a gap in overall security plan was the lack of a background check for employees of contractors with access to critical rail assets.

Consequently, at the end of 2005, several Class I railroads contracted with e-VERIFILE, a background investigation firm, to create an industry-wide security and safety initiative known as e-RAILSAFE to facilitate background checks on employees of railroad contractors. That was an initiative that the industry did on its own.

In general, e-RAILSAFE flags for further review contractor employees who have had a felony conviction within the previous 7 years or who have been released from jail for serving a felony conviction within the past 5 years.

The police division of each railroad reviews the criminal record of those who are flagged and indicates which individuals will be awarded or denied access to railroad property.

It is a contractor decision, contractor decision, not the railroad decision, whether or not the individual continues in the employ of the contractor.

It has come to our attention through the good work of this committee that there has been a certain amount of confusion on the e-RAILSAFE program as to the resource available to contractor employees who are denied access pursuant to the background check.

First, let me address the issue that some may have erroneously conveyed the impression that the e-RAIL's background program is required by the federal government. That is not the case. It is something that we took on our own initiative.

I will point out that it is the case that it is a strongly recommended practice, and I believe Mr. Jamison will stand behind that recommendation in his testimony today.

But I regret any miscommunication that may have occurred and if I or any of my staff miscommunicated on that, I apologize for that. It is not a requirement, but it is a strongly recommended practice and, again, I regret any confusion over that issue.

Second, many contractor employees may not be aware that under the program, the employer, that is, the contractor with whom the railroad had a privity of contract, had the right to appeal the case back to the railroads.

We have decided and are announcing today that we are going to adopt a new practice so that the employee himself or herself has the right to that appeal, that the employee is notified of that right to appeal, that the employee is given access to e–VERIFILE, which would then pass the information back to the railroad.

It will apply to individuals employed by railroad contractors who have been denied access to railroad property through the e-RAILSAFE program.

Both the contractor and the contractor employee will have the right to appeal the initial denial of access through e-RAILSAFE. The appeals process will be clearly described on the e-RAIL Website.

I recognize that might not be enough. When there is a denial of access, a letter to the contractor and the employee clearly describing the appeals process will be sent.

The process will provide the contractor and the employee the opportunity to supply information pertinent to the appeal in a timely fashion and any mitigating circumstances.

Railroads are hopeful that these changes will alleviate the confusion regarding the e-RAILSAFE program and that the procedures to be followed in light of this new program will provide the proper balance that the chair was talking about in security, as well as right to an appeal and civil liberties.

Let me just say that we are committed to continuing to work to have our workplace as safe and secure as possible.

We appreciate the opportunity to be here and will look forward to working with this committee, Congresswoman Brown's committee, the Department of Homeland Security and our employees in continuing to provide that safe and secure workplace.

Thank you.

[The statement of Mr. Hamberger follows:]

PREPARED STATEMENT OF EDWARD R. HAMBERGER

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.

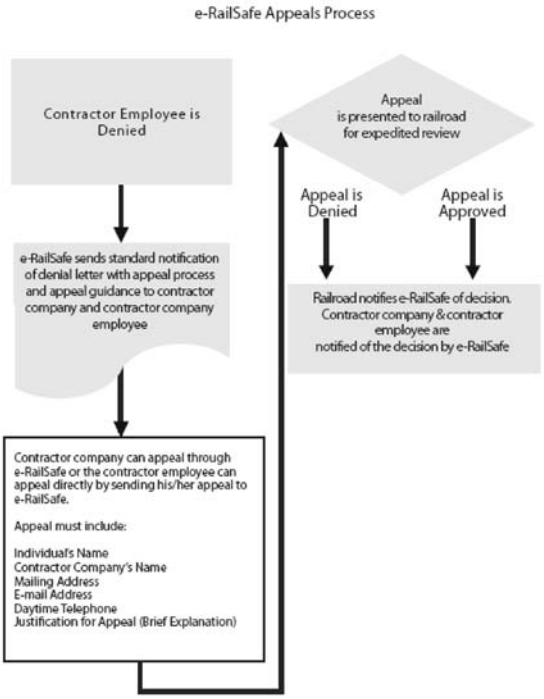
Railroads are hopeful that these changes will alleviate confusion regarding the e-RailSafe program and the procedures to be followed in light of railroad decisions designed to create the safest and most secure work environment possible.

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 seeks effective ways to make this happen.

ATTACHMENT: CHART—E-RAILSAFE APPEALS PROCESS



Ms. JACKSON LEE. Mr. Hamberger, thank you very much and thank you for your testimony and the spirit in which it has been offered.

Mr. Willis?

STATEMENT OF LARRY WILLIS, GENERAL COUNSEL, TRANSPORTATION TRADES DEPARTMENT, AFL–CIO

Mr. WILLIS. Thank you, Madam Chair, Ranking Member Lungren, Chairman Thompson, members of the committee and other guests here today.

Let me first begin and thank you for the opportunity to testify this morning on behalf of the AFL–CIO's transportation trades department and our 32 member transportation unions.

In particular, I want to point out there has been a lot of discussion about what occurred in Chicago, but TTD also represents two unions that are covered by D.C. RAILSAFE checks, the Transportation Communications Union and the Brotherhood of Railroad Signalmen.

11009-1.eps

TCU represents workers in intermodal facilities on the west coast. BRS represents workers represented with contractors of signal systems. And, again, they are also covered by the checks that we are talking about here today.

Let me state, at the outset, an echoed sentiment that has been expressed in this committee. We understand that the world has changed significantly since 9/11 and we understand that controlling access to transportation facilities and assets is an important and inherent part of securing those assets.

We also understand that background checks to root out those, as Mr. Lungren said, that have malicious intent or that represent a security risk are legitimate goals and ones that we fully support.

But there is a right way to go about that and there is a wrong way to go about doing that. And we would submit that the e-RAILSAFE program, as originally rolled out and notwithstanding the modifications that have been announced here today, as still exists, is too far in the direction of the wrong way.

This committee and members of Congress and TSA have worked very hard to get these background checks in the HAZMAT area and the TWIC area for maritime and longshore. While by no means perfect, at least both of those programs, again, as Mr. Lungren said, give you a list of disqualifying offenses, so that workers can fully understand what crimes will cause them problems.

There is nothing that I have seen and there is no clarity in Mr. Hamberger's statement about what those felony offenses will be that are thus flagged and thus are, quote-unquote, disqualifying offenses.

Furthermore, on the e-RAILSAFE Website and in some of the material that we have seen, it also says that, quote-unquote, misdemeanors of concern could also disqualify a worker.

We still don't know exactly what that is. So I think a major component of fairness and due process here is to fully articulate, again, what are the offenses and how far back—again, it has been said 7 and 5 years.

We have heard reports that some contractors go back farther. There has been some major confusion. That needs to be clearly stated about what those offenses are, how far back folks are looking, and to make sure that there is a nexus between those disqualifying offenses and the security threat that you are trying to stop.

I understand that you may not just be targeted on terrorism, but the security rationale for this program has been used as a reason for instituting it and we should understand what are we trying to protect and then make sure those disqualifying offenses hook up directly.

The appeals and waiver process was a critical component of the maritime TWIC program or the HAZMAT program. In fact, one of the things that this committee insisted on as we did the Coast

Guard reauthorization bill last year was to put an administrative law judge, so that there would be an independent person, separate from TSA, deciding whether or not an individual was going to get an appeal.

Again, we appreciate the changes that have been made, that have been announced this morning, and I think there are some good parts of that, but if you don't have an independent person making those types of decisions, you are appealing back to essentially the employer here.

That opens you up to just inherent subjective decisions and claims of bias and favoritism, et cetera, and are going to create further issues here.

We need to identify some independent redress mechanisms that workers can seek.

Again, a lot has been said about the TWIC program and about how this is coming into other modes of transportation. We see that, as well.

I would note that the program done by e-RAILSAFE and TWIC in maritime and HAZMAT is not this program. The TWIC program and the HAZMAT program are much more favorable to workers as far as assuring due process.

So if we want to have one universal program and we want to have not duplicative checks and what have you and one standard, then, again, I think the railroads need to look at the good work that this committee and TSA have done with those other background check programs that, while no means perfect, at least create some parameters and limitations that I think are helpful and important.

My time is up, so let me stop and I would be happy to answer any questions.

[The statement of Mr. Willis follows:]

PREPARED STATEMENT OF LARRY I. WILLIS

On behalf of the Transportation Trades Department, AFLCIO (TTD), I want to thank the Committee for the opportunity to testify this morning on the imposition of criminal background checks by rail industry contractors through the e-RAILSAFE Program. I also want to thank you Madam Chair, not only for calling this hearing, but for your work in investigating and evaluating exactly what is being done by the railroads and your commitment to hold these companies accountable.

TTD represents 32 member unions in all modes of transportation and our 10 rail affiliates make-up our Rail Labor Division.[1] I want to specifically note that two of our affiliates, the Transportation Communications International Union (TCU) and the Brotherhood of Railroad Signalmen (BRS), represent workers that are subject to the checks performed by e-RAILSAFE and that are the focus of today's hearing.

The e-RAILSAFE program, designed and imposed by our nation's Class I railroads, was implemented without any consultation with labor and ignores the standards and procedures that have been developed by Congress and the Administration for security threat assessments. Given this fact, it is not surprising that the program has generated so much confusion and controversy. It is indeed unfortunate

[1] A complete list of TTD's member unions is attached.

that we find ourselves having to address these issues today at a Congressional hearing when many of these problems could have been avoided by the rail industry with smarter planning, collaboration with our member unions, and a better understanding of the work that has been done in this area since the September 11, 2001 terrorist attacks.

Indeed, since 9/11, Congress and the Administration, particularly the Transportation Security Administration (TSA), have focused considerable attention on imposing various forms of background checks on transportation workers and on planning for a universal Transportation Worker Identification Credential (TWIC). TTD has been at the forefront of this debate.

We have participated vigorously throughout the legislative and regulatory process to ensure these initiatives are reasonable and strike the proper and necessary balance between worker rights and due process, and legitimate security concerns. Indeed, it must be clear that no one wants to secure our nation's transportation system, including freight and passenger rail facilities, more than transportation workers. Our members are on the front lines and they will be the ones first affected in the event that a terrorist attack is carried out using or targeting our nation's transportation system and infrastructure.

With this in mind, we have been forceful advocates before Congress and the federal government for more federal support for rail transportation security improvements, mandatory employee training and strong whistleblower protections. It is indeed disturbing that we continue to face stiff opposition from the industry's lobby to our common sense security agenda; and this is the same industry that claims the safety and security of the rail network is its number one priority.

