LAW360 Employment Authority

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Rail Unions Signal Strike Support As Biden Faces Deadline

By **Beverly Banks**

Law360 (July 14, 2022, 6:55 PM EDT) -- After more than two years of negotiations with freight carriers, rail unions are gearing up for a potential strike that could wreak havoc on the supply chain and require presidential action before an impending deadline, with two major unions signaling strike authorization support this week.

Last month, 12 unions including the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Maintenance Way Employes and the International Association of Sheet Metal, Air, Rail and Transportation Workers –Transportation Division **declined an attempt** from the National Mediation Board to take their contract dispute with carriers to arbitration.



Two major rail unions announced this week that they have taken steps toward authorizing a strike if they cannot reach an agreement with freight carriers on issues including wages, benefits and attendance policies. (AP Photo/David Boe)

The unions began negotiating a new contract covering 115,000 workers in January 2020 with the National Carriers' Conference Committee, which represents so-called Class I carriers including Union Pacific, CSX, BNSF Railway, Kansas City Southern, Norfolk Southern Railway and Canadian National's U.S.-based companies.

If the carriers and unions can't reach an agreement, President Joe Biden can establish a Presidential

Emergency Board before the clock runs out on July 18 at 12:01 a.m. to avoid a strike. The board would consist of three to five members who would then draft a report as a guide for parties to come back to the bargaining table.

The White House did not immediately respond to requests for comment about the president's plans to appoint PEB members before the deadline.

BLET announced Tuesday that 99.5% of its members working on Class I railroads voted to authorize a strike if negotiations reach a boiling point. About 23,000 BLET-represented rail workers would participate in the strike, the union said.

BLET President Dennis Pierce described the strike authorization vote as an anticipatory measure amid contract negotiations in which the relationship between railroad management, the unions and employees is "the worst I've seen it."

"I'm not trying to say the employees want to strike the railroad, but they're pretty upset with their employer right now," Pierce said.

SMART-TD President Jeremy Ferguson told members in a letter Thursday that the union's rail general chairs voted in support of authorizing a strike. Final authorization from his office could come later, he said. About 35,000 rail workers represented by SMART-TD would go on strike, according to the union.

Ferguson said SMART-TD members support a strike, but the union's goal is not to shutter the flow of goods nationwide.

"I want to be very clear that we have confidence in the Railway Labor Act and the Biden administration that the act will carry us through without a major disruption to the economy or the supply chain," he said.

Greg Regan, president of the AFL-CIO's Transportation Trades Department, which represents 37 public and private sector unions, said the National Mediation Board went "above and beyond what they normally might do" to get the parties to agree.

He called a strike the "last tool in the toolbox" in reaching an agreement, especially since a work stoppage can be painful and "a real sacrifice" for union members.

Under the Railway Labor Act, the NMB can step in to steer the parties toward an agreement, but if the effort fails, the agency releases the unions and carriers from mediation.

That's what happened in June after the unions rejected what's called a proffer of arbitration from the board, triggering a 30-day cooling-off period laid out in the RLA during which parties maintain the status quo.

A strike is possible once that month passes, unless Biden steps in and establishes a PEB.

Pierce, Ferguson and Regan said the carriers' wage increase proposal isn't acceptable because the companies aren't factoring in higher costs of living with inflation or sharing record profits with workers.

Another major issue at the bargaining table is BNSF's implementation of an attendance policy in February, known as the Hi Viz standard, that led to a litigation in Texas federal court earlier this year. BNSF **won a preliminary injunction bid** in February preventing SMART-TD and BLET from striking over the **point-based policy.**

"I can guarantee you employees on no Class I railroad are inclined to accept any of the offers [carriers have] made because they're so low and they include these other offsets that diminish the value of the low number to begin with," Pierce said.

SMART-TD and BLET are bargaining for operating crew members to have a five-day workweek, Ferguson said.

Until the carriers implemented what Ferguson called "harsh attendance policies," the unions didn't have to worry about asking for a five-day workweek, he said.

"They've cut the workforce so thin there's nobody to fill in the gaps when we take time off," he said. "They

want everybody to work more."

The Surface Transportation Board estimated in April that Class I railroads have slashed 45,000 employees from their payrolls to cut costs in the past six years.

