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U.S. HOUSE OF REPRESENTATIVES

COMMITTEE OF THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

HEARING ON EMPLOYER ACCESS TO CRIMINAL BACKGROUND CHECKS:  
THE NEED FOR EFFICIENCY AND ACCURACY

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Chairman Scott, Ranking Member Forbes and members of the Committee, thank you for the opportunity to speak before you this day on the subject of efficiency and accuracy in criminal background checks for employees of railroad contractors. My name is Robert Davis, and I am an International Vice President and National Legislative Director of the Transportation•Communications International Union, an affiliate of the International Association of Machinists, referred to as TCU.

TCU is a labor organization representing approximately 45,000 active employees, most of whom are employed in the railroad and related industries. TCU represents employees employed in the clerical, carman and supervisor crafts and classes employed by each of the nation's Class I railroads, Amtrak, and various commuter authorities. In addition, TCU represents the employees of some of the contractors providing service to the Class I railroads.

Let me emphasize at the start that there is nothing more important to our union than the safety and security of our members. We accept that some control over access to railroad property is an important component of assuring their safety. Consistent with legitimate security concerns, we can, and we should, also protect employees subject to background checks from arbitrary loss of employment, providing them with fundamental procedural protections.

This is one of the most important aspects in assuring accuracy in criminal background checks.

During 2006 each of the four major Class I carriers - Union Pacific Railroad (UP), Burlington Northern Santa Fe Railroad (BNSF), CSXT and Norfolk Southern Railroad (NS) - implemented a program requiring its contractors to use the services of e-RAILSAFE to conduct background checks, including the criminal background, of their employees.<sup>1</sup> Each of these carriers advised their contractors that this program was adopted to meet "government security recommendations, directives, and regulations." As acknowledged by the President of the Association of American Railroads, and a representative of the Department of Homeland Security, in their testimony before the Subcommittee on Transportation Security and Infrastructure on February 16, 2007, this claim was erroneous.<sup>2</sup> There are no requirements for employee criminal background checks for railroad contractors. As I will demonstrate, where such background checks are required, unlike the railroads' program, federal law affords important protections to affected employees.

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<sup>1</sup>As a result of this program, several employees of a UP contractor were denied access to their work site in the Chicago area because they had failed this background check. The affected employees are represented by the Teamsters, and a representative of that organization also testified at hearings held February 16, 2007, by the Transportation Security and Infrastructure Subcommittee.

<sup>2</sup>We thank Chairman Conyers for his interest in this issue and his attendance at that hearing.

The implementation of this background check program raises serious questions of equity. Even where there is a collective bargaining relationship with a contractor, our current labor laws do not afford a meaningful avenue for redress. In order to make this point, I will now describe in some detail how this program impacted the employees of Pacific Rail Services, referred to as PacRail, who are represented by TCU.

TCU has for many years represented PacRail's employees employed in Seattle, Washington. PacRail provides the labor to load and unload freight at a rail yard owned by the BNSF. This yard is adjacent to a port facility where freight is routinely transferred between BNSF and ocean-going vessels. PacRail's employees work in close proximity to longshoremen responsible for the loading and unloading of cargo. The BNSF facility in Seattle is commonly referred to as an intermodal yard. The facility provides a critical link between rail, ship and truck modes of transportation.

In the fall of 2006 BNSF advised PacRail that its employees would be required to participate in the e-RAILSAFE background screening program. As a result PacRail's employees were required to sign a waiver authorizing e-RAILSAFE to obtain consumer reports including any reports providing information on the employees' "character and general reputation." No explanation was initially offered to PacRail's employees or their union as to the need for

such a broad waiver, though, in response to subsequent inquiries, TCU was advised by PacRail that the broad waiver was needed to assure the accuracy of the criminal background check. No further explanation was given. No explanation was offered to employees or TCU as to which criminal offenses would disqualify them from entering BNSF property. No explanation was offered as to what mitigating factors, if any, were to be considered. While there is an appeal process, that process is totally controlled by BNSF, with no redress in front of a true neutral.

As a result of this background check, two employees lost several weeks of employment, and one has permanently lost employment. While these employees had criminal records, PacRail was well aware of this fact from the time they were hired. Each of these employees had worked for PacRail for several years without incident, and absent BNSF's demands, PacRail would have taken no disciplinary action against them.