We do understand and appreciate that the world has changed since 9/11. Controlling who enters our transportation system and its facilities and ensuring that those who work there do not pose a terrorism security risk are legitimate goals and ones that we fully support. But any background check program must strike the right balance: disqualifying offenses must be clearly articulated and limited to those that cause someone to be a true security risk; a robust and independent appeals and waiver process must be available; worker privacy must be protected; and overall the process must be fair, consistent and transparent so workers can navigate the program in an efficient manner.

Based on these and other objectives, we worked directly with Members of Congress on both sides of the aisle in developing certain parameters for the maritime TWIC program embodied in the Maritime Transportation Security Act. We were pleased that this bipartisan model was largely adopted when TSA implemented the Hazmat security threat assessments required by Congress in the USA Patriot Act. While by no means perfect, these two TSA run programs at least provide workers with a list of disqualifying offenses, an appeals and waiver process, which includes, at the direction of Congress, an Administrative Law Judge (ALJ), and privacy protections limiting the use and distribution of information generated by these checks.

Let me be clear—the rail industry followed none of these principles in implementing its e-RAILSAFE program. And it must be noted that these checks apply to current workers, many of which have had long, productive tenures with their employers and are dependant on these jobs to support themselves and their families.

One of the main problems with the e-RAILSAFE program is that the scope of these checks and the process that workers must follow remain vague and unclear. Even in discussions convened by your staff Madam Chair, railroad representatives expressed uncertainty on exactly what would constitute rejection by e-RAILSAFE. If the railroads themselves cannot tell us how and why someone will fail a background check, how are rank and file workers expected to figure out their rights and how to preserve their jobs?

According to one written description of the program (see attachment 2), "an employee will be denied an identification badge if the background screening process reveals a felony conviction in the past 7 years, or the employee was released from incarceration for a felony offense within the last 5 years." But we have also been told by at least one railroad security official that multiple misdemeanors might also be considered and the e-RAILSAFE web site clearly states that employees can be "denied if they have misdemeanor crimes of concern."[2] Again, railroad representatives offer different interpretations of what this means and no one has been able to tell us what constitutes misdemeanor "crimes of concern." I guess it's whatever some official decides on any given day.

It should also be noted that rail workers are required by the e-RAILSAFE program to sign a broad consent form that, among other things, allows for a review of the employee's "character and general reputation." This may be boilerplate legal language, but with no further explanation from the company, front-line workers are not sure what type of checks they are agreeing to. Furthermore, e-RAILSAFE literature warns that these checks are somehow required by the Department of Homeland Security and subject to audit by government officials. A false claim offered only to lend credibility to this program and to coerce employees who would otherwise have legitimate questions about the extent of these background checks. And failure by the employee to sign the consent form will result in the worker being denied access to the rail facility.

The railroads' claims that workers are offered an "appeals" process are false as well. The fact is that the appeals process is a protection in name only. As far as we can tell, the decision to "appeal" is left up to the contractor and the ultimate decision maker is the Class I railroad itself. This circular and insular process does not represent a fair process and it subjects workers to favoritism, potential bias and inconsistent standards.

A worker must have the ability to offer any corrections to criminal records and further demonstrate that despite a bad decision made several years ago, they do not constitute a security risk. Both of these rights are afforded to workers in the TWIC and Hazmat program. In fact, for the TWIC program Members of this Committee worked with transportation labor to require the availability of independent ALJs to hear worker appeals. This added protection was deemed necessary because the waiver process, as originally proposed, would have required workers to apply back to the very same agency that determined the individual was a security risk in the first place.

I understand that based on the public criticisms of e-RAILSAFE, the AAR has already spoken to Members of this Committee and others in Congress about reforming this program. We applaud this decision. I would note, however, that on a number of occasions we have asked the industry to sit down with us in an attempt to reconcile some of the issues being considered today. Our offers of assistance were rejected and we could only meet with the rail industry on this topic when staff for the Committee convened a meeting late last year. It is my sincere hope that the industry will not employ this approach in the future if it is serious about reforming this program.

As I said at the outset, we are in strong support of efforts that will prevent those that pose a security risk from working in sensitive transportation positions. But there is a right way to go about this and a wrong way. Clearly the approach by e-RAILSAFE is wrongheaded and must be changed.

I hope this time, with our participation and the oversight of this Committee, the industry can get it right. At the end of day, a balanced and fair process of screening workers is not inconsistent with the goals of these checks and will only enhance transportation security.

Thank you for the opportunity to share our views today and I would be happy to answer any questions the Committee may have.

[2] See e-RAILSAFE web site at *http://www.e-railsafe.com/help/rsFAQ.htnl.*

ATTACHMENT 1: TTD MEMBER UNIONS

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 Airways Systems 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)

November, 2006

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ATTACHMENT 2: TTX COMPANY FIELD MAINTENANCE OPERATIONS NEWSLETTER, IN THE FIELD *Class I Railroads Increase Security Measures*, Winter 2007.

TTX COMPANY FIELD MAINTENANCE OPERATIONS NEWSLETTER

In The Field

FIELD MAINTENANCE OPERATIONS

WINTER 2007

Class I Railroads Increase Security Measures

Given heightened concerns regarding national security, the Class I railroads have implemented a contractor background screening and identification program. This program, known as e-RAILSAFE, provides additional procedures to better secure railroad facilities, and satisfies government. security recommendations, directives, and regulations. The e-RAILSAFE program includes a background screening program, security awareness training and a photo identification badge for all qualified service providers, such as TTX. While all TTX employees were subject to a background check at the time of hire, the e-RAILSAFE program requires an additional background check to be performed. In order to initiate the e-RAILSAFE background check, all employees must complete a consent form. TTX Company has been advised by our owner/customers that any employee who refuses to provide this consent form will not be allowed to provide services on their property.

An employee will be denied an identification badge if the background screening process reveals a felony conviction in the past 7 years, or the employee was released from incarceration for a felony offense within the last 5 years. Employees denied an identification badge by e-RAILSAFE may appeal that decision to the railroad.

After employees pass the background check, they will be asked to complete an "on-line" safety/security exam at their location. A digital photograph of each employee will also be taken. Once these requirements have been met, employees will be issued a photo identification badge. Many TTX employees, particularly those working on Union Pacific property, have already been issued an e-RAILSAFE identification badge.

As we all know, security is one of the most important issues freight and passenger railroads face today. In the wake of 9/11 and transit system bombings in Mumbai (India), London and Madrid, ensuring the safety of rail employees, riders, cargo, and infrastructure, as well as the general public, is critical. Railroads are committed to emergency preparedness, and keeping vital rail transportation links open in the post-9/11 world. TTX Company's participation in the e-RAILSAFE process is a positive step forward in protecting our industry.

Ms. JACKSON LEE. Thank you, Mr. Willis. Thank you so very much for your instructive testimony.

And I now recognize Mr. Marinez for him to be able to summarize his statement for 5 minutes.

Mr. Marinez? Thank you.

STATEMENT OF SANTOS MARINEZ, TRUSTEE, TEAMSTERS LOCAL 705

Mr. MARINEZ. Madam Chairwoman, Ranking Member Lungren, Mr. Thompson, members of the subcommittee, my name is Santos Marinez and I am an elected trustee of Teamsters Local 705.

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Thank you for the opportunity to testify today on the impact of background checks on workers in the transportation industry.

Today I will address the issue of security clearances in the rail terminal industry.

Local 705 is one of the largest Teamster locals in the nation, representing over 20,000 members, mostly in the transportation industry in the Chicago area. We represent over 1,200 members in the rail cargo industry, where I started 30 years ago.

The system used in rail yards today to screen employees in an effective means to prevent terrorism is opaque, unjust and ineffective. The vast majority of the functions in rail yards are outsourced to outside vendors by the railroads.

Thousands of these companies across the nation compete fiercely for the work. A badge to enter the rail yard is an absolute necessity for our members. Unfortunately, we cannot negotiate the terms of issuing these badges. They are issued by the railroads, not the employers themselves.

In fact, the employers are as much at the mercy of whatever system the railroad implements for security needs as our members. Because the denial of a badge is effectively the denial of one's livelihood, it is critical that the process be transparent and as fair as possible.

The system of credentialing individuals working at rail yard terminals is confusing. The railroads have required their rail terminal contractors to screen their employees, but there is no government mandate for this.

These background checks at applied inconsistently. Each railroad treats its contract employees differently. Different lists of crimes are used to disqualify an individual, including misdemeanor crimes.

There is no transparency. The railroads don't tell the contractor or the employee what crimes are disqualifying and how far back they are looking.

If background checks are to be required of rail terminal employees, then standards should be the same as those that have been implemented in other sectors, such as airline, trucking and maritime.

The system that the railroads use, called e-RAILSAFE, is being implemented throughout the national railroad system.

This presents the first issue of fairness. I know of employees who have been denied badges in one yard who have gone on to work in other yards. If the badges were properly denied, obviously, this creates a greater security risk, not a lesser one.

If one assumes that they were improperly denied, the system has lost credibility and effectiveness.

With e-RAILSAFE, the employee of a rail vendor is given a very wide ranging release document and ordered to sign it. His or her union is helpless to assist because the property owner, not the employer, is making the demand and the employees have no collective bargaining rights against the railroad.

The release demands access to criminal background information, of course, but also credit checks, among other items.

Why is a credit report required to do a criminal background check?

Employees who protest are advised to sign the document or be discharged. This sharing of personal information with employers and the railroads is inappropriate.

The notification process should be limited to the applicant's background check only.

The list of disqualifying offenses is unclear. Drug offenses are the most common problem and while Local 705 does not condone unlawful drug use, these people do not constitute an extraordinary threat to the nation's rail system.

Here is a real life example of the bureaucratic mess that the system allows. One of our members was convicted of auto theft when he was a young man. After he served his sentence, he applied to work at one of the rail yards for a vendor whose workers were represented by Local 705.

He informed the employer on his application of his criminal record. He had a spotless work record for 5 years and no further criminal history after his conviction.

In August 2004, after a background check, he was summarily terminated because he lost his badge due to his criminal record. Local 705 was powerless to support him, as we had no recourse against the railroad.

We assisted in getting him another job at another local rail yard doing the exact same work. He worked there until 7 years had passed from the time of his conviction.

He was then rehired by his original employer and was granted a badge for the very same rail yard from which he had been expelled 2 years previously.

