

Strategic Risk Management:

Keeping the Trains Running on Time



2022 Employment Law Seminar



Speaker Introductions



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Strategic Risk Management: Part 1

Proactively Preparing for Litigation



Stops on Today's Route

- Two hypotheticals
- Help us visualize
 - The human element of risk management
 - Ways to manage the future evidence (documents)

ALL ABOARD!



Railway Retaliation



En Route

- **Carl:** An experienced conductor
- **Rebecca:** Experienced as a former conductor, but inexperienced as a train engineer
- **The scene:** Carl's annual review
- **The lawsuit:** Retaliation



Letter of Expectations and Notes

To: Carl Conductor
From: Rebecca Railroad



ROCK ISLAND RAILROAD

MEMORANDUM OF EXPECTATIONS

This memorandum addresses some concerns about your performance:

1. **Unprofessional conduct.** You have played practical jokes on other train employees on multiple occasions both when the train is in motion and when it is not. They are not funny, distract other employees, and are unprofessional.
2. **Required paperwork.** At each station, the conductor must complete the SSP Form indicating the time of arrival and weather conditions. Your SSP Forms are frequently incomplete. For example, in the last 20 station stops you have left off either the time of arrival or weather conditions 6 times.

I will be here to provide all the support that you need and I know that some of your acting out/jokes are a coping mechanism.

Failure to improve your performance may result in dismissal from employment.

Pensy President Comment:

We have a lot of employees who make practical jokes, and that one where he pretended to be a villain fighting Ant Man was pretty funny. Are you sure this is so serious?

Dismissal Letter

ACTUAL LETTER



ROCK ISLAND RAILROAD

Dear Carl,

I regret to inform you that you are terminated. Your conduct has been unprofessional and paperwork sloppy and moreover you haven't been honest when reporting what you say are safety concerns. Honestly you aren't really a good fit overall and your employment is at-will. Turn in your keys at the desk, best wishes in your future endeavors.

Rebecca

BETTER LETTER



ROCK ISLAND RAILROAD

Dear Carl,

This letter is notice that Rock Island is dismissing you from your employment for unprofessional conduct and failure to perform important job duties. Both of these concerns were raised to you in a letter of expectations on August 15. The letter was designed to allow you an opportunity to improve your conduct and correctly complete critical paperwork. Since that time you have engaged in additional conduct of the nature you were warned about and that disrupted operations and made additional paperwork.

When we met to let you know we anticipated ending your employment you asserted that Rock Island was ending your employment because you raised a concern about an uneven track. As you know, in response to that concern Rock Island had its safety inspectors inspect the track, and we appreciated that you raised the concern. This had nothing to do with the decision to end your employment.

We will work with you to arrange the return of company property.

Rebecca

Keeping This Train Running on Time

- Best practices for the human side of risk management
 - Be clear in writing
 - Avoid unrealistic statements of support
 - Use phone/remote meetings, not comments, texts, etc.
 - Take all complaints that *could be protected* seriously
 - Engage in progressive discipline if feasible
 - Don't use "fit"
 - Provide the reasons for dismissal – preferably in writing



Documentation Depot



En Route

- **Evelyn:** A train engineer with a short fuse
- **Caleb:** An up-and-coming conductor
- **The scene:** A wintery afternoon in the Columbia River Gorge
- **The lawsuit:** Wrongful termination for sex harassment and discrimination



Platform Please Don't Say That

EVELYN

I'm thinking about you...

Big mistake! I can help you get far with the railroad. Everyone listens to me. Date tonight in Portland?

Another mistake! Felicia is interested in moving up and taking your job. Let's see what happens.

CALEB

You are making me uncomfortable. Let's keep it professional. Also, don't text me while you are driving the train!

No, thanks. I'm super uncomfortable.

Platform Please Don't Say That

EVELYN

Caleb has to go. I don't like his red hair.

He's old. He's older than me and I'm retiring soon in a few years.

Don't worry! The track is straight here. I'm going to delete these texts – you should too.

SAL

He's doing a good job.

He's just started and is looking to move up. He's really good. Also, don't text while you are driving.

Yeah, you probably don't want anyone knowing you think Caleb's too old.

Keeping This Train Running on Time

- How can employers mitigate this risk?
- What can be done *before* the train has left the station?



