Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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U.S. RAIL CARRIERS FACE A NATIONAL STRIKE

On Saturday, August 6, 2022, several hundred railroad workers organized a demonstration in Illinois, to send a message to rail carriers and the government that they are ready to display unity and militancy in ways similar to that of other unions in the labor movement, including a national rail strike, in hopes of obtaining favorable contract terms to resolve a long-running railroad-industry contract dispute. The national freight railroad workers are represented by any one of twelve rail unions including, but not limited to the Sheet Metal, Air, Rail and Transportation Workers – Transportation Division ("SMART-TD"), the Teamsters' Brotherhood of Maintenance of Way Employees Division ("BMWED") and Brotherhood of Locomotive Engineers and Trainmen ("BLET"), and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("Boilermakers") (collectively "Rail Unions").

The Rail Unions, representing 115,000 members in every craft in the industry across more than 30 railroads, are currently at the bargaining table negotiating in lockstep with the rail employers including, but not limited to BNSF, Union Pacific, Norfolk Southern, and CSX. The Rail Unions are seeking inflation proof raises, reduced health care costs, and expanded paid sick leave, while the railroad employers are seeking to reduce freight train crews from at least two workers to only one. Workers cite to the 2013 Lac-Megantic tragedy to illustrate the dangers of a single-worker crew seem. There, the sole engineer on a Montreal, Maine and Atlantic ("MMA") Railway train failed to secure a train with a shipment of crude oil, consequently resulting in a derailment and explosion that killed forty-seven people and destroyed several dozen buildings. Recognizing such safety concerns, on July 27, 2022, the Department of Transportation's Federal Railroad Administration proposed a new rule requiring a two-person minimum train crew size, except in "certain low risk operations." A public comment period on the proposed rule is open from now until September 26, 2022, after which a final decision will be made.

Contract talks between the railroads and Rail Unions began in January 2020 in accordance with the Railway Labor Act's ("RLA" or "Act") cumbersome bargaining process. The Act requires the parties to undergo a series of steps before either party can enter into "self-help," *i.e.*, a strike or a lockout. First, railway parties engage until impasse in direct negotiations on a multi-employer basis to reach the terms of a new agreement, at which point either party can request mediated negotiations with the assistance of the National Mediation Board ("NMB"), the federal agency that facilitates resolution of labor-management disputes arising from railroad and airline industries. If the parties fail to reach agreement and the NMB determines that the parties have reached an impasse, either party may request that the open issues be sent to a to a special panel for final and binding arbitration. However, if either party rejects arbitration, they enter the first of up to three 30-day "cooling-off" periods. During this period, the siting U.S. President can intervene and establish an emergency board ("PEB") to investigate and within 30 days

report their findings and recommendations that could be used as a framework for a voluntary settlement. If the parties reject PEB's findings and recommendations, they enter a final 30-day cooling-off period after which either party can resort to "self-help." However, before it ends, and in rare instances such as in the 1970s and 1990s, the House and the Senate can intervene to prevent or terminate service disruptions. Legislative measures to end the dispute can include additional cooling-off periods to continue negotiations, implementation of PEB recommendations, or compulsory arbitration. Absent intervention, the Rail Unions may strike.

Currently, the Rail Unions are awaiting a PEB report of findings and recommendations pursuant to an order that President Joe Biden signed on July 18, 2022, appointing to the Board three legal experts who have helped resolve labor disputes in the past. As such, a report from PEB No. 250 Chairman Ira F. Jaffe and members Barbara C. Deinhardt and David P. Twomey, is imminent. The Biden Administration is hoping that the parties accept and adopt the PEB's recommendations to prevent a strike that could cripple an already-strained US supply chain still recovering from bottlenecks caused by the pandemic.