National security was not served this episode. Rather, it seems arbitrary, unfair and pointless. And there are so many other similar stories.

Denying a badge to individuals who have a felony conviction within the last 7 years, who have been released from serving a felony sentence in the last 5 years must be reconsidered.

This is causing the dismissal of good, hardworking Americans who have had solid work records and is casting them as threats to our national security.

Once an employee fails a background check, he can either disappear, presumably into the welfare or the criminal justice system, or he can try and appeal, but the system seems arbitrary and unfair.

Moreover, the employee who has returned to work is not compensated for his lost time or wages during his time off work.

Broader offenses are an especially difficult problem. If there is concern about crimes such as foreign identity documents, they should be spelled out. However, disqualifying an individual for a felony involved fraud and dishonesty could include passing bad checks.

Many hardworking Americans could be considered a security risk because of that offense.

Criminal codes can vary greatly from state to state and employees should have the ability to challenge the characterization of a particular offense in the appeal process.

Appeal decisions should be made by an administrative law judge or a third party not linked to the railroads.

I believe that we must have a safe rail system. After all, our members are on the front line of a potential attack. However, a vigorous effort must be made to balance the interest of increased security with the protection of employee rights.

It is my hope that the recommendation I have discussed today will be considered to further improve this balance.

With that, I thank you for the opportunity to testify today. I would be happy to answer any questions from the committee.

Thank you.

[The statement of Mr. Marinez follows:]

PREPARED STATEMENT OF SANTOS MARINEZ

My name is Santos Marinez, and I am an elected Trustee of Local 705 of the International Brotherhood of Teamsters. Thank you for the opportunity to testify today on behalf of our members on the issues of background checks and security clearances on workers in the transportation industry. The International has been very active in the Congress since 9/11 and the advent of additional background checks in the transportation industry, in trying to protect our member's privacy, assuring a fair and just process for evaluating workers as potential terrorist threats, providing a means by which our members can correct erroneous information, appeal a decision that might deny them a security clearance or credential and hence their livelihood, and allow for the consideration of mitigating circumstances—giving someone who has made a mistake and paid for it—a second chance. From background checks implemented on airline employees, hazmat hauling truckers, maritime industry employees, and the implementation of the Transportation Worker Identification Credential (TWIC), we have sought to ensure that our members are protected through any credentialing process that would unjustifiably deny them their ability to earn a living.

I am here today to specifically address the issue of background and security clearances in the rail terminal industry. Local 705 is one of the largest Teamster locals in the nation, representing over 20,000 members, mostly in the transportation industry in the Chicago Area. Local 705 represents drivers, warehouse workers, UPS and DHL delivery persons and hundreds of other job classifications. We represent around 1,200 members in the industry from which I come, the rail cargo handling business. Working in the rail yards has come a long way since I started thirty-five years ago. Most notably, the use of containers has become almost universal. The days of the boxcar as the dominant railcar are long over. Rail yards are also different. Yards used to be located in the city, near the center and were generally relatively small and scattered through the area, especially in my area, the rail capital of the nation. However, with the advent of so-called "intermodal" rail traffic, built around a container box that is loaded at the shipper's site, carried by truck to a rail yard or port, loaded on a train or ship and then placed onto another truck to be delivered to the receiver's location, the look and operation of today's rail yards has changed dramatically. New rail yards are enormous, covering hundreds of acres and are located many, if not hundreds of miles from the cities they service. Trains have grown longer and the demands on the personnel loading and unloading them have become greater.

Security concerns have also grown in the intermodal age. Containers are very rarely opened or inspected during transit and, thus, are potential entry points for all manner of threats. In the post 9/11 world, there is clearly a need to strengthen security in the United States and in particular in the nation's transportation system. However, the system used in the rail yards to screen employees is not an effective means to prevent terrorism. While some form of increased security measures may need to be implemented, including an employee background check, the current system is opaque, unjust and ineffective.

A word of explanation is in order: the railroads for the most part do not do their own cargo handling in their rail yards. The vast majority of functions at a rail yard: from check-in and check-out, to crane operations, and to moving the containers around the yard be outsourced to outside vendors. There are thousands of these companies around the nation and they compete fiercely for the work. Local 705 represents approximately 1,200 employees of these vendors.

I must point out that a badge to enter the rail yards is an absolute necessity for our members. Unfortunately, we cannot negotiate the terms of issuance of these badges, as they are issued by the railroads, not the employers themselves. In fact, the employers are as much at the mercy of whatever system the railroad imple-

ments for security needs as our members. Because the denial of a badge is effectively the denial of livelihood, it is critical that the process be transparent and as fair as possible.

There seems to be a lot of confusion and misunderstanding of what credentialing and background check protocol is required of individuals working at rail terminals. It appears that the railroads have required their rail terminal contractors to screen their employees by utilizing a criminal history record check. But there appears to be no government mandate for this. What even makes this worse is the haphazard and inconsistent way in which these background checks have been applied. Depending on which railroad the contract employee works for, he may be treated in a variety of ways. Different lists of crimes can be used to disqualify an individual, including the use of misdemeanor crimes. There is no transparency—the railroads don't tell the contractor or the employee what crimes are disqualifying or how far back they are looking. There are no established procedures to correct records that may be in error; there appears to be no process for appeal of a disqualification; and there is no consideration of mitigating circumstances. The fact that the individual may have done his time, paid his debt to society and has righted his life receives little or no consideration. These are all elements of background checks that have been initiated in the airline, trucking and maritime industry. And if background checks are to be required of rail terminal employees then standards should be the same as those that have been implemented in other sectors.

One of the first questions that should be asked is "who should be covered?" Are there secure or restricted areas that exist within the boundaries of the rail yard, where a potential terrorist act could cause an explosion or release of toxic chemicals? If so, then perhaps only those workers with access to those secure or restricted areas should be made to undergo a criminal background check. That's what's done at airports and maritime facilities.

The system that the railroads have come up with is called "e-railsafe" and is being rolled out on a yard-by-yard basis throughout the national rail system. This rollout presents the first issue of fairness. I am personally aware of employees who have been denied badges in one yard, who have gone on to work in other yards. Assuming the badges were properly denied, obviously, this creates a greater security risk, not a lesser one. And if one were to assume that they were improperly denied, the system has lost credibility and effectiveness.

Once e-railsafe is implemented in an individual yard, the employee of a rail vendor is presented with a very wide-ranging release document and ordered to sign it. His or her union is helpless to assist, as the property owner, not the employer, is making the demand and the employees have no collective bargaining rights against the railroad. The release demands access to criminal background information, of course, but also credit records, among other items. No one has yet articulated a convincing reason to me as to why a credit report is required to do a criminal background check. Employees who protest this requirement are advised to sign the document or they will be discharged. This seems to be a completely inappropriate sharing of personal information with employers as well as the railroads.

The railroads must be committed to protecting the privacy of our members and should work to limit the notification process to the applicant's background check status only. Employers should not be provided a complete and detailed background check of each of their employees, regardless of the security determination. Furthermore, it is essential that personal data be cared for and discarded in ways that do not compromise privacy or lead to theft of personal information. To every extent possible, information gathered for a criminal background check should be encrypted in a Department of Homeland Security (DHS) database so that unauthorized access is avoided. We feel strongly that if these background checks come under government requirements that DHS not contract out any of the application process to private contractors operating for profit. The urge to maximize profits could cause sensitive information to be compromised.

The list of disqualifying offenses is opaque. Virtually all the cases I am familiar with involve drug offenses. While Local 705 does not condone unlawful drug use, there is no reason to believe that these people constitute some extraordinary threat to the nation's rail system. As the Teamsters Union has testified in the past, there should be a close nexus between disqualifying crimes and the job to be performed. An example of the bureaucratic nightmare that can result is the following: one of our members was convicted of auto theft when he was a young man. After he served his sentence, he applied to work at one of the rail yards for a vendor whose workers were represented by Local 705. He informed the employer on his application of his criminal record. He had a spotless work record for five years and no further criminal history after his conviction. In August of 2004, he was summarily terminated because he lost his badge due to his criminal record. Local 705 was powerless to sup-

port him, because we had no recourse against the railroad. We assisted him in getting another job at another local rail yard doing exactly the same work. He worked there until seven years had passed from the time of his conviction. He was then rehired by his original employer and was granted a badge for the very rail yard from which he had been expelled two years previously. I see no national security purpose that was served by this farcical episode. Rather it seems arbitrary, unfair and pointless.

The list of disqualifying offenses should be better defined to include only those offenses that have a consistent and direct link to national security. Once these individuals have paid their debt to society they should not be unfairly restricted from obtaining employment.

The most critical component of this system is the denial of a badge to individuals who have a felony conviction within the last seven years or who have been discharged from serving a felony sentence in the last five years. I strongly recommend the reconsideration of the existing 7/5-year look-back periods. It is clear that these time frames were adopted from the hazardous materials endorsement process, in an effort to allow for unity in the way in which transportation workers are treated. I urge the reconsideration of the five and seven year periods for disqualification.

Once an employee has been denied employment due to a failed background check, he can either disappear, presumably into the welfare or criminal justice system, or he can try to appeal. While e-railsafe has an appeal process and I am aware of one or two individuals who have been restored to work due to mistakes, the system seems arbitrary and unfair. Moreover, the employee who is returned to work is not compensated for is lost time or wages during his enforced hiatus.

Moreover, the system lacks any mechanism for a person to challenge the assertion that a particular crime constitutes a disqualifying offense. This is particularly a problem with the broader offenses. If there is concern about crimes such as forging passports, immigration papers and other identity documents, those should be spelled out. However, disqualifying an individual for a felony involving fraud and dishonesty could include passing bad checks. If writing bad checks makes someone a terrorist threat, then many hardworking Americans would be considered a security risk. Thus, the problem may be partly resolved if the list of disqualifying crimes is revised to include more specific offenses. Nevertheless, because criminal codes can vary greatly from State to State there may be circumstances where a person is convicted of an offense that seems to constitute a disqualifying offense but was not necessarily intended to be one. I urge for language granting employees the ability to challenge the characterization of a particular offense either in the appeal or waiver process.

More generally, I urge that appeal decisions should be made by an Administrative Law Judge or some other third party not officially linked to the railroads. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressure or subject to interference. Only recently, has the Department of Homeland Security allowed for an appeal to an Administrative Law Judge in the case of the TWIC in the maritime industry and pending regulations for background checks in the chemical plant industry. The old process forced workers to appeal to the same agency that just determined that they are a security threat. Furthermore, Administrative Law Judge decisions would establish case precedent that would better define what constitutes a security risk. This would bring fairness and consistency to a system that is central to both employee rights and national security. For these reasons, I urge the modification of the appeal process to include the independent review of these requests.

