

OSHA WHISTLEBLOWER STAKEHOLDER MEETING:  
TRUCKING AND RAIL  
June 12, 2018  
Minutes

U.S. Department of Labor  
Frances Perkins Building  
200 Constitution Avenue, N.W.  
Washington, DC

The OSHA Whistleblower Stakeholder Meeting was called to order by Andrew Levinson at 1:00 pm on Tuesday, June 12, 2018.

The following members of the public were present:

<b>NAME</b>	<b>INDUSTRY</b>	<b>TITLE &amp; ORGANIZATION</b>
Andrew Adelman	Trucking	Associate, Correia & Puth, PLLC
Fritz Edler	Railroad	Special Representative, Railroad Workers United
Michael Ellis	Other	Attorney, National Whistleblower Center
Jay Grimes	Trucking	Director, Federal Affairs, Owner-Operator Independent Drivers Association
Matthew Hinrichs	Trucking	Safety Intern, American Trucking Associations
Aaron Jordan	Other	Attorney, National Whistleblower Center
Azita Mashayekhi	Trucking	Staff Industrial Hygienist, International Brotherhood of Teamsters
Roy Morrison	Railroad	Director of Safety, Brotherhood of Maintenance of Way Employees
Abigail Potter	Trucking	Manager of Safety and Occupational Health Policy, American Trucking Associations
Richard Renner	Trucking	Attorney, Kalijarvi, Chuzi Newman & Fitch
Bruce Rolfsen	Press	Reporter, Bloomberg BNA
Daniel Saphire	Railroad	Associate General Counsel, Association of American Railroads
Cole Scandaglia	Railroad	Legislative and Policy Analyst, Transportation Trades Department, AFL-CIO
Joseph Sirbak	Railroad	Member, Cozen O'Connor
John Tolman	Railroad	VP & National Legislative Representative, Brotherhood of Locomotive Engineers and Trainmen, Teamsters Rail Conference
Vince Verna	Railroad	Director of Regulatory Affairs, Brotherhood of Locomotive Engineers and Trainmen, Teamsters Rail Conference
Gary Visscher	Trucking	Of Counsel, Law Office of Adele Abrams PC

Harry Zanville	Railroad	Special National Counsel, Brotherhood of Maintenance Way of Employes
Thomas Devine*	Other	Legal Director, Government Accountability Project
Sofia Hubscher*	Railroad	Deputy General Counsel, MTA Metro-North Railroad
Shontell Powell*	Other	Of Counsel, Ogletree Deakins
Michael Rowan*	Railroad	Director of Regulatory Compliance, Long Island Rail Road
Michael Elliott*	Railroad	Retired
Kiel Garella*	Railroad	Attorney, Garella Law, P.C.
Kellyanne Gallagher*	Railroad	Director, Regulatory Affairs, NY MTA
Jeff Dingwall*	Railroad	Attorney, Eight & Sand
Jeff Chod*	Railroad	Owner, Chod Law, LLC
Jason Zuckerman*	Railroad	Principal, Zuckerman Law
Gerald Borovick*	Trucking	Attorney, Adresen & Borovick, LLP
Eric Miller*	Press	Staff Reporter, Transport Topics
Daren Hansen*	Press	Senior Editor, Transportation Safety, J.J. Keller & Associates
Chloe Pedersen*	Railroad	Attorney, Fletcher & Sippel, LLC
Brian Saltz*	Railroad	Assistant Deputy General Counsel, MTA Long Island Rail Road
Brenda Zylstra*	Other	Government Affairs & Policy Manager, American Society of Safety Engineers
Andrew King*	Trucking	Owner-Operator Independent Drivers Association
Michael Kucinski*	Trucking	Director, Human Resources, Little Caesars/Blue Line
Alina Marciniak*	Rail	Labor Relations Analyst, F&H Solutions Group

Note: \* denotes attendees who participated via teleconference

The following U.S. Department of Labor staff were present:

<b>NAME</b>	<b>AGENCY</b>	<b>TITLE</b>
Loren Sweatt	OSHA	Deputy Assistant Secretary
Galen Blanton	OSHA	Acting Deputy Assistant Secretary
Francis Yebesi	OSHA	Acting Director, Directorate of Whistleblower Protection Programs (DWPP)
Anthony Rosa	OSHA	Deputy Director, DWPP
Andrew Levinson	OSHA	Deputy Director, Directorate of Standards and Guidance, Event Moderator