Before the Train Leaves the Station: Risk Management Checklist

Evidence Preservation and Management

- Train employees on recommended ways to communicate
- Preserve information when systems are upgraded or devices replaced
- Retain devices (and communications) when employment is terminated
- Protect metadata



Before the Train Leaves the Station: Risk Management Checklist

Evidence Preservation and Management

- Draft litigation hold letter
- Establish document retention policies
- Utilize cell phone policies in employee handbooks or employee contracts



Before the Train Leaves the Station: Risk Management Checklist

Practices to Manage the Human Factor

- Articulate clear expectations for employee performance and improvement
- Take all employee complaints seriously and follow up
- Ensure responsive procedures are in place and used as intended and as written
- Make dismissal decisions thoughtfully, with an eye toward potential risk

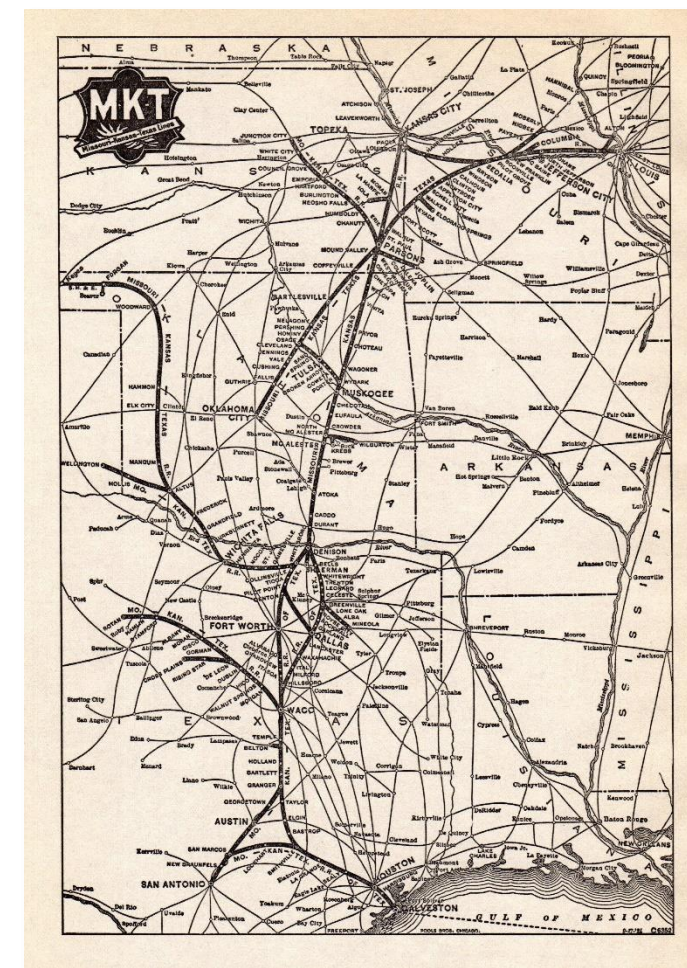
Strategic Risk Management: Part 2

Responding to an Occupational Safety and Health Administration (OSHA) Inspection



Trip Itinerary

- Anticipating an OSHA inspection
- What prompts an OSHA inspection?
- Conduct and management of an OSHA inspection
- OSHA citations and employer options for response
- Administrative hearings and appeals



What Prompts an OSHA Inspection?

- Programmed inspections
- Unprogrammed inspections



On Track Preparation Before an OSHA Inspection

- Develop and implement a comprehensive safety and health program
- Conduct internal or external safety and health audits
- Train staff on OSHA basics and inspection rights
- Establish an inspection team and inspection protocols

Chugging Along – Conduct and Management of an OSHA Inspection

1. Opening conference

- Inspect credentials
- Determine the reason for the inspection
- Determine the scope of the inspection
- Prepare the worksite
- Ask the compliance officer to wait if designated employees are not on the premises



Chugging Along – Conduct and Management of an OSHA Inspection



2. Review of records
 - OSHA Form 300 Injury & Illness Log
 - Form 301 Incident Reports
 - Form 300A Summary of Work-Related Injuries and Illnesses
 - Workers Compensation Documents
 - Internal Safety Audits
 - Work Policies or Rules Related to Health or Safety

Chugging Along – Conduct and Management of an OSHA Inspection

3. Inspection of the worksite

- If it's in plain view, it's fair game
- Protecting confidential processes and trade secrets
- Equipment
- Can the compliance officer ask to inspect other information?
- Not your enemy, not your friend
- It's a group venture



