

Memorandum

To: Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure

From: Madeline Neighly

Re: e-RAILSAFE Background Checks on Rail Workers

Date: January 13, 2010

This memorandum provides background information on the e-RAILSAFE program, which is the criminal background check system utilized by the Association of American Railroads, their members and the contractor employers whose employees work on railroad properties. This memorandum also provides information on the Federal Trade Commission Commissioner's charge against two rail companies, Quality Terminal Services, LLC and Rail Terminal Services, LLC, and subsequent settlement for violations of the Fair Credit Reporting Act while using e-RAILSAFE. Finally, it provides information on possible civil rights violations and concrete suggestions on how Congress can provide oversight of the program and ensure workers' rights are protected.

- History of e-RAILSAFE Program

E-RAILSAFE is a criminal history screening program developed by U.S. and Canadian railroads and e-Verifile.com, a private company.¹ Started in 2005, e-RAILSAFE is an online based program that permits employers to request criminal background checks on all current and prospective employees. The website address is <http://erailsafe.com>.

Although not required by any federal or state law, e-RAILSAFE has been adopted by seven major railroads including BNSF, Canadian Pacific, Canadian National, Conrail, CSX, Norfolk Southern, and Union Pacific. These railroads then require all contractors/vendors (e.g., Quality Transportation Services and Rail Terminal Services, companies that provide services to the AAR members) and their employees who physically operate on the railroad properties to comply with the e-RAILSAFE program, including passing the background check and obtaining the e-RAILSAFE credential.

Companies that do not participate in the e-RAILSAFE program requiring the e-RAILSAFE background checks are not able to access the railroad companies' properties and would thus cease operations. Employees of the companies that contract to work on the railroad properties who are unable to obtain e-RAILSAFE credentials are unable to access their worksites and are thus effectively unable to work. However, because the workers are employees of the contractor and not the railroads, the railroads can claim that they are not responsible for a worker losing his/her job.²

On February 16, 2007, the House Subcommittee on Transportation Security and Infrastructure Protection held a hearing on the impact of background and security clearances on the transportation workforce focused specifically on the e-RAILSAFE program. In that hearing, multiple representatives raised concerns about the due process and civil rights of the workers who lost their jobs as a result of the e-RAILSAFE program.

- How e-RAILSAFE Works

For each employee applicant, e-RAILSAFE provides the “testing, background checks and badges on ... current employees and future applicants that is required by the railroad.”³

Initial application

The companies that contract with the railroads create accounts with e-RAILSAFE. Employees may only submit to an e-RAILSAFE conducted background check if they have the employer’s account number. As such, people are unable to first secure e-RAILSAFE certification and then seek work with a railroad or company that contracts with railroads. Per the e-RAILSAFE website, employee applicants “can be denied access to the railroad property if they have: a felony conviction within the last 7 years; an Active Warrant; an open felony court case; a fraud alert and/or your release from incarceration within the last 5 years and/or a history of misdemeanors or crimes of concern.”

Once an employee has been “flagged for review” by e-RAILSAFE based on the criteria listed above, “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.”⁴ The railroads, not e-RAILSAFE, thus decide who is permitted an e-RAILSAFE credential and thus who can access railroad properties.

In contrast to the e-RAILSAFE program in which workers may be disqualified for “misdemeanors or crimes of concern,” the Transportation Worker Identity Credential (TWIC) program administered by the Transportation Security Administration (TSA) specifically precludes disqualifications based on misdemeanor convictions. In addition, while any felony can disqualify a worker under the e-RAILSAFE program, the TWIC program (the federal program regulating access to the ports) has a limited list of felony convictions that are interim and permanent disqualifications (e.g., drug possession is not a disqualifying felony offense under the TWIC program).⁵ As explained in more detail below, workers convicted of permanent disqualifying offenses and interim disqualifying offenses for which they have been convicted within the last seven years or released from incarceration within the last five years are eligible to apply for waivers in the TWIC program.

Appeals process

Prior to the 2007 House Subcommittee hearing, only the company that contracted with the railroads had the right to appeal denials of individual workers based on e-RAILSAFE review. After a worker had been flagged by e-RAILSAFE and determined by the police division of the railroads to be ineligible to obtain clearance, the contractor employer could appeal that decision. In those cases, the appeal would be sent back to the railroads’ police divisions for review. Individual workers had no right to request an appeal, and the same department that initially determined ineligibility was, and is, charged with review of its own decision.

