

(§ 0.461(g)(1)(i) through (iii)) apply to the processing of the request.

(3) *All other requesters.* (i) The Commission shall charge requesters who do not fit into any of the categories above fees which cover the full, reasonable direct cost of searching for and reproducing records that are responsive to the request, pursuant to § 0.465 and § 0.467, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

(ii) All other requesters shall not be assessed search fees if the Commission fails to comply with the time limits under § 0.461(g)(1), if no unusual or exceptional circumstances (§ 0.461(g)(1)(i) through (iii)) apply to the processing of the request.

(b)(1) The 100 page restriction on assessment of reproduction fees in paragraphs (a)(2) and (a)(3) of this section refers to 100 paper copies of a standard size, which will normally be "8½ x 11" or "11 x 14," or microfiche containing the equivalent of 100 pages or 100 pages of computer printout.

(2) When the agency reasonably believes that a requester or group of requesters is attempting to segregate a request into a series of separate individual requests for the purpose of evading the assessment of fees, the agency will aggregate any such requests and assess charges accordingly.

(c) When a requester believes he or she is entitled to a reduced fee assessment pursuant to paragraphs (a)(2) and (a)(3) of this section, or a waiver pursuant to paragraph (e) of this section, the requester must include, in his or her original FOIA request, a statement explaining with specificity, the reasons demonstrating that he or she qualifies for a reduced fee or a fee waiver. Included in this statement should be a certification that the information will not be used to further the commercial interests of the requester.

**Note to paragraph (c):** Anyone requesting a reduced fee or a fee waiver must submit the request directly to the Commission and not to the contractor who will provide documents only at the contract price.

(d) If the Commission reasonably believes that a commercial interest exists, based on the information provided pursuant to paragraph (c) of this section, the requester shall be so notified and given an additional ten business days to provide further information to justify receiving a reduced fee. See § 0.467(e)(2). During this time period, the materials will be available for inspection to the extent that the time period exceeds the time period for responding to FOIA requests, as appropriate.

(e)(1) Copying, search and review charges shall be waived or reduced by the General Counsel when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. 552(a)(4)(A)(iii). Simply repeating the fee waiver language of section 552(a)(4)(A)(iii) is not a sufficient basis to obtain a fee waiver.

(2) The criteria used to determine whether disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government include:

(i) Whether the subject of the requested records concerns the operations or activities of the government;

(ii) Whether the disclosure is likely to contribute to an understanding of government operations or activities; and

(iii) Whether disclosure of the requested information will contribute to public understanding as opposed to the individual understanding of the requester or a narrow segment of interested persons.

(3) The criteria used to determine whether disclosure is primarily in the commercial interest of the requester include:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(4) This request for fee reduction or waiver must accompany the initial request for records and will be decided under the same procedures used for record requests.

(5) If no fees or de minimis fees would result from processing a FOIA request and a fee waiver or reduction has been sought, the General Counsel will not reach a determination on the waiver or reduction request.

(f) Whenever the total fee calculated under this section is \$15 or less, no fee will be charged.

(g) Review of initial fee determinations under § 0.467 through § 0.470 and initial fee reduction or waiver determinations under § 0.470(e) may be sought under § 0.461(j).

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 225

#### Railroad Accidents/Incidents: Reports Classification, and Investigations

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation.

**ACTION:** Notice of interpretation.

**SUMMARY:** FRA is issuing this notice of interpretation to inform interested parties of its application and enforcement of the harassment or intimidation provisions contained in 49 CFR part 225, specifically relating to situations in which a supervisor or other railroad official accompanies an injured employee into an examination room. This notice of interpretation informs the regulated community as to when such behavior constitutes harassment or intimidation calculated to discourage or prevent the reporting of an accident, incident, injury or illness. This document is not intended to address or impact statutory provisions related to providing "prompt medical attention," as enforcement of those provisions fall within the jurisdiction of the U.S. Department of Labor.