I also recommend strongly that you study the possibility of combining other programs currently underway within the Department of Homeland Security with the security threat assessment program for the rail yards. The TSA had indicated that it would consider the consolidation of several programs to improve efficiency while fulfilling security needs. [69 Fed. Reg. 68723].

It seems logical that all security threat assessment programs should utilize the same, or nearly the same, system for security threat determinations, as well as the same infrastructure such that the costs associated with these programs (both to the agency responsible for the programs and to the individuals involved) can be minimized. I believe that consolidation of security programs will offset some of the costs associated with this program and minimize any additional fees that will be assessed on the hazmat endorsed drivers as a result of this program. To that end, I urge examination of all security threat assessment programs, as well as the infrastructure needed to administer these programs, with the ultimate goal of consolidating as many as possible.

I believe that we must have a safe rail transportation system; after all, our members are on the front line in any potential attack. However, a vigorous effort must

be made to balance the interests of increased security with the protection of employee rights. It is my hope that the recommendations I have discussed today will be incorporated to further improve this balance.

With that, I thank you again for the opportunity to testify today. I'd be happy to answer any questions you may have.

Ms. JACKSON LEE. Thank you, Mr. Marinez. We thank you for traveling from Chicago and making this journey and giving us, again, this instructive testimony.

I now recognize Mr. Jamison to summarize his statement for 5 minutes.

Mr. Jamison? Thank you.

STATEMENT OF ROBERT D. JAMISON, DEPUTY ADMINISTRATOR, TRANSPORTATION SECURITY ADMINISTRATION

Mr. JAMISON. Good morning, Madam Chairwoman, Ranking Member Lungren, Chairman Thompson, Chairman Conyers, Chairwoman Brown and members of the subcommittee.

I am pleased to have this opportunity to testify on the impacts of background and security clearances on the transportation workforce.

I would like to begin by noting that with the exception of limited overlapping requirements of other congressionally-mandated programs, the Department of Homeland Security neither performs nor requires rail operators to conduct background checks on rail workers.

However with over 233,000 employees supporting transportation across the nation's railroads, the issue of proper background checks and credentialing is something that TSA takes very seriously.

A fundamental part of our security strategy across all modes of transportation is to utilize our threat and vulnerability assessment and knowledge of the industry to develop baseline measures that raise the baseline of security.

We continue to work with the government and industry partners to develop, recommend and implement security action items to reduce risk.

As you know, last summer, TSA, in partnership with DOT and the rail industry, issued a set of action items for rail transportation of toxic inhalation materials. These actions were and are designated voluntary.

One of the recommendations was to establish procedures for background checks for contract employees with unmonitored access to company-designated critical infrastructure.

As with other recommendations, we stand behind this recommendation as an important fundamental security practice.

At the time of issuance, we did not provide specific requirements, procedures or standards to industry for these checks, nor did we mandate their application to any specific group of employees.

As a result of the interest of this committee, Chairman Conyers, Chairman Thompson and others, and to ensure the fairness to rail workers, TSA has quickly issued additional voluntary guidance on background checks for rail workers.

Utilizing the experience we have obtained from the implementation of our other vetting programs, we have recommended that operators set standards and procedures similar to those used in the

hazardous materials endorsement in transportation worker identification credential, or TWIC, assessments, including the use of federally-established lists of disqualifying crimes.

We have also recommended that operators establish vigorous appeal and internal redress processes for adversely affected applicants and personnel.

Finally, TSA is extremely concerned with potential misuse of the TSA name or the homeland security name to conduct actions that are not directly related to the security mission.

Consequently, TSA's office of inspection has initiated an inquiry to determine whether any misrepresentations occurred in connection with the recent terminations of rail workers.

I thank you for the opportunity to appear today before the subcommittee and to clarify TSA's current regulations.

I am pleased to answer any questions that you may have.

Thank you.

[The statement of Mr. Jamison follows:]

PREPARED STATEMENT OF ROBERT D. JAMISON

Good morning Chairwoman Jackson-Lee, Ranking Member Lungren, and Members of the Subcommittee. I am pleased to appear before you today to discuss the use of background checks for rail workers.

As you may be aware, there are over 233,000 employees performing a wide variety of tasks associated with railroad transportation. With the exception of employees whose responsibilities overlap other credentialing programs, the Department of Homeland Security (DHS) does not perform background checks on these workers, nor do we require rail carriers to perform them. A rail carrier may voluntarily conduct background checks on employees and applicants, subject to limitations imposed by applicable Federal, State, or local law, and the terms of any collective bargaining agreements to which they may be subject.

On June 23, 2006, DHS and the Department of Transportation (DOT) issued a set of recommended security action items for the transportation of toxic inhalation hazard materials to all rail carriers. The action items were the product of rail corridor risk assessments conducted jointly by DHS, DOT, and rail carriers, and were developed with the concurrence of the Association of American Railroads, the American Shortline and Regional Railroads Association, and certain rail operators. Included in the action items was the recommendation "[t]o the extent feasible and practicable, utilize photo identification procedures for company-designated critical infrastructure. Establish procedures for background checks and safety and security training for contractor employees with unmonitored access to company-designated critical infrastructure." The action items do not impose regulatory requirements, and their adoption by the railroad industry is purely voluntary. TSA stands behind this recommendation as an important, fundamental security practice.

Currently, employees who operate motor vehicles containing placarded amounts of hazardous materials must possess a Hazardous Materials Endorsement (HME) for their commercial drivers license. In order to receive such an endorsement, the employee must comply with TSA regulations implemented pursuant to the USA PATRIOT Act and undergo a security threat assessment that includes a check of terrorist databases, relevant criminal history databases, and alien status information. In addition, port workers requiring unescorted access to secured areas of port facilities will soon be required to obtain a Transportation Worker Identification Credential (TWIC) with a similar threat assessment. This will include the many rail workers who require unescorted access to secured areas of a port as part of their duties

TSA has redress policies in place for applicants who are denied a TWIC or HME. In the case of a TWIC, denied applicants will be provided with information on why they were denied and given instructions on how to apply for an appeal or waiver. All applicants have the opportunity to appeal a disqualification, and may apply to TSA for a waiver if disqualified for certain crimes or mental incapacity, or are aliens in Temporary Protected Status. Applicants who are aware of a potential disqualifying crime may apply for a waiver immediately after applying for a TWIC to expedite the waiver process. Applicants who seek a waiver and are denied may seek review by an Administrative Law Judge (ALJ).

To ensure fairness to rail workers, we have recently issued additional guidance on the issue of background checks to rail carriers. On February 12, 2007, DHS and DOT issued a second supplement to the recommended security action items for the rail transportation of toxic inhalation hazard materials. This supplemental guidance was rooted in our past experience with current redress policies. Using what we have learned from our experience and with stakeholder input, we have recommended that operators establish standards and procedures similar to those used for HME and TWIC threat assessments, including use of the federally established list of disqualifying crimes for those programs. Likewise, the appeals and waiver process, which we have adjusted since first used for HME, can now be recommended best practices for rail workers and other transportation workers. Therefore, we also recommended that operators establish procedures that permit employees to correct outdated and incorrect records that may disqualify them, as well as procedures permitting an employee to demonstrate rehabilitation or facts surrounding a conviction that mitigate security concerns that may be revealed by the check to allow the employee to either be hired or remain employed.

As with the previously issued recommendations, the recently issued guidance is solely voluntary, and is not intended to conflict with any other provision of law or any provisions in collective bargaining agreements or individual employment contracts. Rail carriers must still comply fully with all applicable Federal and State law, including statutory employment protections, as well as the regulations, orders, and directives of DHS, DOT, or any other government agency of competent jurisdiction.

Lastly, I would like to add that TSA is very sensitive to anyone using the name of the Department of Homeland Security or TSA to conduct actions that are not directly associated with security. We take this issue very seriously and are looking into any possible misuse of our name or mission.

Thank you for the opportunity to appear before you today. I would be pleased to respond to questions.

Ms. JACKSON LEE. I thank all the witnesses for their testimony.

I remind each member that he or she will have 5 minutes to question the panel.

I will now recognize myself for 5 minutes.

Let me, in the framework of the remarks made by both the full committee chairman and the ranking member of the subcommittee, make very clear the intent of this subcommittee and the fact that we believe that we are constructive implementators and challengers of language that has not been clarified and that has, in many instances, harmed thousands of workers.

So the action of this committee today is to bring all of the principals together so that we can lay a groundwork for some of the misstatements and misactions that have occurred.

We have a basis from which to operate and that is, of course, the February 12, 2007 recommended security action dealing with rail transportation. Some aspects of that language has helped somewhat the clarification, but it is not fully clarified, I think the context that brings us here today.

And, clearly, the hearing is not in any way to suggest that we do not live in a different climate and that homeland security does require diligence, but I think along with diligence it requires a fair understanding, and the witnesses here today have raised some very important questions.

Let me start, Mr. Jamison, with you.

Mr. Jamison, rail companies are pointing to the Department of Homeland Security and its new standards as the cause that might have generated recent firings that you have heard, in particular, in the city of Chicago, but this has occurred in other areas around the nation.

Please tell us, with a yes or no answer, whether the department is responsible for those firings.

Mr. JAMISON. No.

Ms. JACKSON LEE. We would also like to know what was the department's intent when it issued supplement number two to the action items on June 23, 2006, and please explain why the department issued this clarification.

Mr. JAMISON. The clarification, the original supplement number two that you refer to, issued in June, was to finalize some best practices or industry security action items that had been debated and we weren't able to get consensus on when we issued the original items.

But more in focus, they also were to focus the industry on what we considered to be the most important risk reduction measures that they could take.

So the second issue of guidelines, you see us focusing on the security and the reduction of standstill time for toxic inhalation materials in high threat urban areas.

There were four items that were mainly addressed in that additional supplemented guidance and it was mainly on operational procedures around reducing risk in high threat urban areas, toxic inhalation materials, but the additional supplement did not include any issues with background check.

Ms. JACKSON LEE. So it might be accurate to say, as you have said in your testimony and as the industry has said, we want best practices. We would like to ensure that the homeland is secured.

But you did not have direct actions that would then result in direct instruction to fire workers.

Mr. JAMISON. No, ma'am. With every industry, especially after 9/11, as we look at the different modes of transportation, everybody is wanting to be proactive and take actions in the name of homeland security.

