Labor & Employment Issues
In Focus

Pitta LLP

For Clients and Friends

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STRIKE AVERTED BUT DID BIDEN'S "PRO-UNION" TRAIN LEAVE THE STATION WITHOUT THE UNIONS OR AVOID A TRAIN WRECK?

"[T]o save jobs to protect millions of working families from harm and destruction, and to keep the supply chain stable around the holidays," explained President Biden, the President on December 2, 2023 signed legislation imposing a contract that was ratified by a majority of the 12-union consortium that collectively represents 115,000 railway workers. Four of the twelve labor organizations, which represent just more than half of the workers, rejected the latest contract proposal because it did not include the seven paid days of sick leave that workers wanted. Although the House of Representatives quickly passed a bill to revise the original deal to increase the amount of sick leave, which was a major sticking point during negotiations, that change, as well as one extending the "cooling off" period during which the unions cannot strike by another 60 days, did not have sufficient support in the Senate. The Biden Administration pressed on without the sick leave, concerned that a looming strike would harm the economy and cause a massive supply chain disruption to drinking water, food and energy supplies, and impose detrimental conditions on the retail-heavy holiday season.

The rail agreement provides a 24 percent raise over five years, immediate payouts averaging $11,000 per employee, and an extra paid day off. However, work-life balance issues in addition to paid sick leave including train crew size, scheduling, and medical and vacation benefits remain unresolved. The pandemic highlighted for rail workers the effect of staff cuts, especially considering that while private sector workers, on average, receive seven to eight days of sick leave per year, most rail workers have none.

Some of the unions as well as the Association of American Railroads, which represents the nation's freight rail companies, praised Congress and the Biden Administration for swiftly acting to avert an economically devastating work stoppage. However, by intervening and stopping the strike, Congress enabled the railroads to bargain "in bad faith," rather than being forced to "come running to the bargaining table" to avoid a strike, argued Tony Cardwell, president of the Brotherhood of Maintenance of Way Employees Division, one of the four unions that rejected the tentative agreement. By stepping in to avert a strike before the December 9 deadline arrived, the federal government stripped away the unions' most fundamental right and undermined the root source of their bargaining power, complained Cardwell. While the actions of less than half the 115,000 workers suggest they did not want to strike, in situations, as here, where issues such as sick leave are important to workers, the ability to use the striking arrow from their quiver is an important tool, now lost, to pressure employers to agree to work rule changes, he noted.

The sought-after changes to sick leave for rail workers will now need to be addressed by Congress or the Administration at some unknown future point or in the next round of contract negotiations. However, Senate Republicans, who opposed the sick leave benefits in the past and a newly Republican House, are unlikely to provide the Biden Administration the support he needs to enact sick leave legislation for rail or other workers in the next Congress. Still, U.S. Labor Secretary Marty Walsh said he would not wait for the new contract to expire to strike a deal on the paid leave issue, and he "intend[s] on sitting down with the companies and talking to them about a couple of things that during the negotiations [he] heard from the unions." President Biden agreed, recognizing that "we still have more work to do, in my view in terms of ultimately getting paid sick leave not just for rail workers, but for every worker in America."

SECOND CIRCUIT SENDS RETIREE BENEFITS DISPUTE TO ARBITRATION

Normally, benefit entitlement of retirees under an expired collective bargaining agreement ("CBA") cannot be arbitrated, but in a recent case the United States Court of Appeals for the Second Circuit ordered arbitration of a retiree benefit dispute because the expired CBA contained a broad arbitration clause and whether that right to retiree benefits had been violated was reasonably in dispute. *Local Union 97, IBEW v. NRG Energy, Inc*., No. 21-2565-cv (Nov. 10, 2022).