Chugging Along – Conduct and Management of an OSHA Inspection



4. Employee interviews
 - Interviews of hourly, non-supervisory employees
 - Interviews of supervisory or management employees

Chugging Along – Conduct and Management of an OSHA Inspection

5. Closing conference

- What was found
- What citations may be issued
- How the officer believes the employer might correct any alleged violation



Ticketing – OSHA Citations and Employer Options for Response



- Accepting the citation
- Disputing the citation
- Settling the citation with the Area Director
- Disputing then settling with the Regional Solicitor

Key Takeaways

- Have a plan in place
- Implement procedures and work with counsel
- Try to work collaboratively with OSHA, but remember your rights

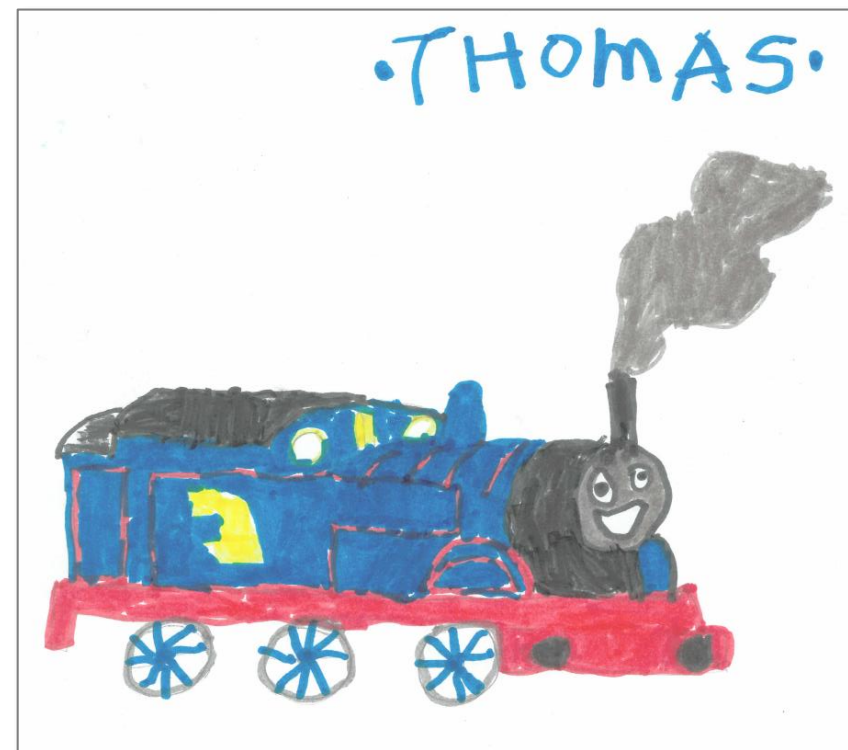
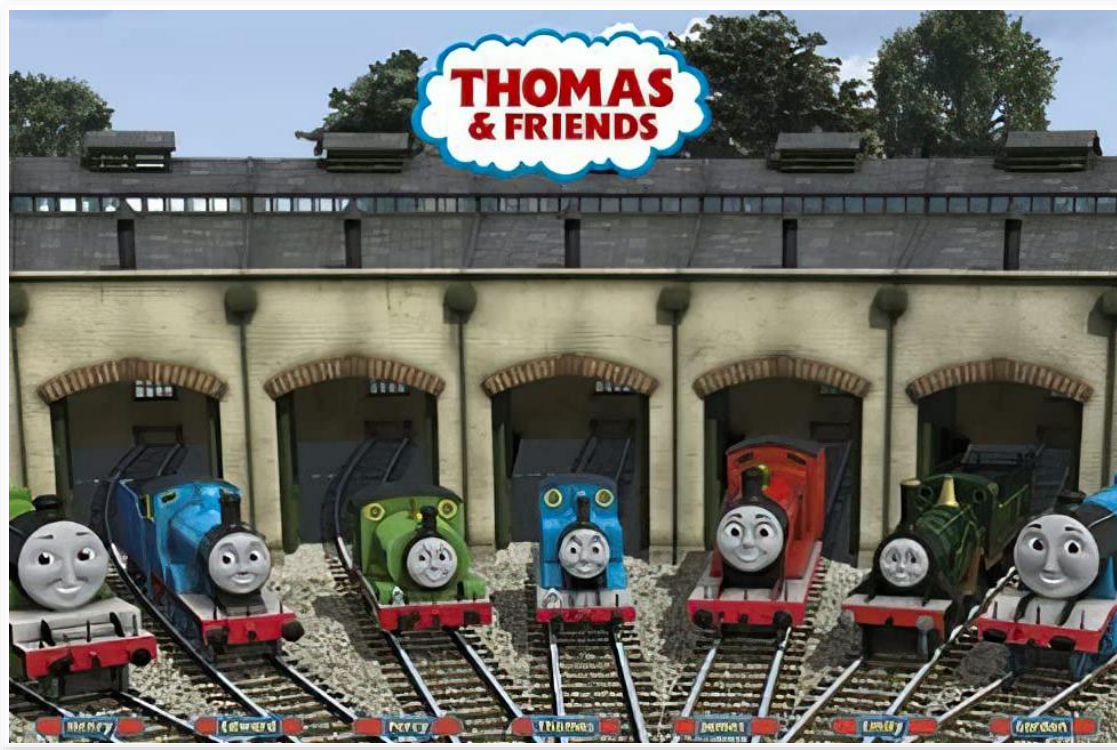