Christine Stewart	OSHA	Division Chief, Division of Policy, Planning, and Program Development, DWPP
Meghan Smith	OSHA	Program Analyst, DWPP
Yasmin Wardlaw	OSHA	Program Analyst, DWPP
Robert Swick	OSHA	Investigator, DWPP
Sarah Caudrelier	OSHA	Program Analyst, DWPP
Dale Caldwell	OSHA	Program Analyst, DWPP
Otis Barrett	OSHA	Investigator, DWPP
Laura Givens	OSHA	Program Analyst, DWPP
Marisa Johnson*	OSHA	Program Analyst, DWPP
Tammy Vo Bui	OSHA	Student Volunteer, DWPP
Alexandra Pickeral	OSHA	Student Volunteer
Philippe Blancato	OSHA	Investigator, DWPP
Kristen Rubino	OSHA	Regional Supervisory Investigator, Region I
Mark Lerner	SOL-OSH	Senior Attorney
Brian Broecker	SOL-OSH	Staff Attorney
Grant Jones	SOL-OSH	Legal Intern
Justin Winn	SOL-OSH	Legal Intern
Megan Guenther	SOL-FLS	Senior Attorney
Frank Meilinger	OSHA	Director, Office of Communications (OOC)
Kim Darby	OSHA	OOC
Michael Trupo	OSHA	OOC
Tobias Kammer*	OSHA	Assistant Regional Administrator, Region X
Michael Mabee*	OSHA	Assistant Regional Administrator, Region I
Terri Wigger*	OSHA	Assistant Regional Administrator, Region II
Rosalynn Garcia*	OSHA	Regional Investigator, Region IX
Jared Kline*	OSHA	Regional Investigator, Region IX
Rebecca Bowen*	OIG	Audit Manager

Note: \* denotes attendees who participated via teleconference

### **OSHA Speakers**

OSHA Deputy Assistant Secretary Loren Sweatt greeted the participants, asking them to focus on the two issues stated in the Federal Register Notice:

1. How can OSHA deliver better whistleblower customer service?
2. What kind of assistance can OSHA provide to help explain the whistleblower laws it enforces?

### **Acting Director, Directorate of Whistleblower Protection Programs Francis Yebesi**

In Fiscal Year 2017, OSHA received 424 complaints under the Surface Transportation Assistance Act and 293 complaints under the Federal Railroad Safety Act. Because of the volume of cases that OSHA handles under these statutes, we decided to seek input from these regulated communities on how we can improve.

We will be taking notes on all of your input and will upload this information to regulations.gov in the docket. In addition, we will also upload any written comments you have to the docket for the record. We have copies of several informational materials, including revised fact sheets, available for participants in the back. These materials have been uploaded to docket OSHA-2018-0005, available here, <https://www.regulations.gov/docket?D=OSHA-2018-0005>.

We're looking forward to hearing all of your input on how we can improve.

### **Trucking Industry Speakers**

#### **Jay Grimes, Director, Federal Affairs, Owner-Operator Independent Drivers Association**

Mr. Grimes began by speaking about the deficiencies that he believes exist in the complaint filing process under the Department of Transportation's (DOT) Anti-Coercion Rule. While most professional drivers are aware of DOT rules, far fewer are familiar with OSHA protections. OSHA should work with the Owner-Operator Independent Drivers Association to educate professional drivers about OSHA's whistleblower protection program.

#### **Richard Renner, Attorney, Kalijarvi, Chuzi Newman & Fitch**

Whistleblower laws are remedial laws that encourage employees to raise concerns about dangers that might affect the financial system and the integrity of workplace as well as the general public. Congress meant to make these violations easy to prove through the contributing factor standard and the lower clear and convincing standard enacted in the statutory language. We can accept the fact that sometimes a less than deserving complainant will win their case, but we cannot accept the inability of a plaintiff to obtain a proper remedy after raising a meritorious whistleblower retaliation complaint.

Despite the Supreme Court's decision in Whitmore v. Department of Labor holding that the burden remains with the employer-respondent to demonstrate that they would have taken the same adverse action regardless of the whistleblower's complaints, the success rate for whistleblower complainants remains far too low. It doesn't encourage people to come forward and represents a failure for the free speech rights these statutes are meant to convey to employees.

Currently, merit cases have to go through a vigorous review process but dismissals require less review. Investigators should be able to issue merit decisions on their own but go through a review process for dismissals.

