An Employer's Guide to the Potential Railroad Strike Ahead

Insights
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Only hours before 100,000 railroad workers across the United States were set to go on strike in September, President Biden announced that his administration had facilitated a tentative agreement to prevent the walk-off. For good reason, the nation breathed a collective sigh of relief, knowing we averted a possible economic crisis unlike anything the country has experienced in recent memory. But did we all celebrate too soon? Maybe so, as recent events culminating in a union vote on November 21 have put the agreement in jeopardy – meaning we could still see a calamitous strike as soon as December 9. What do you need to know about the possible railroad strike?

What Happened Since the Tentative Pact was Announced?

Since President Biden's announcement on September 15, the members of the 12 labor organizations representing the thousands of railroad workers across the United States have been voting to accept or reject the new terms and conditions of employment. The final votes are in as of November 21, and only eight of the 12 labor organizations approved the deals touted by President Biden.

The four labor organizations that rejected their respective deals are SMART-TD (the organization that represents railroad conductors), Brotherhood of Railway Signalmen (the organization that represents workers who install and maintain railroad signal systems), Brotherhood of Maintenance of Way Employees (the organization that represents the workers who build and maintain the tracks, bridges, buildings and other structures on the railroad), and the International Brotherhood of Boilermakers (the organization that represents the workers who maintain locomotives). As a result, the nation once again finds itself on the precipice of a national railroad strike.

While we cannot predict whether a strike actually takes place and, if so, how long it might last, what we do know is that the parties are covered by a unique statutory scheme with safeguards ultimately aimed at protecting our nation's collective interests.

Understanding the Railway Labor Act

The statute governing this situation is the Railway Labor Act (RLA), a law expressly designed to preserve and promote labor harmony in the transportation industry. When it was passed in 1926 – and some would argue to this very day – railroads were the most effective means of mass transportation.

Indeed, railroads moved virtually all of the goods that were necessary for daily life. Our nation's power plants relied on daily shipments of coal that were delivered by railroad cars. Our nation's military relied on railroads for the transportation of troops and equipment. Our nation's factories relied on railroads to provide raw materials. The list goes on and on. Stated simply, Congress recognized that an interruption in the freight railroad network would be devastating to our nation's well-being. The same is true today.

As a result, unlike the National Labor Relations Act where the parties bargain with no real-time oversight, the RLA is specifically designed to provide regulatory and political guardrails protecting the integrity and viability of the railroad network. This unique bargaining scheme is commonly referred to as the Section 6 Bargaining Process.

What is the Section 6 Bargaining Process?

Under the Section 6 Bargaining Process, the parties start negotiations by providing written notice to each other identifying and explaining the subjects they want to negotiate over. In this case, the National Carriers' Conference Committee, its railroad members (called "Carriers") and the labor unions that represent all of the major crafts and classes working on the railroad (called "Organizations") exchanged Section 6 notices in the winter of 2019 and early 2020.

Once the parties exchanged their respective Section 6 notices, there were four possible outcomes.

- One, the parties could reach a voluntary agreement.
- Two, the parties could request assistance from the National Mediation Board (NMB) and engage in mediation.
- Three, the NMB could require mediation if the parties did not request it.
- Four, the parties could call off negotiations and wait 10 days before they were free to exercise self-help (i.e., strike, lockout, unilateral implementation, etc.).

Here, the parties were not able to reach any voluntary agreements, so the Organizations requested mediation. Once the parties entered federal mediation, there were two possible outcomes.

- One, the parties could reach a voluntary agreement.
- Two, the parties could bargain to impasse (i.e., where the parties are no longer willing to make any additional concessions).

What Happened Here?

In this case, the parties bargained to impasse because they could not achieve an agreement through mediation. When this happened, the NMB proffered voluntary, binding arbitration on June 14 in an effort to resolve any outstanding disagreements. The Carriers agreed to binding arbitration, but the Organizations rejected it.

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Because the Organizations rejected binding arbitration, the NMB served notice to the parties on June 17 that its services had been terminated and that self-help would become available at 12:01 in the morning on July 18. In other words, the railroad workers could go on strike. While many might think of "impasse" as the end, it was really just a new beginning under the RLA.

On July 15, President Biden established Presidential Emergency Board No. 250. Under the RLA, the Presidential Emergency Board, made of three neutral members, had 30 days to hold hearings and then provide a report to the president. The report provided recommendations to the president on how the negotiations should be resolved.

Equally important, the process postponed a strike because the parties are not allowed to engage in self- help during the Emergency Board process. Presidential Emergency Board No. 250 convened and held five days of hearings at the end of July. On August 16, the Board issued its report containing recommendations for settlement, which also triggered another 30-day cooling off period.

On September 15, the final day of the 30-day statutory cooling off period, President Bident announced a tentative deal that many thought ended the labor dispute and guaranteed labor harmony with yet another cooling-off period. This period was intended to provide the workers with an opportunity to vote for or against the new proposed terms.

Very few anticipated, however, that only eight of the 12 organizations would ratify the new agreements – but that is precisely what happened. Accordingly, the final cooling-off period – the only measure preserving labor harmony – will expire at midnight on December 8.

What Happens Next?

There are only three options left to resolve the dispute:

- the parties can voluntarily negotiate new agreements;
- Congress can step in and impose new terms; or
- if lawmakers and the White House do nothing, the workers go on strike.

Make no mistake, a strike could happen. But it is not likely that Congress will allow a prolonged strike to cripple our nation's economy, especially given we are in the midst of an inflationary crisis and the word recession on the tip of everyone's tongue. Indeed, Congress – the very body that passed the law intended to preserve and promote labor harmony as a matter of public policy – has the legal authority to end the impasse, and there simply is too much at stake.

As such, we anticipate that any strike that takes place, if one takes place at all, will be short-lived and quickly resolved through Congressional action.

Conclusion

We will continue to monitor the situation and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you want more information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or Transportation and Supply Chain Industry Team .

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