Of great concern at the hearing was the lack of a robust appeals process in the e-RAILSAFE program. In response to these concerns, Ed Hamberger, the president and CEO of the American Association of Railroads, announced a new appeals process for the e-RAILSAFE program whereby, going forward, individual employees would be able to appeal their denials. In this new system, the employee, not just the contractor, is given access to e-Verifile to provide appeal documentation which is then transmitted back to the railroads for reconsideration.⁶

Because the workers are employed by companies that contract with the railroads, the railroads avoid responsibility for being the agency that fires the worker. However, because the workers' jobs necessarily require them to access the railroads' properties, they cannot work if they cannot obtain e-RAILSAFE credentials.

The appeal process now consists of providing e-RAILSAFE with your name, the contractor's name, mailing and email addresses, daytime telephone number, justification for the appeal (brief explanation), and supporting documentation if applicable.⁷ Although some employee applicants provide e-RAILSAFE with additional documentation attempting to prove a record of rehabilitation, the website does not provide information on what additional documentation would be useful or "applicable." If the railroads deny the employee applicant's appeal, there is no further recourse and the employee applicant is unable to access work sites.

In stark contrast, the TWIC program not only limits the disqualifying convictions to felonies and limits the length of time for which most felony convictions will be considered, it provides workers with both appeal and waiver procedures that have been very successful, and a final appeal process to a neutral arbiter, an Administrative Law Judge.

When a TWIC applicant receives an initial determination that they may be ineligible for a TWIC, they are able to appeal disqualifications based on erroneous information. For example, if a person's conviction is incorrectly listed as a felony on their FBI rap sheet, they become eligible to obtain a TWIC card once they provide TSA with official documentation verifying that they were convicted of a misdemeanor only. Once TSA receives notice that the applicant does not have a disqualifying offense, they are to promptly issue a TWIC card.

If a TWIC applicant has a permanently disqualifying offense or is within the time limit of an interim disqualifying offense, they are able to request a waiver of the disqualification from TSA. To assist workers, TSA sends a package of information to each applicant that receives an initial determination that they may be ineligible to obtain a TWIC. The information provided by TSA explains the applicant's rights and what information they should provide to request a waiver, including a personal statement, court documentation, and letters of reference from parole/probation officers, employers, friends, and family members.⁸

If an applicant's waiver request is unsuccessful and TSA declines to issue a TWIC, the applicant has the ability to request review by an external, neutral arbiter. Upon receiving notice that TSA denied the waiver request, the applicant also receives notice that they may appeal the denial to an Administrative Law Judge. In this way, TWIC applicants can be assured that a neutral actor reviews their waiver request.

- Consumer Rights Violations and Civil Penalties

The Federal Trade Commission (FTC) filed charges against two of the companies that contract with the railroads for violating the Fair Credit Reporting Act (FCRA) in the process of using the e-RAILSAFE program. The two companies, Quality Transportation Services (QTS) and Rail Terminal Services (RTS), settled with the FTC for a total of \$74,000 and agreements to comply with the FCRA notification requirements of 15 U.S.C. § 1681 et seq.

In particular, QTS and RTS were found to have violated FCRA mandates to provide workers with: a “clear and conspicuous” disclosure prior to obtaining background reports; a copy of their individual reports and a written explanation of their rights under FCRA; notification that an adverse action has been taken in whole or in part because of the report; and information on their right to a copy the report and to dispute the report’s accuracy.

Reportedly, because they were not given copies of their reports and the opportunity to contest inaccuracies, employees were terminated even when they had no prior record, and the report reflected identity theft, mistakes or even typographical errors.⁹

QTS and RTS were liable under FCRA because they are the employers and are ultimately responsible for taking the adverse action. Although it is the railroads that determine who will be granted clearance through the e-RAILSAFE program, ultimately it is the contractor employers who terminate the workers.

- Possible Civil Rights Violations

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, gender, national origin and other categories. The agency that enforces Title VII is the Equal Employment Opportunity Commission (EEOC). The EEOC has found that employment decisions based on criminal background checks, if not conducted properly, may violate Title VII.¹⁰

One type of illegal employment discrimination prohibits employers from taking actions that have the *effect* of discriminating on the basis of race. Employers frequently fire or do not hire workers because of an arrest or because of a conviction that is not related to the job duties involved. This practice has a greater effect on African-Americans and Latinos because African-Americans and Latinos are disproportionately represented in the criminal justice system. Because of that “disparate impact” on African-Americans and Latinos, when arrest and conviction records are improperly used to screen out otherwise eligible workers, the EEOC will investigate those complaints based on criminal background checks as possibly demonstrating race discrimination.