Last month in the United Kingdom organized rail workers enjoyed widespread public support when they engaged in a three-day strike over concerns similar to those cited by the Rail Unions. In anticipation of not reaching an agreement, the Rail Unions are organizing, mobilizing, and preparing for a work stoppage. Last month, BLET members voted to authorize a strike with over 99.5 percent approval and SMART-TD also took the first step toward authorizing a work stoppage in accordance with the governing provisions of the SMART Constitution. The Rail Unions may believe that so long as Democrats remain in control, Congress can forge a favorable resolution for rail workers, especially given the fact that campaign season for the November mid-term elections is in full swing.

NLRB IMPOSES AGGRESSIVE REMEDIES ON REPEAT VIOLATOR

In *Nexstar Broadcasting Inc*, 19-CA-248735, 19-CA-2551880, 19-CA-259398 and 19-CA-262203 (July 27, 2022), a unanimous National Labor Relations Board ("Board" or "NLRB") panel of Chair McFerran and Member Prouty joined by Member Kaplan, imposed a bargaining order, reimbursement of Union bargaining expenses, and other relief against a serial unfair labor practice employer. McFerran and Prouty also joined to order reimbursement of employee lost wages for attending bargaining sessions that proved futile due to Nexstar's bad faith, with Kaplan dissenting. Nexstar's rampant unfair labor practices thus set the stage for the politically balanced Board panel to unanimously impose a broad range of strong relief, to add an order by 2:1 vote not used by the Board since 1989, and to float a fascinating left side trial balloon as well.

Nexstar engaged in a barrage of unfair labor practices in violation of the National Labor Relations Act ("NLRA" or "Act") in order to oust the National Association of Broadcast Employees, CWA Local 51 (the "Union") from representing its employees. The U.S. District Court for the District of Oregon issued a preliminary injunction under Sec. 10(j) of the Act, enjoining Nexstar from: failing and refusing to recognize the Union and

bargain in good faith; withdrawing recognition from the Union; unilaterally changing the bargaining units' terms and conditions of employment, including by granting a wage increase and removing the Union bulletin board; assigning bargaining unit work to non-bargaining unit members; promising and granting benefits, including a wage increase; prohibiting employees from discussing the Union and their wages; prohibiting distribution of union literature; and threatening to revoke a wage increase for engaging in Section 7 activity. The Court also ordered mandatory meetings at which its Order was to be read to employees.

Thereafter, the Board found Respondent violated the Act by failing and refusing to bargain in good faith with the Union about health insurance since April 24, 2019; engaging in bad faith bargaining and surface bargaining since June 21, 2017; withdrawing recognition from the Union on January 8, 2020 absent an actual loss of the Union's majority status; unilaterally assigning bargaining unit work to non-bargaining unit employees on or about September 30, 2019; and unilaterally changing the vacation policy in January 2020. In particular, the Board found that Nexstar unlawfully denigrated the Union by making "false and misleading statements" to bargaining unit employees regarding the Union's purportedly exorbitant initiation fees and dues, and Nexstar's claimed effort to reduce them in bargaining, the purported use of those fees for "wining and dining" and high salaries, the alleged ability of the Union to abruptly increase fees and dues in the future, and the Union's alleged failure to bargain over wages despite Nexstar refusing to provide a wage proposal. McFerran and Kaplan held this conduct violated Section 8(a)(1) of the Act, removed from the protections of Section 8(c) by Nexstar misleadingly telling employees that it was fighting for their rights for reduced Union dues ("highway robbery"), while Prouty found Section 8(a)(5) violated as well.

As remedies, Chair McFerran (*conservative* D) Member Kaplan (R) and Member Prouty (D) agreed that Nexstar should reimburse the Union for all bargaining expenses, cease and desist from violations of the Act and have "a high-ranking management official" read or be present at the reading of the Board's notice. The panel also unanimously imposed a bargaining order on Nexstar, despite the U.S. Court of Appeals for the D.C. Circuit's criticism of such orders, on the grounds that Nexstar's egregious violations denied employees their Section 7 rights while the order "fosters meaningful collective bargaining and industrial peace" by removing an incentive for Nexstar to continue its unlawful campaign against the Union.