BNSF imposed the requirement that PacRail employees undergo criminal background checks, designed the process for the background check, dictated the scope of the employee waiver, selected the company that conducted the background check, and designed the appeal process, which it controlled. Though BNSF maintains that it is responsible only for barring affected contractor employees from their property, and not for their termination of employment, the effect of the system is to deny PacRail employees an opportunity to

work. Though BNSF designed, imposed and controlled the background check procedures, it was not obligated to bargain or arbitrate with TCU about that program, since TCU's collective bargaining relationship for the involved employees is with PacRail, not BNSF.

Under the National Labor Relations Act, PacRail is obligated to bargain over this program with TCU, but since it was not the moving party, there was no basis to engage in meaningful bargaining with the party responsible for their program. TCU filed unfair labor practice charges against PacRail for failing to bargain over this background check program, but investigation of these charges has been deferred pending arbitration. Further, PacRail was so uninvolved with the program that it was unable to respond to TCU's information requests, nor was it able to get BNSF to do so. BNSF also declined to respond to TCU's direct requests to it for information about this program.

To summarize, employees who honestly revealed their criminal records at the time of hiring, after years of an unblemished work record, have been barred from entering their work site because of their criminal records about which their employer was well aware. While these actions were supposedly taken in the name of security, no explanation was offered as to how these employees are security risks. While there is an appeal process, it is controlled by the railroad, and BNSF has refused to provide its contractor, the affected employees, or their union the most basic information about

this process. It is hard to believe this situation is happening in America. And to make it even worse, this entire mess has been justified by the railroads as stemming from their compliance with non-existent requirements from the Department of Homeland Security.

TCU has filed a grievance over the implementation of this program with PacRail. PacRail has defended its actions by maintaining that it had no choice but to put this program into effect at the insistence of BNSF and that BNSF, not it, barred employees from going to work. This matter is pending arbitration, and we will soon learn whether the arbitrator accepts this defense. But even assuming the arbitrator finds that PacRail violated its collective bargaining agreement with TCU, he will be unable to provide the employee who has been permanently barred from his work place with the traditional remedy of reinstatement. Since BNSF is not party to the collective bargaining agreement, it will not be bound by the arbitrator's decision, and the arbitrator has no means to require BNSF to permit the employee onto its property.

Traditional collective bargaining, negotiations, information requests, grievances, and arbitration have proven totally ineffective to deal with this issue. Since the tools the law currently provides employees and their unions are not up to the task, we have turned to Congress to deal with this issue. We believe at a minimum that simple fairness and traditional concepts of fundamental due process require that (1) a time period be

established for considering felony convictions; (2) a background check procedure be transparent - the list of disqualifying felonies be clearly articulated for all interested parties; (3) there be a nexus between the involved felonies and homeland security - rail contractor employees should be subjected to no greater scrutiny than Congress has imposed on port employees; (4) mitigating factors such as the facts surrounding the conviction and rehabilitation should be considered; and (5) there be a meaningful appeal process where a disqualifying decision could relatively promptly be reviewed by a true neutral.

The Transportation Worker Identification Credential (TWIC) program called for in the Port Security Act of 2006 already provides these protections to longshoremen and truck drivers carrying hazardous materials. PacRail employees work closely with both. The TWIC program was passed with bipartisan support in Congress and signed into law by President Bush.

The TWIC program calls for a robust appeal and waiver process with the right to redress before an Administrative Law Judge. The TWIC program lists specific crimes by statute for which an employee could be disqualified and provides that such crimes must have direct nexus to "terrorist and security risk." The railroads' original appeal process, as well as recently revised procedure, contains none of the protections of the TWIC program.

Fortunately Congress is in the process of addressing this problem. We want to add our voices to those supporting the Perlmutter Amendment to the Public Transportation Act, Section 120 of H.R. 1401. We thank Congresswoman Jackson Lee for being a co-sponsor of that amendment. That amendment provides for a waiver process in which the affected employees can demonstrate that through rehabilitation or other factors he is not a security risk, a meaningful appeal process, and, most importantly, a meaningful redress process. Significantly, these procedures bind the rail carriers and their contractors and, therefore, provide the basis for relief. We believe that fundamental fairness warrants support of this bill, which we understand has been passed by the House. A companion bill has been passed by the Senate, and the two bills are heading to conference committee. We are hopeful that the conference committee report will retain the protections described above and that a bill will soon be on its way to President Bush.

Thank you again for this opportunity to testify.