**FOR FURTHER INFORMATION CONTACT:** Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS-11, Mail Stop 25, Washington, DC 20590 (telephone 202-493-6255); or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC-11, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6072).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 225.33(a) of Title 49 of the Code of Federal Regulations requires each railroad to "adopt and comply with a written Internal Control Plan" addressing the railroad's policies and procedures regarding accident/incident reporting. This section further requires that such Internal Control Plans include, at a minimum, a "policy statement declaring the railroad's commitment \* \* \* to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated \* \* \*." The FRA Guide for Preparing Accident/Incident Reports also notes that "many railroad

employees fail to disclose their injuries to the railroad or fail to accept reportable treatment from a physician because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with the reporting of such injuries." FRA Guide, Ch. 1, p.8. The FRA Guide goes on to state that supervisory personnel and mid-level managers in some instances "are urged to engage in practices which may undermine or circumvent the reporting of injuries and illnesses." Id.

FRA is aware of incidents in which a supervisor or other railroad official (hereinafter collectively referred to as the "supervisor") has accompanied an injured employee into an examination room, or other room in which the injured employee received medical treatment (hereinafter collectively referred to as the "examination room"). While FRA is concerned that injured employees in such situations may not receive complete or prompt medical treatment, responsibility for ensuring that such treatment is afforded has been assigned by Congress to the Department of Labor. FRA is concerned that when accompanied by a supervisor an injured employee may be discouraged or otherwise prevented from reporting an accident, incident, injury or illness. Similarly, a supervisor may influence the type or extent of medical treatment afforded the employee in an effort to affect the reportability of that injury. Although concerns have been expressed as to the need for a railroad to determine the extent of an employee's injuries, FRA does not believe that such concerns outweigh the potential pitfalls and problems associated with the practice of

having supervisors accompany injured employees while they receive care from their physicians. Moreover, physicians are in the best position to evaluate the health of injured employees and the presence of a supervisor during such examinations would not, in most cases, add any value to the treatment of an employee and would, in general, be a distraction to both the employee and the physician.

The purpose of this document is to articulate a general principle regarding what behavior constitutes harassment or intimidation in violation of § 225.33(a)(1) in the particular context of supervisors accompanying injured employees in examination rooms. The interpretation contained in this notice reflects the longstanding position of FRA regarding this practice. This document is not intended to address or impact the meaning or application of the statutory provisions contained in 49 U.S.C. 20109 related to providing "prompt medical attention," as enforcement and application of those provisions fall within the jurisdiction of the U.S. Department of Labor.

## II. Interpretation

### A. General Principle

Harassment and intimidation occur in violation of § 225.33(a)(1) when a railroad supervisor accompanies an injured employee into an examination room, unless one or more of the exceptions listed in section II(B) of this notice exists.

### B. Exceptions

FRA recognizes that there are limited circumstances in which it is

appropriate, and indeed preferable, for a supervisor to accompany an injured employee into an examination room. Thus, FRA believes that limited exceptions to the general principle articulated in section II(A) of this notice are necessary. Consequently, FRA recognizes the following limited exceptions:

(1) The injured employee issues a voluntary invitation to the supervisor to accompany him or her in the examination room. The injured employee must issue this invitation freely, without coercion, duress, or intimidation. For example, an injured employee may seek the attendance of a supervisor where the supervisor is a friend. This exception does not encompass invitations issued by third parties, including physicians, unless the invitations are made pursuant to the request of the injured employee.

(2) The injured employee is unconscious or otherwise unable to effectively communicate material information to the physician and the supervisor's input is needed to provide such material information to the physician. In these circumstances, the supervisor is assisting the injured employee in providing information to the physician so that the injured employee may receive appropriate and responsive medical treatment.

Issued in Washington, DC, on March 24, 2009.

**Jo Strang,**

*Acting Deputy Administrator, Federal Railroad Administration.*

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