So we tried to quickly utilize threat and vulnerability assessments and our other knowledge of the industry to give recommendations so that they focus their areas on what is most important.

The recommendation for background checks is one of those broad recommendations and thanks to the interest of this committee, we have clarified and given more guidance, as this was brought to our attention, but it was a broad recommendation, just like we do with other industries, on what actions they should take.

Ms. JACKSON LEE. Mr. Marinez, let me quickly ask you, do you know where credit checks of your employees precluded a worker from continuing their employment?

And I would like Mr. Hamberger to also answer the question as to what actions occurred in the industry when they got the initial communication from TSA.

So you can clarify, again, how you responded to it and how you are correcting it.

Mr. Marinez? And those are my last two questions.

Turn your microphone on.

My question was, do you know of any situations where an adverse credit history precluded a worker from continuing employment at the rail yard.

Mr. MARINEZ. Not at this time, I don't.

Ms. JACKSON LEE. Mr. Hamberger, would you comment on how you responded?

Mr. HAMBERGER. Thank you very much, Madam Chairwoman.

As I tried to make clear in my opening statement, the origin of the background check for contractor employees was an initiative of the freight rail industry.

We have taken many such initiatives since 9/11 and we are proud of the role that we have played in trying to secure our operation.

With respect to the interplay between TSA and the industry on background checks of contractor employees, we did work with TSA to come out with 24 recommended voluntary action items, number 15 of which is to establish procedures for background checks for contractor employees with unmonitored access to company-designated critical infrastructure.

So that was an agreement. That was something that we committed to do. We committed to the Unite States government that we are going to do background checks on contractor employees.

In the press release announcing those 24 action items, the department said, dated June 23, 2006, "Where applicable, implementation of these action items to their fullest extent practicable should be the goal of the affected property owner and operator."

We take these things very seriously. When we commit to do it, when we are told by the United States government that it should be the goal to fully implement these action items, that is what we did.

Ms. JACKSON LEE. But you admit today that that was not a requirement. It was an initiative by the railroads of which?

Mr. HAMBERGER. As I indicated, it was not a requirement. It is a voluntary action item that we agreed to do. But we looked at it as a commitment to do it and we tried to do it to the best of our ability and I think the appeals process that we announced today, with the work of the committee helping us to take a look at that, makes it even better.

It is an evolving program. We didn't implement it until the end of 2005. Not all of our members have even begun to do it.

Ms. JACKSON LEE. Well, we seek clarification today and that is what we are going to work on and we—

Mr. HAMBERGER. Madam Chairwoman, absolutely.

Ms. JACKSON LEE. —appreciate that clarification. Thank you so very much.

Allow me to yield 5 minutes to the ranking member of the subcommittee, Mr. Lungren.

Mr. LUNGREN. Thank you, Madam Chairwoman.

And I might say that it appears that the interest of the committee has gotten some of the interested parties together to at least make some progress. It doesn't sound like we have unanimity as to the extent of the progress, but it does look like there is some progress.

To the two gentlemen representing the unions, I would like to ask you this. Can you give us some guidance on what you think would be an appropriate list of disqualifying felonies?

And the reason I ask you that is that is something we are dealing with and that is something we are dealing with DHS on.

As attorneys, and I plead guilty to being an attorney, we are subject sometimes to a rule called disqualification of your bar rights for any crime of "moral turpitude." That could be a felony or a misdemeanor.

It basically goes to the question of whether you can be trusted. I wouldn't suggest that we would go that far. It may be better, now that I think about it, some attorneys I know, if we had an actual list of disqualifying felonies.

But, Mr. Willis and Mr. Marinez, could you give us an idea, and, if you don't have it here, submit for the record what it would be, and would you have differing lists of disqualifying offenses depending upon the nature of the work that the individual would do?

Mr. Willis?

Mr. WILLIS. Well, it is a great question and it is one that I know has come up that you raised last year in several instances when we were talking about the HAZMAT program and your legislation to try and narrow that, as you referenced in your opening statement.

Look, there is a list of disqualifying offenses that TSA has come up with in response for both the maritime and the HAZMAT program, that tries to prevent those that, quote, would pose a terrorism security risk to the United States.

We think that was a good standard. We do think some of those disqualifying crimes, as we have articulated, may go beyond that standard.

In fact, then Chairman Peter King, with the concurrence of the Democrats, issued a statement in the last Congress agreeing with that proposition, that those crimes, at least in the proposal by TSA, went beyond the standards of a terrorism security risk.

But at least with there, there is an actual list that you can look at and, as it stands right now, even after the statement today, if a union member walks into our office and says, "You know, I have had some problems with the law in the past, but here is what I have done. Is this going to disqualify me? Am I going to lose my job at the rail yard," I can't tell them that, because I don't know what the crimes are.

They may have misdemeanors. Again, depending on?

Mr. LUNGREN. So your suggestion is it would be better to have a specific list, even though you are not prepared at this point in time to give us that list. Would that be correct?

Mr. WILLIS. Well, I think, yes, you should have a specific list and I think to get to your original question of should there be sort of different standards, I think, yes, that is possible, depending on the infrastructure that you are trying to protect.

Mr. LUNGREN. Mr. Marinez?

Mr. MARINEZ. Yes, I also think that you should have some specific reasons, the one case in particular, Mr. Lungren.

Mr. LUNGREN. You are about the only one in the room that we can hear without the mike, but we hear you better with the mike.

Mr. MARINEZ. I have a particular member in one of my rail yards, the mother of 4 children, was pulled out of service for—she had a stolen identity charge on her she was not aware of.

She was pulled out of service for 6 weeks, managed to get her job back, cleared it all up. And this was a charge that she was not even aware of.

Mr. LUNGREN. So if there had been an expeditious appeal, so it wouldn't take her out for 6 weeks, that would have solved that problem.

Mr. MARINEZ. Part of that is the contractor there was not aware of an appeal process and there is a problem, sir.

Mr. LUNGREN. See, this is an issue that we deal with not only on this committee, but on the Judiciary Committee with Mr. Conyers. We have been trying to work out something with respect to maintaining a prison industries system that works so that you can actually encourage people, while they are incarcerated, to get some work skills and it is not an easy thing, because you have people that object as it works.

So I don't think this is a partisan issue. I think this is a bipartisan issue, how we try and figure out how we extend the opportunity to work for people that we want rehabilitated—I am talking about those who have had difficulty with the law in the past—and, yet, at the same time, maintain that kind of vigilance that is necessary.

It is not easy and we are not trying to convey to you that we think it is easy and we appreciate you coming here and trying to help us with that.

Ms. JACKSON LEE. Thank the ranking member.

And with that, as I yield to the full committee chairman, let me emphasizes it is not a partisan issue and I think we can work through this for a better solution.

I yield 5 minutes to the distinguished chairman of the full committee, Mr. Thompson.

Mr. THOMPSON. Thank you very much, Madam Chairman.

Mr. Hamberger, if you would, could you provide the committee with a copy of this new guidance you referenced in your testimony?

Mr. HAMBERGER. Yes, sir. There actually is a chart which I meant to draw your attention to attached to my testimony, which lays out a flowchart as to how it is designed to work.

Mr. THOMPSON. Okay, I understand the chart. Do you have the narrative explanation?

Mr. HAMBERGER. Yes, sir, I can get that. Yes, sir.

Mr. THOMPSON. That is what we are looking for. And I want to compliment you for doing that.

One of the reasons we are here is because with the Chicago situation, there was no clarity on due process. And as I said in my opening remarks, this is America and every citizen is entitled to do process and that is clearly the spirit that got us here today.

But I am also troubled whether or not we have objective criteria and standards put forth so that subjectivity doesn't come into play, if you understand what I am saying.

If a worker for one company is summarily discharged, but that person can go to another company and do the very same job and 2 years later go back to the job that they just left, something is wrong.

And I think we still have to have uniformity and part of we are looking at, as you know, we are taking up a rail bill and it might be that we have to have more oversight by DHS in this process.

So we will have a rail bill next month and I think what we glean from this hearing and others will have strong argument for having some aspect of it in that rail bill.

Now, Mr. Jamison, I want to be clear, from the department's perspective. At this point, there is no DHS requirement or directive of guidance beyond what was released earlier in the week with reference to our situation we are discussing today.

Am I correct?

Mr. JAMISON. That is correct, sir.

Mr. THOMPSON. Because part of what got us here is that when people started inquiring, DHS was getting the blame. So when we convened the meeting, we found that, indeed, it was not DHS, that it was just basically a rouse being put forth by the companies just to say that this was what was happening.

So I am of the opinion that we have in place the policy. We need to go forward with that. But I am convinced now, because we had to have a hearing, that we absolutely have to have some federal oversight if this is going to be implemented and maintained properly.

Mr. Willis, can you briefly give me whether or not you think there is a federal role on behalf of workers in this process?

Mr. WILLIS. I am sorry?

Mr. THOMPSON. Can you tell me whether or not you think DHS or the federal government, in general, should have a role in this particular process?

Mr. WILLIS. Well, there is no question that there needs to be some role here and some oversight.

And I the distinction here is important that, yes, background checks, as a general proposition, may indeed have been a recommended practice for various reasons, but it doesn't specify what type of background check process you are going to have.

And, in fact, I have not reviewed it, but to the extent that TSA has issued additional guidance, I think that is good, but clearly there is a role for federal government oversight, from our standpoint, to ensure that you have basic protections in place.

Again, in the maritime and HAZMAT, those are statutory protections. There are privacy protections. There is a right to an appeal. There is a right to waiver with an administrative law judge. There is a statutory look-back, et cetera.

So, yes, if you are going to have these checks, there needs to be some protections and I think the federal government has a role to play to make sure that happens.

Mr. THOMPSON. Thank you.

I yield back, Madam Chair.

Ms. JACKSON LEE. I thank the chairman.

It is my pleasure to yield to Mr. Bilirakis for 5 minutes.

Mr. BILIRAKIS. Thank you, Madam Chair.

Mr. Jamison, I am sure that you are aware that my state of Florida has been a national leader in developing its own port access credentials. In fact, the state entered into an agreement with TSA in 2003 to implement a TWIC prototype.

My understanding is that the state's version is virtually interchangeable with the TWIC, with certain exceptions. However, there are questions about whether Florida's credentials will meet the federal requirements.

My staff recently met with TSA officials who have pledged to continue to work with our state on this issue and I understand that Representative Brown–Waite has been on the forefront on this issue and I appreciate it very much that she has.