Strategic Risk Management: Part 3

Best Practices for Identifying and Responding to Union Organizing



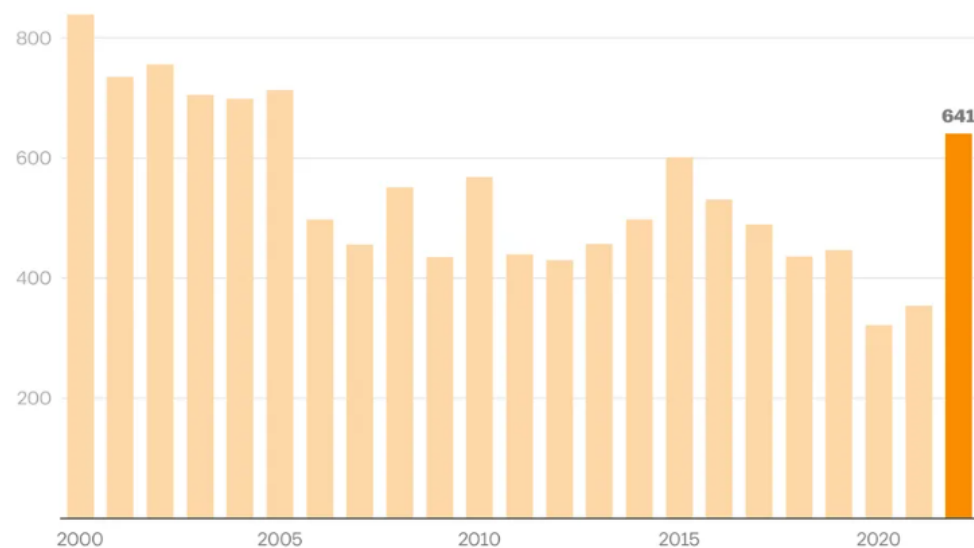
Avoiding Trouble at the Depot



Interest in Organized Labor and Union Organizing Is on the Rise

Unions won more elections in 2022 than they have in nearly 20 years

Data for National Labor Relations Board elections, January through June each year