Brendan Branon, chair of the National Railway Labor Conference, which represents the Class I carriers, told Law360 in a statement that claims from labor leaders about a net pay decrease are false, saying the carriers' proposals include significant wage hikes effective July 1 and retroactive pay applicable to 2020 and 2021.

"These proposed pay increases — along with future proposed increases in 2023 and 2024 — will keep rail employees among the best paid employees in the nation," Branon said.

The unions have based their arguments on "the unsupported notion" that pay is connected to and must "exceed the percentage increase in the highest available consumer inflationary measure each year," he said.

Branon said the railroads are "outperforming the broader labor market in terms of recruiting and retention" and characterized the labor shortage as a reflection of nationwide trends.

A person who worked closely with the National Mediation Board told Law360 that the board, the White House and the Office of Management and Budget are probably in talks right now about the potential for a disruption to interstate commerce. The person requested anonymity due to the sensitivity of the topic.

The OMB is expected to send a report that the NMB uses to decide if there will be a significant impact to the flow of goods, the person said, and then the president creates a PEB through an executive order.

The person, who is familiar with the PEB process, explained that some PEBs have been given extensions, but noted the time crunch leading up to the midterms with this set of negotiations.

Congress would not want to return from its recess in an election year to end a rail strike, the person said. Both the House and Senate are in session in mid-September, but only the House is in recess in October.

OMB did not immediately respond to a request for comment.

In an announcement on Wednesday, the Brotherhood of Maintenance Way Employes said that the NMB recommended the establishment of a PEB, and it is likely the presidential board will be appointed.

"Certainly, what we're hoping here is that a PEB comes in and sort of resets the negotiating dynamic, and we can talk off of that and find something that works for everybody," Regan said.

A PEB was last appointed for freight carrier negotiations in 2011, Pierce recalled, adding that the presence of the board for a national agreement was rare. Before 2011, a PEB for freight rail hadn't been appointed since 1991, he said.

As a final step in the RLA, Congress can intervene if the unions plan to strike — or "engage in self help," as the statute says — after the parties choose not to adopt the PEB's recommendations.

But a work disruption on freight railroads hasn't occurred since 1992.

Compared to 30 years ago, the unions have a more united front, Pierce said, and the companies are raking in higher profits.

"The railroads got most of what they asked for, and the unions couldn't ratify it," he said. "That's why it had to walk through the steps to get to Congress."

Ferguson attributed the 30 years of relative peace to a "different generation of negotiators" from the management side, who he said bargained agreements in good faith.

Legal experts told Law360 that when the RLA was passed in 1926, the goal was to prevent mass disruptions of interstate commerce when railroads were the dominant mode of transportation. Amendments to the RLA in 1934 created the NMB.

Catherine Fisk, a labor and employment law professor at the University of California, Berkeley School of Law, said the RLA gives the federal government a "great deal of power and responsibility" to intervene and push parties toward a contract.

"What the Railway Labor Act does is it equalizes bargaining power or ameliorates inequalities of bargaining power by preventing the party that thinks they could get more out of a strike or a lockout from using that leverage," Fisk said.

Government intervention will help the weaker party, whether it's the unions or the carriers, she said.

Lee Adler, a professor at Cornell University's Industrial and Labor Relations school, said the government's goal is to encourage an agreement to "keep the trains running" and stop the devastating effects to the supply chain.

"Joe Biden has said continuously that he supports people organizing unions at Starbucks and Amazon, but that doesn't mean he supports a railroad strike," Adler said.

Anne Lofaso, a labor law professor at West Virginia University, said Biden could face pushback if a strike occurred, but she questioned whether any president would be at fault for failed negotiations that began more than two years ago.

"If [a president] picked a board that is so lopsided that it would create even greater divisions, that would be problematic," Lofaso said.

All three professors agreed that compared to the National Labor Relations Act, the RLA allows for more government intervention.

Unlike the NLRA, under which unions can strike once a collective bargaining agreement expires, a labor contract under the RLA is only amendable, Lofaso said. This difference in the RLA helps keep the parties talking, she said.

Adler, Lofaso and Fisk said that the RLA's complex process reflected an intent to avert economic problems.

"The idea behind this elaborate process is that the government can promote rational settlement on the merits of the dispute essentially by making it so hard for the parties to resort to economic warfare, that they'll ultimately give up and compromise," Fisk said.

--Editing by Haylee Pearl.

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