Will you commit to working with me and my state and other members of the delegation to help address this situation so that transportation and maritime workers in my state will not be required to obtain multiple cards for the same security purposes and operators will not be required to purchase separate systems to read them?

Mr. JAMISON. Congressman, first of all, we value the relationship we have had with the state of Florida and, as you note, we have worked with them over the last several years on a model program or at least a pilot program for the TWIC program and we also appreciate them being proactive in the area of port security.

Sometime in the past, over the past year, Florida made a decision to move forward more quickly and expeditiously with a worker identification card. At that point in time, we had notified them that we had not yet finalized our national standard and there were some concerns; if they went forward, they were at their own risk because of interoperability and the congressional mandate for what the requirements would be with the TWIC card.

Now, that being said, we would be happy to continue to work with your staff and the state of Florida to see what areas that we might be able to compromise, but we are committed to meeting the congressional mandate of having a national interoperable card for all port workers.

Mr. BILIRAKIS. Thank you very much.

Do you believe that some of the problems that have been discussed here today at this committee meeting about background checks for railroad workers will also be concerned with the maritime workers undergoing the TWIC background checks?

Mr. JAMISON. Well, I am confident that we have learned a lot since September 11 and actually even credentialing was required and background checks were required for airport workers prior to September 11. So we have learned a lot through the last several years.

And the TWIC process has a robust appeals process and a robust waiver process that is a part of that rulemaking, as well as the provision to appeal the waiver to an administrative law judge procedure.

So it is a very robust process. We are confident it is a good process and a fair process.

Mr. BILIRAKIS. Thank you.

TSA and the Coast Guard are working to implement the TWIC in the maritime mode early this year. Is TSA considering including other transportation modes in the future?

Mr. JAMISON. Well, originally, when the TWIC card was discussed, the long-term vision is that this would be an interoperable

credential for all modes of transportation that had critical infrastructure.

There currently are no plans to expand that to anyone other than the port workers at this point. We are going to work through the port worker implementation and continue to monitor risk in worker populations before we make a determination about the next phase.

Mr. BILIRAKIS. Thank you. Thank you, I appreciate it.

Thank you, Madam Chairwoman.

Ms. JACKSON LEE. Thank you.

I yield 5 minutes to the distinguished gentlelady from the District of Columbia, Ms. Eleanor Holmes Norton, for her questions.

Ms. NORTON. Thank you, Madam Chair.

Mr. Hamberger, your industry deserves a lot of credit for having, in the past, hired ex-offenders. It is an old industry who understands and has learned and had enough experience to know how to do that.

Why are ex-offenders who have been employed in your companies for some time, apparently with good records, now being fired under your RAILSAFE program?

Mr. HAMBERGER. Well, not to be too technical, but to be precise as to how the e-RAILSAFE program works, it is not for the employees of the individual companies. It is a background check on the employees of the companies with whom the railroads have a contract to provide a service.

We do not fire them. We determine whether or not there is a risk to the safe workplace, also from a security standpoint, also from a drug standpoint, because as you know, we are a highly regulated industry from the standpoint of drug use.

And so we take—

Ms. NORTON. Say it again. You don't fire who?

Mr. HAMBERGER. The specific program we are talking about today, e-RAILSAFE, does not apply to the employees of the railroads. We do a screening process at the application standpoint when an applicant for a position with the railroad comes to apply for a job.

That is when we do the background check. The individual companies do the background check. That is not done through e-RAILSAFE.

Ms. NORTON. Well, you are aware that long-time employees have, in fact, been fired.

Mr. HAMBERGER. Not from the railroads, no, ma'am.

If a decision has been made by a contractor, like H&M, that is the decision of the contractor.

What the railroad was involved in, if I can get into the specific perhaps of the Chicago situation that has arisen in the past couple of months, there were, as I understand it, 33 employees of H&M who were denied access to two different rail yards.

One of those yards was a Union Pacific rail yard. Thirty of the 33 employees were being checked, the background check, came forward, 30 of them were denied access. They were given a right of appeal individually. Fifteen of them have been reinstated, six of the appeals were denied, and nine have not yet appealed.

The other three in the Chicago situation were Norfolk Southern yard. They were apprised, the employees were apprised of their right to appeal. No one has appealed yet.

And I appreciate your opening statement, it is a very long time industry. And the point I would like to make, to echo Mr. Lungren's comment that this is not a partisan issue, notwithstanding what you may observe here at the witness stand, this is not an issue between rail management and rail labor at its core.

We want rail employees. We are looking to hire 80,000 people in the next 5 years. We are not turning people away willy-nilly. We want people to come work for this industry. There are good jobs. We want people to work here.

But we have an obligation to the safe workplace, to security and to protecting the property of the customers who give us that property to move to do a background check.

Ms. NORTON. You have testified about fusion and your own processes and about the fact that some may have, as you say on the last page of your testimony, may have conveyed the impression that this was required by the federal government, that many contractor employees may not be aware that they had a right to appeal.

What redress should railroads how give to those who were not aware that they had the right to appeal or did not or were not allowed to appeal?

Mr. HAMBERGER. I don't know that we have access to the database for those people. I do know that over the course of 2006, about 75,000 people were run through the e-RAILSAFE program. About 4 percent were denied access to rail property.

Ms. NORTON. If those people were to come forward, inasmuch as you concede the confusion was not theirs—

Mr. HAMBERGER. I think that it would be appropriate, if it is their interest to come forward and appeal that denial, that this process would apply, absolutely.

Ms. NORTON. Thank you, Madam Chair.

Ms. JACKSON LEE. I thank the distinguished member for her questions.

And I now yield 5 minutes to the distinguished member from New York, Ms. Clarke, for her questions.

Ms. CLARKE. Thank you very much, Madam Chair. And good afternoon, gentlemen.

I just wanted to ask, Mr. Hamberger, under the e-RAILSAFE program, has there, in your assessment, been a typical length of time for the adjudication of an appeal and what is that time period?

Mr. HAMBERGER. Thank you for that question.

We have just unveiled this new appeals process and we are going to be putting something out. I know one company has announced that they would intend to have a decision within 5 days.

I don't know whether that will be the standard, but certainly that is the intent, that there would be an immediate notification to the employee that the employee could come forward with any clarification, corrections, mitigating circumstances, and that, when that was received, it would be 5, 7, 10 days at the outside would be my guess.

But we have not nailed down an industry—

Ms. CLARKE. So your association has not encouraged an industry standard as of yet.

Mr. HAMBERGER. We have encouraged it, but have not yet achieved it.

Ms. CLARKE. I think that that is a critical part of this.

Mr. HAMBERGER. Yes, ma'am.

Ms. CLARKE. We are talking about the dignity of the individuals involved here and I think while we are certainly concerned about homeland security, the individuals who come under this category and I would say probably the majority of cases that you are dealing with have paid their debt to society and, having paid that debt, should enjoy, as the rest of us do, civil liberties and the right to employment.

So it is my hope that the industry would sort of put that in the framework, because as has been stated by Ms. Holmes Norton, your industry has been a trailblazer and has been one of those areas where many have been able to go and resume life and be meaningful and product in giving back to society.

So I hope that you will certainly frame things in that way. And thank you for your testimony here today.

Mr. Jamison, I wanted to ask, is there any notification that is required to DHS once these background checks have flagged individuals that pose or that, I guess, the system indicates poses a threat to homeland or national security?

Mr. JAMISON. No, ma'am. Again, it is just a broad recommendation from DHS and TSA to implement these background checks. So we are not providing oversight or are we performing a similar function like we do with TWIC and/or HAZMAT in adjudicating names against the terror screening database. We are not doing that.

Ms. CLARKE. You are not doing that. Because it just seems to me that there is a hole there, because at the end of the day, what we are trying to do is identify individuals that pose a real threat from a homeland security standpoint, from a national security standpoint, that there would be some interfacing and some liaising with those companies and corporations, if they are not operating in a subjective manner, in getting that information to you and you sort of and your agency sort of serving as a partner, I think and I believe, in determining whether, in fact, the level of threat that has been imposed upon an individual indeed is a threat.

I mean, that is where the subjectivity actually comes in.

Mr. JAMISON. Congresswoman, we are pleased to work with any industry member that brings us a potential list of employees that they might be concerned with and that we could utilize a terror screening database search on.

And we are continuing, as I mentioned earlier, the broad range, long range goal of the TWIC program is to address a comprehensive transportation worker identification credential to include other modes of transportation, if they have access, just like in the ports, access to what is defined as secure areas.

We currently have no plans to expand that right now. We are dealing with the port side of that. But we would be happy to work with employers that have a particular interest in particular employees.

Ms. CLARKE. And to Mr. Willis and Mr. Marinez, are there areas that you have identified where an abuse of the screening process is something that you have observed time and time again?

Thank you, Madam Chair, for the time.

Mr. MARINEZ. Again, yes, it is misapplied and contractor vendor itself not applying the process to the members, it is just not—it is very unfair. The members are not made aware of it and, like I say, they say they are in the dark about it, that they didn't know there was an appeal process.

And our members are suffering without the pay and, like I said, it has happened quite a few times. There is a lot of stories. I could go on and probably need 10 more bottles of water to go through that.

Mr. WILLIS. One of the comments that was made earlier by Mr. Hamberger was that—

Ms. JACKSON LEE. Mr. Willis, if you could quickly summarize your answer.

Mr. WILLIS. I will stop there.

Ms. JACKSON LEE. If you can finish your sentence. Did you have an answer? You don't have an answer. Well, we will hope that you will have an answer shortly. Thank you.

Mr. Perlmutter, you are recognized for 5 minutes.

Mr. PERLMUTTER. Madam Chair, if it is permissible, because I had to step out, I would like to pass and then if there are any questions at the end, can you come back to me?

Ms. JACKSON LEE. That certainly is permissible, Mr. Perlmutter. We thank you so very much.

With that, we would like to yield to Mr. Conyers for 5 minutes.

Mr. CONYERS. Thank you so much.

I commend the chairwoman on these hearings, along with our other judiciary colleague, Mr. Lungren. I think this is working out very well.

Now, here is what I need to know and I have asked the chair if we can have this information forwarded to her. About 71 people have been fired, maybe more. What we are trying to do is to find out why they were fired and what are their possibilities for being restored.

In other words, this is in real time now and this committee will get all the rules and regulations ironed out.

But 71 people have lost their jobs so far. How many of them have terrorist vulnerabilities or backgrounds that make them dangerous? We want to keep a database going to the chairperson of the committee about this.