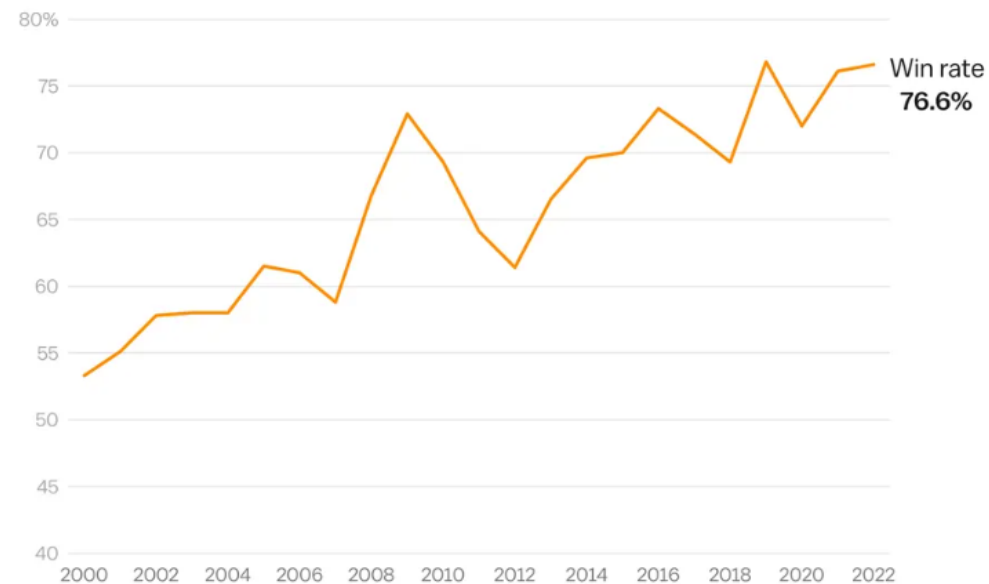
Source: Bloomberg Law

recode BY Vox

Source: <https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes>

Unions are winning more than three-quarters of their elections

Data for National Labor Relations Board elections, January to June each year



Source: Bloomberg Law

recode BY Vox

National Labor Relations Act Section 7 (Rights of Employees)

- Under the Act, employees have the right:
 - To self-organize, form, join, or assist labor organizations;
 - To bargain collectively through their chosen representatives;
 - To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or
 - To refrain from any or all such activities.



Remind Your Crew How Useful They Are

- Demonstrate the company invests in employees— as individuals
 - If employees request resources to help them do their jobs better, provide them
 - Ensure continued training opportunities are available
- Seek input from employees on business operations
 - Solicit product and process improvement ideas
 - Seek out employee input **and** respond
 - Knowing that the company not only listens to employee input, but actually values it, makes a big difference



Remind Your Crew How Useful They Are

- Show them respect
 - Verbalize that you value the job they do, and reward employees who do excellent work
 - Identify which rewards are important to individual employees – money, time off, other rewards?
 - Little things matter – flexible schedules, “you’re doing a great job,” “thank you”
 - Always respond to questions, even if you don’t have the full answer (and be willing to find an answer if you don’t know it)
- Get to know your employees – as people
 - Find out what brought them to the company and what their goals are
 - Company and store-wide events



Why Employees Organize



Why Employees Organize

- **Perceived lack of a voice in the workplace**
 - Employer doesn't listen to problems or investigate complaints
 - Employer doesn't care what employees think or value their input
- **Lack of advancement opportunities**
 - No pathway to move up if employee desires to
 - No opportunities for training or personal improvement
- **Bad managers and unfair treatment**
 - Inconsistent application of policies
 - Unaware of expectations or direction of work
 - Discipline process unfair
 - Unfair = similarly situated people treated differently
- **Wages/benefits**
 - Perceived unfair wages
 - Wages not competitive with other companies in the industry
 - Lack of healthcare, bonuses, fringe benefits

Early Warning Signs of Union Organizing

Warming Up

- Increased curiosity in benefits/policies
- Requests for copies of employer policies
- Unusual groupings of employees spending time together
- Abnormal amount of absenteeism
- Surge of complaints
- Argumentative questions

Early Warning Signs of Union Organizing

Getting Hot

- Unusual amount of time in parking areas at the beginning/end of shifts
- Employees leaving work areas to talk to others
- Requests for names/addresses of employees
- Use of labor terms like arbitration, grievance, seniority
- Union literature in break room
- Open talk about unions

Rules of Employer Conduct During Union Organizing



It Is Unlawful for Employers...

- To interfere with, restrain, or coerce employees in the exercise of rights under Section 7 of the NLRA
- To ***encourage or discourage*** membership in any labor organization
- To “chill” an employee’s ability to engage in such rights
 - No showing of actual interference, restraint, or coercion needed

Stay Within the Law During Organizing: TIPS

- How to avoid violations of the law?

Follow the rule of TIPS:

- Threats
- Interrogation
- Promises
- Surveillance (and discrimination)



What You Can Say: FOE

- Providing an answer or response to questions or claims about union organizing is better than saying “I can’t talk about it.”
- What can you say?

Facts, Opinions, Experiences

- Facts you know to be true
- Opinions you have, or the opinion of the company
- Experiences you’ve had with unions



Thank You!



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