

**Thompson Manager’s Amendment to H.R. 1401,
the “The Rail and Public Transportation Security Act of 2007”**

*Prepared by the Majority Staff of the Committee on Homeland
Security*

Fact Sheet

After extensive negotiations with the Chairman of the Transportation and Infrastructure Committee, Rep. James Oberstar, Homeland Security Committee Chairman Bennie G. Thompson agreed to offer a Manager’s Amendment during consideration in the House of H.R. 1401 to clarify the roles of the Department of Homeland Security (DHS) and Department of Transportation (DOT).

Additionally, Chairman Thompson agreed to a number of changes requested by the Chairman of the Oversight and Government Reform Committee, Rep. Henry Waxman, in order to make the whistleblower protections for federal employees and contractors in H.R. 1401 more similar to the protections provided in H.R. 985, the “Whistleblower Protection Enhancement Act of 2007,” which passed the House earlier this month.

The Manager’s amendment makes the following key changes:

Grants – Responsibilities of DHS and DOT

H.R. 1401 creates three new grant programs: a rail security grant program, a public transportation security grant program, and a bus security grant program. In the original version of H.R. 1401, DHS solely managed all three grants.

Under the Manager’s amendment, for all three of the grants, DHS will be responsible for:

- (1) determining the requirements for recipients of grants, including application requirements;
- (2) determining the recipients of grants;

- (3) determining the uses for which grant funds may be used;
- (4) establishing priorities for uses of funds for grant recipients; and
- (5) transferring grant funds to the Secretary of Transportation for distribution to the recipients of grants determined by the Secretary of Homeland Security.

DOT will be responsible for distributing grant funds to the recipients of grants determined by DHS.

DHS and DOT will jointly monitor and audit the use of grant funds.

Providing DOT with a greater role in the grant process is consistent with the American Public Transportation Association's recommendations.

Mr. Millar, President of the American Public Transportation Association, told the House Homeland Security at a hearing on March 6, 2007 that:

Our view has been that the Department of Homeland Security has not proven itself to be a good grant-making agency and that the Department of Transportation has had relationships going back 40 years or more with the transportation systems involved.

And our view has always been that the Congress should set the policy in cooperation with DHS, but once the policy is set, once the program is established, the money should be transferred to the Department of Transportation for purely administrative purposes.

Last year, in his written statement for a Subcommittee on Highways, Transit, and Pipeline of the House Committee on Transportation and Infrastructure hearing, Mr. Millar stated that

. . . DHS's current process and conditions have created significant barriers and time delays in getting funds into the hands of transit agencies where they can be used to protect riders.

Grants – Eligibility

Under the Manager's Amendment, only railroad carriers (including Amtrak), public transportation agencies, and over-the-road bus operators will be eligible to receive grants. These grants can be used to reimburse state, local, and tribal governments for additional security personnel during periods of heightened security and for operational costs for personnel assigned to full-time security or counterterrorism duties related to public transportation.

The original version of H.R. 1401 made state and local governments and private or public-private entities eligible for the grants. There are concerns that too much funding could be lost to administrative costs if the grants are not provided directly to the railroad carriers (including Amtrak), public transportation agencies, and over-the-road bus operators.

The Manager's Amendment also requires GAO to conduct a study on an annual basis the first three years after the enactment of H.R. 1401 of the administration and use of the security grants, including the roles of DHS and DOT in the process.

Roles of DHS and DOT

The original version of H.R. 1401 required the Secretary of Homeland Security to consult with the Secretary of Transportation in carrying out responsibilities under various sections of the bill.

In order to ensure H.R. 1401 does not contradict existing relationships established between DHS and DOT, the Manager's Amendment:

- Explicitly states that the Secretary of Homeland Security is the principal Federal official responsible for transportation security.
- States that the roles and responsibilities of DHS and DOT in carrying out the Act are the roles and responsibilities of these Departments assigned pursuant to the Aviation and Transportation Security Act (P.L. 107-71); the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458); the National Infrastructure Protection Plan required by Homeland Security Presidential Directive 7; Executive Order 13416: Strengthening Surface Transportation Security dated December 5, 2006; various Memorandums of Understanding entered into between DHS and DOT; and any subsequent agreements between the DHS and DOT.

Whistleblower Rights.

The Manager's amendment clarifies the whistleblower protections for employees of DHS and DOT, contractors or of those two agencies, and employees of providers of covered transportation.

Specifically, no individual covered by this provision may be discharged, demoted, suspended, threatened, harassed, reprimanded, investigated, or in any other manner discriminated against—including by a denial, suspension, or revocation of a security clearance or by any other security access determination—if such discrimination is due, in whole or in part, to any lawful act done, perceived to have been done, or intended to be done on the part of the whistleblower.

The Manager's amendment gives whistleblowers administrative and civil remedies, the latter of which expressly omits an amount-in-controversy requirement and grants the right of trial by jury at the request of either party, to DHS and DOT employees and contractors and to private sector providers of rail, public transportation, or over-the-road-bus service.

The Manager's amendment gives the right to all relief necessary to make a whistleblower whole, including damages, reinstatement with prior seniority status, special damages, and attorneys fees, among other things. Punitive damages are only available to private sector employees of providers of covered transportation and may not exceed the greater of treble damages or \$5 million. The amendment clarifies the procedures to be followed if the government asserts the "state secrets privilege" as a defense.

The Manager's amendment also clarifies that criminal penalties, if applicable, would not apply to claims brought by DHS and DOT employees or their contractors, but would apply to claims brought by employees of other providers of covered transportation. The criminal penalties include a fine, imprisonment for not more than one year, or both.

Clarification of the Federal Rail Safety Act

Finally, the Manager's Amendment states that the Federal Rail Safety Act (FRSA) does not preempt state laws --- i.e. it just sets minimum safety standards to improve railroad safety and reduce accidents. Some courts have

interpreted the FRSA as preempting state laws, and as a result, have thrown out negligence suits and similar actions. These decisions leave claimants with no right to a day in court, as the FRSA creates no federal cause of action.

-End-