#### **Abigail Potter, Manager of Safety and Occupational Health Policy, American Trucking Associations**

All motor carriers and drivers must follow safety regulations and Surface Transportation Safety Assistance Act (STAA) whistleblower protections are necessary to create a safe working environment. Some members find that drivers file non-legitimate complaints, which are time-

and resource-intensive to resolve. The effort expended takes away from time and resources that could be better spent on improving operations. The American Trucking Association (ATA) believes that OSHA could do more to inform drivers what is needed to prevail in a STAA case and that such outreach would lead to increased efficiency for the processing and resolution of whistleblower complaints. ATA looks forward to working with OSHA on this issue in the future.

### **Azita Mashayekhi, Staff Industrial Hygienist, International Brotherhood of Teamsters**

The teamsters have collaborated with OSHA on whistleblower issues through the Whistleblower Protection Advisory Committee but wishes to register their concern that OSHA's whistleblower office faces a lack of resources. The agency should be more forthcoming in asking for supplemental funds during the appropriations cycle and should retain its focus on legitimate cases, in contrast to Ms. Potter's advice.

The process should be shortened as a protracted process interferes with effective implementation. DWPP should have authority equal to other directorates so that cases are overseen by the directorate rather than the regions.

### **Rail Industry Speakers**

#### **Mike Elliot, Retired Engineer**

OSHA should create a State Participation Program (SPP) similar to that which exists at the Federal Railroad Administration (FRA). With the FRA SPP, states may have state inspectors federally certified to operate with the same authority as FRA inspectors. The SPP has been very effective throughout Washington State in putting additional "boots on the ground" to enforce FRA regulations.

By taking the SPP concept in use today at FRA and extending it to OSHA, you effectively enhance and expand OSHA's influence on whistleblower protections and, in turn, on public safety. Most of the Regional OSHA offices are backlogged with whistleblower cases and have limited staff resources to conduct timely investigations and adjudicate cases. Implementing a SPP would encourage more states to participate, bring in additional state-level resources, raise the overall safety bar, and help ensure justice is served swiftly for those who violate OSHA whistleblower protection laws. Remember, justice delayed is justice denied.

#### **Harry Zanville, Special National Counsel, Brotherhood of Maintenance Way Employes**

Mr. Zanville reiterated many of the comments that he submitted to the docket. His written comments can be found here - <https://www.regulations.gov/document?D=OSHA-2018-0005-0005>. He recommended that OSHA enforce its Memorandum of Agreement with the Federal Railroad Administration (FRA) or that OSHA work with his organization to sue the FRA to enforce certain safety provisions.

### **Fritz Edler, Special Representative, Railroad Workers United**

Mr. Edler has represented employees in disciplinary proceedings and noted that, while retaliation cases have been down in number, they are beginning to increase. Awards in favor of whistleblowers are often delayed pending appeal, lessening their impact. The punitive damage cap is insufficient, which makes it easier for railroads to engage in retaliatory practice after monetary calculation. There's nothing to hold bad managers accountable. He called on OSHA to make the workplace safe and protect the material gains that have come about from rail workers' whistleblower provisions.

### **How Can OSHA Better Reach Stakeholders?**

#### **Abigail Potter, Manager of Safety and Occupational Health Policy, American Trucking Associations**

OSHA should reach out to FMCSA.

#### **Jay Grimes, Director, Federal Affairs, Owner-Operator Independent Drivers Association**

OSHA should reach out to several media outlets the Owner-Operator Independent Drivers Association has contacts with to better reach stakeholders.

#### **Richard Renner, Attorney, Kalijarvi, Chuzi Newman & Fitch**

Under the Energy Reorganization Act, employers are required to post signage explaining employee rights. If they don't have a poster, the statute of limitations doesn't begin running. This rule gives employers an incentive to inform employees of their rights.

#### **Azita Mashayekhi, Staff Industrial Hygienist, International Brotherhood of Teamsters**

OSHA should reach out to the Federal Motor Carrier Safety Administration regarding their anti-coercion rule and find out how they relate to Surface Transportation Assistance Act cases. OSHA should have a process for getting feedback from complainants, if such a process doesn't already exist.

#### **Jason Zuckerman, Principal, Zuckerman Law**

OSHA should let people know when the agency has been able to get a good result on behalf of a whistleblower, as it demonstrates the agency's efficiency and effectiveness. He noted that there has been an effort to let the public know when there is reinstatement of a whistleblower and hopes that there will be further notification efforts in the future. Such notifications can result in beneficial publicity that informs potential complainants and whistleblowers where they can go to receive aid.