Incidentally, Madam Chair, a person who is of Michigan interest, former Secretary of Transportation Rodney Slater, has joined us and I know you would want us to know of his interest in this matter that brings him to the hearing room.

How many of these people discharged can be returned?

Look, this is down on the table. If there have been mix-ups and screw-ups and inadvertencies, fine, but let's get some people back to work. That is what I want to find out.

And as a son of a family of people involved in the labor movement, not to mention myself being a labor lawyer and a former

workman compensation referee, what are the unions doing about this?

Now, I will tell you what I have been hearing, my brothers of labor, is that you are saying there is nothing that can be done. I have been getting zero. And the unions have a responsibility to step up to this thing.

That is what these people are paying union dues for. You are losing. I know you are down to 12 percent of the workforce in America in unions. This is a time especially for the unions that are represented here to leap forward into this and let's get this thing rolling.

I feel very strongly that we have all got to do something in it. So if you understand where I am coming from, that we are going to start tracking these discharges person by person and we want, where there is error committed, to get them back to work.

What is wrong with that? And I yield to all of you for any advice you want to give me about this.

Mr. WILLIS. Well, first of all, from a transportation trades perspective, we don't represent the union nor the workers in Chicago. So I will let my brothers from the Teamsters speak to that.

As I said at the outset, we do represent two unions, TCU and DRS, that do have workers that are covered by this. TCU has had several workers that have been caught up in this. Some have been able to appeal and get back, not all, though.

They have been very aggressive in any means at their disposal, including filing unfair labor practices and trying to work with the employer to get those members their jobs back, and, again, I think in many instances they have.

Also, quite frankly, we have been very active about coming up to the Hill and talking to this committee and others about this problem.

Quite frankly, many months ago, when we appreciate the?

Mr. CONYERS. Okay, your intentions are well taken. We have only got a few seconds left.

My brother from the Teamsters?

Mr. MARINEZ. Congressman Conyers, we are trying to do our best to represent these men. The problem here that is very frustrating is these railroads have to be held accountable, also.

When I write to them, when I call them and they don't want to answer me because we are dealing with a different vendor and what have you, this gets very frustrating to us, and they have to be accountable also for these actions.

They implement these rule changes. This has to stop. They have to set the guidelines, also.

Mr. CONYERS. Thank you, sir.

Mr. HAMBERGER. If I might respond to the 71, Mr. Chairman. It is my understanding that of those 71, 33 were denied access to a freight rail terminal. The other 38 had nothing to do with the e-RAILSAFE program. H&M would have to explain to you why they were terminated.

But of the 33, 21 have appealed. Of those 21 appeals, 15 have been granted and the other 12 have not appealed.

Mr. CONYERS. I thank you all and I am grateful to the chairwoman, who has agreed to start her own internal database so that

this doesn't become a hearing in which we are dealing with myriad cross-contradictory rules and regulations and resubmissions and new ones.

There is a human element here and I yield to nobody in conclusion about supporting background checks, I mean, for goodness sake, and we have to be prepared against terrorist activity.

Has anybody ever dug up a terrorist working in the railroads yet in the 5 years we have been in this stuff? One.

I yield back.

Ms. JACKSON LEE. Thank you, Mr. Conyers.

And this committee will ask for, as you have requested, a list of all of those who have been most recently impacted under this particular background check, and what we want is consistency and we will pursue that in just a moment.

Let me again acknowledge the former secretary of transportation, Mr. Rodney Slater, if he would make himself known.

Thank you so much, Mr. Slater, for your presence here today and also for your service to this nation, we fully appreciate it, and thank you for your presence here.

It is my pleasure now to yield to the subcommittee chair of the collaborative committee on the Transportation Infrastructure Committee, Corrine Brown of Florida, 5 minutes for her questions.

Ms. BROWN. Thank you, Madam Chairwoman, and thank you, ranking member, for giving me the opportunity to sit in on this meeting.

In the future, I will certainly make sure everyone has the notice, but I had a break in the schedule and this is such an important committee hearing.

Let me just say that this is a problem in rail, but this is also a problem in port security, it is a problem across the board. And I realized, when we were doing the port security, that we were going to have a problem in this area.

But I think part of the problem is the lack of common sense. If we go back to 9/11, and I have said it over and over again, there was no American on either one of those planes that brought those planes down.

And so many of America's taxpayers that have had some discretion in their use, but the jobs that we are talking about are hard jobs, but they are important jobs to America, important jobs to keep people moving.

And, in fact, when a person has some useful discretion or has some problems, we have got to make sure that somebody offers them a job other than the drug dealer. This is the problem we are experiencing with over 108 homicides in Jacksonville.

We have got to find ways to have better education, better training, and these are decent jobs we are talking about. These are jobs that we know take care of one's family and have people to be taxpayers.

And so I guess I want to go with a couple of questions. First, I guess I would go to homeland security.

When you all issued your report recently, can you tell me, was there anything in there about personal checks financing? Because I understand that that was an aspect that was considered, if you had some bad checks or your financial report.

I mean, I would be concerned, anybody roaming around through one's finances. So you tell me what that has to do with homeland security, except credit cards.

Mr. JAMISON. No, ma'am. The original recommendation just said to conduct background checks on individuals that had unmonitored access to company-designated critical infrastructure.

The subsequent guidance clarification that we issued this past Monday basically asked them to consider aligning the programs similar to TWIC and HAZMAT, which has a published list of federal crimes and also has an appeals and waivers process.

Ms. BROWN. And we have a copy of that as we speak.

Mr. JAMISON. Yes, you do.

Ms. BROWN. Mr. Hamberger, can you tell me where we are and how we are going to clean this up? Because I was told that this company is a third-party company that will pay $50 if you find that I am not eligible, but if you find that I am eligible, you get $30.

So you have an incentive there to make me not eligible. I hope that is not true.

Mr. HAMBERGER. I am unaware of the specific issue that you raise there, Madam Chairwoman. But where we are, I believe, is that the industry has a very robust pre-screening process for our own employees and we have extended that now to employees of contractors as a way to make sure that it is not just security, and I think that is important for this committee to understand, that we go beyond terrorism.

We look at this through the prism of terrorism, workplace safety, drug use, theft, which is not part of the TWIC disqualifying crime, because we are entrusted with millions, billions of dollars worth of property that our customers give to us.

So those are things that we need to take a look at. But your point is well taken and you know probably better than any first-hand the effort that we are going through to keep pace with the growing demand for freight transportation and the need we have to get more employees into the industry.

So we are not disqualifying people because it is something we want to do. It is something that we feel, again, for the safety and security of the workplace, that we have to.

But we are out vigorously trying to attract more employees to this industry.

Ms. BROWN. I understand that you are.

I have a question. If I have been working for you for 5 or 6 years and, of course, you knew about my criminal record when I came to work, what has changed? I have done a good job. Why would you just—

Mr. HAMBERGER. With respect to the employees of the rail companies themselves, nothing has changed. All this background check is done at the application, pre-employment time and it actually, I am told by the individual railroads, that pre-employment screening is actually much more complete than the screening process, the background check that is done for employees of the contractors.

What our security committee decided, and, again, I will emphasize that we did this on our own initiative in 2005, is that contractor access to critical assets could be just as damaging from a security and/or workplace safety standpoint as our own employees.

So we decided that we needed to do a background check for the employees of our contractors and that just rolled out at the end of 2005 and I am hopeful that today we have improved upon that process so that employees of those contractors who are denied access to our property are aware of and have that right of appeal.

Ms. BROWN. Just in closing, but that right of appeal, how timely is that process going to be?

Mr. HAMBERGER. Well, as I was saying to Congresswoman Clarke, it is not something that we have settled on as an industry. I know one railroad has committed to a 5-day turnaround.

And as soon as the decision is made to deny access, there would be a letter sent to the contractor, a letter sent to the employee alerting him or her of the right to appeal, how to do it, what kinds of information to bring forth, and then once that information is received, there would be, at least in this one instance, 5 days and—

Ms. JACKSON LEE. The gentlelady's time is up. Thank you.

Ms. BROWN. Would you let him finish, please, answering that question.

Ms. JACKSON LEE. If he is concluding in two more words.

Mr. HAMBERGER. Shortly.

Ms. JACKSON LEE. Thank you.

Mr. Perlmutter, you are recognized for 5 minutes.

Mr. PERLMUTTER. Thank you, Madam Chair.

Mr. Hamberger, I read your materials. I was here for most of your opening statement and I apologize that I had to step out.

I guess the first thing is I am just confused by who is the employer and who is the employee here, because ordinarily there should be a grievance process, as Mr. Conyers was saying, that would allow the employee, through the union, to get some redress pretty quickly on a termination, I would expect, under a contract.

So who is the employer?

Mr. HAMBERGER. The employer is the contractor who has a contract to perform duties for the railroad.

We have a privity of contract with that company and heretofore, the right of appeal was communicated to the contractor to say, "One of your employees has been denied access to a rail yard," and the contractor either did or did not and, unfortunately, in many cases, apparently did not convey that right of appeal to the individual employee.

That is something that we have corrected today and we will make sure that the employee does not have to rely upon the contractor to come forward, that he or she has that right individually.

And, again, the appeal would be to the right of access, not on an employment basis. The appeal would be, "You have denied me access to your rail yard based on your background check. Let me explain to you the mitigating circumstances or maybe you have the name wrong, a misidentification," or whatever other mitigating circumstances might come forward.

Mr. PERLMUTTER. So they are appealing that to now the railroad company?

Mr. HAMBERGER. It would go through the company that the railroads have hired, the e-RAILSAFE is the program, but then through them to the railroads, yes, sir, and the railroads, for the most part, have indicated that that would be not just the security

person on the appeal, but also a human resources person, a lawyer, and taking a look to make sure that the appeal is dealt with properly.

Mr. PERLMUTTER. Is there an appeal from that?

Mr. HAMBERGER. No.

Mr. PERLMUTTER. So there is no sort of neutral—the railroad company is considered to be the neutral arbiter here.

Mr. HAMBERGER. Well, at this point, sir, it is indeed a decision of a private company, much like any company around the economy, as to who to hire and who to allow on their property, but there is the TWIC that—

Mr. PERLMUTTER. My experience is not that way. Ultimately, there is somebody who comes in either as the administrative law judge or a neutral referee ultimately between the union bring a grievance and the employer defending its action.

So as I read this stuff, I was just confused, because it didn't sort of agree to anything that I understand.

And I guess my question to you and to the unions is, is that what your contract says?

