

**STATEMENT OF
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BEFORE THE

**COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON TRANSPORTATION SECURITY AND
INFRASTRUCTURE PROTECTION**

UNITED STATES HOUSE OF REPRESENTATIVES

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

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Madam Chairwoman, Ranking Member Lungren and Members of the Subcommittee:

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 implements 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 support 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 his 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.