Employers may consider an applicant’s criminal history when making an employment decision. However, under EEOC guidelines, employers must first make an individual, case-by-case inquiry and consider:

- (1) the nature and gravity of the offense or offenses,
- (2) the nature of the job, and
- (3) the time that has passed since the conviction and/or completion of the sentence.

The e-RAILSAFE program, involving e-RAILSAFE/e-Verifile, the railroads and their contractors, arguably violates Title VII of the Civil Rights Act of 1964 because of the policy of blanket employment bans for people with criminal records. The critical questions are:

1. Is e-RAILSAFE liable under Title VII for imposing the blanket selection criteria?
2. Are the railroads liable in failing to apply the EEOC criteria when reviewing employees who have been “flagged” by e-RAILSAFE based on their criminal histories?
3. Are the contractor employers liable for terminating employees in violation of Title VII?

- Congressional Investigation and Oversight

On February 16, 2007, the House Subcommittee on Transportation Security and Infrastructure Protection held a hearing on e-RAILSAFE investigating allegations of race discrimination and other violations. Members of the subcommittee expressed their concern about the disparate impact the e-RAILSAFE program was having on communities of color, and the lack of a robust appeals process. At that hearing, the AAR agreed to a new appeals process but did not agree to follow the TWIC disqualification standards or to review by a neutral arbiter. It is not clear what has happened since that time.

Currently, there appears to be little or no oversight of the e-RAILSAFE program. While the FTC settlement requires the two contractors to comply with the notification requirements of FCRA, we do not know if other rail workers are receiving appropriate notification from other contracting companies. Additionally, there is no information available on how many workers have been subject to e-RAILSAFE background checks and the outcomes of those checks. Thus, now that almost three years have passed since the House Subcommittee hearing, it is an appropriate time to take another look at the issue. We recommend starting by sending the railroads, e-RAILSAFE, and the contractor employers specific questions to gain information on how the program is currently implemented and how workers are being affected. In addition, there may be cause for another hearing, a GAO report, and/or federal agency enforcement actions.

To ensure the e-RAILSAFE program is providing adequate worker protections and not denying qualified workers access to their worksites, the House Subcommittee could begin by requesting the following information from e-RAILSAFE/e-Verifile, the railroads or AAR, and the contractor employers:

1. How many requests for individual background checks have they received under the e-RAILSAFE program?
2. How many applicants were denied clearance based on the e-RAILSAFE background report?
3. How many of the denied applicants appealed that denial to the railroads (breakdowns by railroad company)?

4. How many appeals were granted/denied (by railroad company)?
5. How many requests to correct records were received by e-RAILSAFE and/or e-Verifile?
6. How many records were corrected?
7. For what offenses or types of offenses were most applicants denied?
8. How long on average does the appeal process take (by railroad)?
9. What data has been collected from the individual railroads and their contractors?
10. What procedures have been put in place by e-RAILSAFE, the railroads, and their contractors to ensure compliance with Title VII and the EEOC guidelines?
11. What specific criteria do the individual railroads apply to determine eligibility when cases are flagged for their review?

¹ The Impact of Background and Security Clearances on the Transportation Workforce, 110th Cong., 1st Sess. 10-11(2007) (oral testimony of Ed Hamberger).

² *Id.*

³ <http://erailsafe.com>

⁴ The Impact of Background and Security Clearances on the Transportation Workforce (oral testimony of Ed Hamberger).

⁵ More information on the classification of convictions for the TWIC program may be found at http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#Crimes.

⁶ The Impact of Background and Security Clearances on the Transportation Workforce (oral testimony of Ed Hamberger).

⁷ E-RAILSAFE website at http://erailsafe.com/erail_appeals.html.

⁸ This information is also available on the TWIC website at http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#denied_twic.

⁹ Complaint filed with the Federal Trade Commission (copy available upon request).

¹⁰ The three EEOC guidances on the employment rights of people with criminal records are:

1. EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (Feb. 4, 1987) (available at <http://www.eeoc.gov/policy/docs/convict1.html>).
2. EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987) (available at <http://www.eeoc.gov/policy/docs/convict2.html>).
3. EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (Sept. 7, 1990) (available at http://www.eeoc.gov/policy/docs/arrest_records.html).