Mr. MARINEZ. The contract with us and the vendor, of course, we file the grievance on behalf of the member, whoever was pulled out of service. It is always thrown back, "It wasn't us, it was e–RAIL."

I call e–RAIL, which I have been in touch with John Holbert—

Mr. PERLMUTTER. So you are getting a shell game, kind of back and forth, and I don't mean that in a—you know, everybody's got to try to look out for their interest.

At the end of the day, we have got to look out for security for this nation, but we don't want to have things that allow somebody to dismiss a bunch of folks, get them caught up in a terrible bureaucracy based on homeland security.

So I appreciate the chairwoman's willingness to have kind of a log of where this is happening. I would like to see just a standard labor-employer kind of a system, where somebody can go and get a fair hearing by a neutral judge.

Mr. WILLIS. Well, you raise one of the key problems with the current appeals process and even now as modified.

When the TWIC program was proposed for maritime, one of the major deficiencies that we identified, that there wasn't this independent entity, whether it was an ALJ or what have you, deciding appeals, it went back to TSA, we expressed a lot of concern about that and this committee and others in Congress reacted by changing the law slightly and providing for an administrative law judge to hear those appeals and to hear those waivers.

We think something like that needs to be a component of this program.

Mr. PERLMUTTER. And I guess I am not saying to the railroad side, to the contractor side, that you might have other crimes that go beyond homeland security issues. I am not objecting to that, but that should be part of the deal in the first place, especially whether it is a new applicant or somebody who has been working for you and then there ought to be a neutral arbiter.

That is just sort of my picture of the way it works.

Mr. HAMBERGER. Well, clearly, for those people who are employees, that is the way it works of the railroad itself and it is sort of an interesting dichotomy that this is not a requirement.

So I am not sure how the TWIC process would work to a program that is not a requirement. If there were a TWIC program for the railroad workers, I am sure that that would then be a government sanctioned certification and then there would be an appropriate ALJ role.

Here, this is a private sector background voluntary program, and so we are doing the best we can in applying that appeals process and we think we do it fairly and that is certainly the goal.

Mr. PERLMUTTER. Thanks, Madam Chair.

Ms. JACKSON LEE. I thank the gentleman.

We are about to conclude this hearing and I wanted to pose a suggested strategy for going forward and, as well, to try and get the parties at hand to see if we could cooperate.

First, I think it is important to note that Secretary Chertoff has rendered a position based upon the meeting of the Department of Homeland Security with the members of this committee and to also note that there have been meetings with the Transportation Committee, Judiciary Committee and Homeland Security Committee, that several of the victims or impacted persons have been in, including railroad representatives, as you well know, Mr. Hamberger, and I think that we have the makings of moving forward.

Let me just cite the language that was issued February 12, after our meeting seeking clarification from Secretary Chertoff. "The industry should consider establishing a vigorous internal redress process for adversely affected applicants and personnel, including an appeal and waiver process similar to the system established for HAZMAT drivers and transportation workers at ports."

Now, it says "similar to," but it does not say that it has to be completely in synch. And so I raise these issues and concerns with you, Mr. Hamberger, and I think you did make it.

First of all, we see that notice is important and I am very disturbed with the story that Mr. Marinez has about the mother of four that had an identity issue, but it took 6 weeks.

I imagine in 6 weeks she could have lost her home, she could have been evicted out of an apartment, and certainly could have been left in dire straits. So I think timeliness is crucial.

My question to you is, as you go back after this hearing, can we count on this process to include a more timely notice? This is out of the railroad and we know you are dealing with contractors.

And I am going to be looking to see how far our reach is on contractors, because contractors can always have a dear ear or have a different pathway. And I understand Mr. Marinez seems to suggest that contractors want to do right, but they are being directed by the rail.

So let's try to see if we can all communicate. And I am disturbed that people are so negatively impacted.

And I might say that Congresswoman Brown is correct of the disparate impact and particularly, though we see that our representatives here from those who have been impacted, are diverse, we know that there is a heavy impetus or heavy impact on, in many instances, Hispanics and African–Americans and hardworking Cau-

casians, if you will, who are working every day, from a certain economic level, that they are the ones that are impacted negatively.

That is not doing this country any good and it certainly does not thwart our commitment to homeland security.

So can you commit here today—I am looking at this process, but I am also reading the word "vigorous"—to timely notice? Your contractors then can give timely notice. Can you commit to a timeliness that would certainly not be in the category of 6 weeks?

I think you said some companies are talking about 5 days. I think that is really responsible and I would like to see that be the rule or the goal of the industry.

So I have asked three questions and I guess the last one is, looking and listening to Mr. Willis and Mr. Marinez, the opportunity for the industry to look at diversifying its panel, because what I sense is that the panel is representative only of the industry and I wonder whether or not there is that opportunity, again, keeping in line with the responsibilities of homeland security and safety, which is what your concern is.

Mr. Hamberger?

Mr. HAMBERGER. In keeping with the fact that we need to wrap this up, I will just say yes, yes, and we will take a look at it.

Yes, we will have a commitment on a timeline for prompt notification that access has been denied. Yes, we will have an industry standard on a timely decision on that appeal. And I will make no commitment with respect to broadening the appeal board, but we will, based on your direction here today, certainly go back and take a look at it.

Ms. JACKSON LEE. That I think the committee would appreciate.

And Mr. Lungren started out this committee by saying that this is a bipartisan issue. He was called to the floor. So I offer his regrets to you.

We wanted to make sure that you understood that we are trying to work effectively on safety and security in the joint jurisdiction that we have.

Mr. Conyers' committee jurisdiction, of course, deals with the civil liberties, civil rights and due process that these workers have.

And let me just, as I make this inquiry, because, Mr. Marinez, you represent the workers, I believe, that are here in the room today.

Mr. MARINEZ. No, Congresswoman.

Ms. JACKSON LEE. Who represents those?

Mr. MARINEZ. One of the other locals.

Ms. JACKSON LEE. Do you know the other local?

Mr. MARINEZ. Just met them today.

Ms. JACKSON LEE. Does anyone know the other local, 710? Is that out of Teamsters? Yes.

Then, Mr. Marinez, let me just recount for you, you mentioned the individual that had an identity problem and could have gotten that straightened out in a short period of time.

Would it disturb you to note that an individual has finished their probation in 2000 and now they are still on the crosshairs of being terminated? Would that disturb you?

Mr. MARINEZ. Yes, it does.

Ms. JACKSON LEE. Mr. Willis, would that disturb you?

Mr. WILLIS. Absolutely.

Ms. JACKSON LEE. And let me be very clear, this is Mr. Yicardi and his offense is not a crime of violence.

Would it disturb you if a gentleman has not a crime of violence and he seems to have been released out of his crime in 2000 and he is still terminated, Mr. Shed?

Mr. Willis?

Mr. WILLIS. Yes.

Ms. JACKSON LEE. Would you have a solution for that that we have not offered here that does not counter homeland security?

Mr. WILLIS. Well, again, we think there is a process to do these checks in the right way and if you have it stated what the crimes are, how far back you are going to look, you have a robust appeals and waiver, with an independent entity looking at these cases, I think you are going to address?you are not going to address all of them, but you are going to address a lot more than what is currently the case under this program.

Ms. JACKSON LEE. So we need to possibly give instruction or guidance or counsel with the railroads to look at a vigorous appeal process that might have an opening or a diverse panel or a process that individuals who seemingly their background has been cleared since 2000 would be able to have their grievances addressed.

Mr. WILLIS. I think that is correct, and even offenses that are more recent. If they can demonstrate that they are not a security risk, just like TSA does for TWIC and HAZMAT, they should be able to go to work.

Ms. JACKSON LEE. Mr. Jamison, anything that we have said here that counters the regulations or the CFRs that TSA has sent out?

Mr. JAMISON. Not to my knowledge. Again, there is no CFR particularly pertaining to this process, but the recommendation of the TWIC and the HAZMAT process, I am not sure, but I don't think so.

Ms. JACKSON LEE. I think what we wanted to clarify today is to find a pathway of resolve for many of the workers who have been impacted negatively and to clarify between contractors and railroads and unions and workers a pathway of providing these individuals with an opportunity for work and an opportunity for their career, an opportunity for their professional development, if you would.

And I think that the record has been made enormously clearer. I hope with the information that we will receive, as requested by Mr. Conyers, the commitment, Mr. Hamberger, that you have made on notice and timeliness and, also, to review the panel, which I think is crucial, should put us in steps going forward.

Let me ask my last question of you, Mr. Hamberger. We have mentioned substance abuse and availability of substance abuse being issues that would require treatment or consultation.

Do you still maintain that, on the record, that some of those issues may lend themselves more to counseling, particularly if they have not engaged in any criminal act in that instance?

Mr. HAMBERGER. I think what we discussed when we met yesterday was the fact that the railroads, under Operation Redblock, have a very vigorous program of counseling and assistance for their employees.

We have a zero tolerance drug policy that is actually from the Department of Transportation, and so it is an effort of the industry to help the employees not just in drug abuse, but alcoholism and other social issues that we do for our employees.

We do not offer that to the employees of our contractors and I would not assume that we would. That is an employee of the railroad issue and not for the employees of our contractors.

Ms. JACKSON LEE. Well, Mr. Hamberger, we realize the sort of good working relationship that you have with your contactors and the desire of the contractors to be particularly accommodating to the railroads and we hope that you will be able to encourage them to follow suit on some of the good plans that you have.

I will conclude by making this final comment, and that is that, the four witnesses, your testimony has been welcomed. If there are additional statements that you desire, we welcome them to be added into the record.

We would also say to members if there are additional questions that you would have for the particular witnesses, we would welcome them into the record.

And I would like to put on the record that Mr. Yicardi—am I pronouncing the name correctly? Mr. Yicardi and Mr. Shed are two still unemployed individuals that represent a sample of those who have been terminated.

Their facts seem to suggest, based upon what we have heard today, that there is no reason for them to still be unemployed. I hope that those who are engaged in this process will move expeditiously to provide a report to this committee and to this chairperson on the status of these two individuals and the status of their reemployment.

With that, I would like to thank the witnesses for their valuable testimony and the members for their questions.

The members of the subcommittee may have additional questions for the witnesses, as I have said. We will ask you to respond expeditiously in writing to those questions and I ask the witnesses to respond to me for the inquiries that I have made, including my specific inquiry made on behalf of Mr. Shed and Mr. Yicardi with respect to their employment status, as quickly as possible.

Hearing no further business, the subcommittee now stands adjourned.

[Whereupon, at 12:46 p.m., the subcommittee was adjourned.]

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