Following such unanimity, the panel then split into an array of fascinating factions. Chair McFerran and Member Prouty added an order that Nexstar reimburse bargaining committee member employees for wages lost during Nexstar's bad faith bargaining, an "extraordinary" remedy not used by the Board since 1989 as noted by Member Kaplan in his dissent, justified in their eyes due to Nexstar's virulent recidivism. Prouty went even further, arguing unsuccessfully for an independent mediator to monitor Nexstar's conduct during bargaining, to report to the Board and to make recommendations.

The Board's multi-layered response to Nexstar may truly be limited to a payback against an outrageous repeat offender, or it may presage more in light of the NLRB's shift to a Democratic majority. In particular, members Prouty and Wilcox bring experience

representing unions to the Board as reflected in Prouty's novel advocacy for a mediator to monitor bargaining. Coupled with an increased budget of $319M for 2023 and an aggressive agenda by General Counsel Jennifer Abruzzo (also a former union side attorney), a vote by Chair McFerran could have dramatic effect. On the other hand, Republican appointed Members Kaplan and Ring will likely still pull away from any groundbreaking pro-union moves, midterm elections loom ominously, and Chair McFerran has been known to lean right as well as left. Labor practitioners will accordingly be watching the Board for signs of what is to come.

CANNABIS LAWFUL? SDNY SENDS UP SMOKE

While a number of states, including New York, have legalized marijuana, a recent case illustrates the limited legal protections available even to those who have been certified as a medical marijuana patient. Recently, a plaintiff lost his claim that a company violated New York City law by discriminating against him based on the fact that he was a certified medical marijuana patient. *Scholl v. Compass Grp. USA, Inc.,* No. 19-cv-6685 (SDNY July 13, 2022).

Plaintiff Christopher Scholl ("Plaintiff" or "Scholl") sued a prospective employer, Defendant Compass Group USA, Inc. ("Compass"), which owns Eurest Services, Inc. ("Eurest") (collectively, "Defendants"), alleging that Defendants violated the New York City Human Rights Law ("CHRL") and the New York State Human Rights Law ("SHRL") by denying him employment based on the fact that he was a certified medical marijuana patient. Scholl applied for a position at Eurest, which, according to the Complaint, "provides food and facilities services to corporate offices" and received an offer contingent on his passing a drug test. Scholl failed the drug test and was not hired. The Court granted Defendants' motion for summary judgement on the CHRL claim but allowed the case to proceed to trial on the SHRL claim.

Specifically, in regards to the CHRL claim, Plaintiff alleged that Defendants violated the CHRL "by discriminating against Plaintiff because of his disability, denying him employment, and refusing to provide Plaintiff with a reasonable accommodation for his disability (certified medical marijuana patient)." The Court granted Defendants' motion for summary judgement, reasoning that while New York State had expanded the definition of "disability" to include individuals who hold medical marijuana certifications, the New York City had not. Therefore, the Court found that it was "beyond dispute" that the CHRL does not recognize marijuana use as a protected disability. The Court further noted that marijuana use remains illegal on the federal level and, while the text of the CHRL does not include medical marijuana patients in its disability definition, the definition expressly provides that "[i]n the case of alcoholism, drug addiction, or other substance abuse, the term 'disability' . . . *does not include an individual who is currently engaging in the illegal use of drugs when the [employer] acts on the basis of such use*." (Emphasis added). Accordingly, the Court held that the CHRL "does not provide a remedy when an employer declines to hire an individual who is engaging in marijuana use."

It is worth noting that as of May 10, 2020, the CHRL protects pre-employment marijuana testing with exceptions. In other words, with exceptions, covered employers

are not allowed to test job candidates for marijuana or tetrahydrocannabinols ("THC") as a condition of employment. The exceptions provide that employers are allowed to test job applicants for marijuana or THC for certain job positions including but not limited to positions that fall into the category of police officers, peace officers, positions requiring a commercial driver's license, and positions supervising or caring for children.

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