In 2003, Local 97, IBEW ("Union") and NRG Energy, Inc. ("NRG"), entered a CBA providing for life insurance benefits for retirees. A "Supplemental Agreement" entered at that time stated that the retirees would be "grand fathered." The CBA contained a broad arbitration clause, but the Supplemental Agreement did not provide for arbitration. The last CBA runs from 2019-2023 and contains a broad arbitration clause covering "a dispute or difference ... as to the meaning, application or operation of any provision of this agreement." When NRG changed past retiree benefits, the Union grieved the change to arbitration under both the 2019-2023 CBA and the 2003 Supplemental Agreement. NRG countered that the CBA's arbitration clause did not cover retirees and the Supplemental Agreement contained no arbitration clause. The District Court agreed with NRG and the Union appealed to the Second Circuit.

Judge Pooler, joined by Judges Perez and Rakoff, reversed. Rejecting contrary Third Circuit precedent, the Second Circuit held that "disputes between unions and employers regarding retiree benefits are subject to arbitration where the collective bargaining agreement includes a broad arbitration clause and terms regarding retiree life benefits" even if the claim "appears to the court to be frivolous." Here, the CBA contained a broad arbitration clause and provisions regarding retiree benefits. Since NRG could not point to "evidence of a purpose to exclude the claim from arbitration," the arbitration provision was "susceptible to an interpretation that covers the asserted dispute" and the Union's claim of vested lifetime benefits was "plausible," whether NRG could change retiree benefits should be arbitrated, ruled the Court. Moreover, continued the Appeals Court, the Supplemental Agreement that contained the "grand fathered" promise should be linked to the CBA's arbitration provision as collateral to it. Although conceding that post contract retiree disputes are ordinarily not arbitrable, Judge Pooler noted an

exception where, as here, action taken after contract expiration affects plausibly vested benefits under a CBA with a broad arbitration clause. Again, applying the presumption favoring arbitration, the unanimous panel found the dispute fell within the CBA's broad arbitration clause and the meaning of "grand fathered" in the Supplemental Agreement was for the arbitrator under that clause.

NLRB DELETES T-MOBILE'S T-VOICE

Recently, the National Labor Relations Board ("NLRB" or "Board") found that T-Mobile violated the National Labor Relations Act ("NLRA" or "Act") and must terminate its nationwide program to collect complaints from its customer services representatives ("CSRs") because the program, known as "T-Voice," violated Section 8(a)(2) of the Act. *T-Mobile USA, Inc.*, 372 N.L.R.B. No. 4 (Nov. 18, 2022).

After years of soliciting CSRs' feedback through various surveys, focus groups, and an open-door policy, T-Mobile established T-Voice in 2015. T-Voice was comprised of representatives from each call center and from different shifts who were to solicit, collect and submit "pain points" and discuss their activities during regular meetings with senior managers and/or support team members.

The Republican majority NLRB in *T-Mobile I* found that T-Voice was not a labor organization as T-Voice did not "deal with" T-Mobile. 368 NLRB No. 81 (2019), The *T-Mobile I* Board held that T-Voice representatives acted primarily as conduits for transmitting "pain points" by other employees to T-Mobile and proposals were not sent "as a group." The Court of Appeals for the D.C. Circuit ("Court") found the concept of "dealing with" problematic, refused to enforce the prior Board's decision and asked the Board to explain what constitutes a "group proposal."

While the Court asked the Board to define what constitutes a "group proposal," the now Democratic Board instead focused on whether T-Voice acted in a representative capacity because, if the organization is designed to represent employees, receives employee participation, and deals with conditions of work or other statutory subjects, it is a labor organization. T-Mobile did not dispute that it dominated and supported T-Voice, which, once T-Voice is found to be a labor organization, as here, violated Section 8(a)(2) of the Act.

In holding that T-Voice violated the Act, the Board majority of Democratic appointed Members Prouty and Wilcox found that T-Voice was an employee representation committee in which employees participated and that existed, in part, for the purpose of dealing with management concerning conditions of work. The Board found that T-Voice "plainly did act in a representative capacity" citing to T-Mobile calling employees it selected to serve on T-Voice as "T-Voice representatives." The T-Voice

representatives repeatedly solicited co-workers to submit "pain points" and T-Voice served as "a direct line of Frontline feedback for senior leadership." Since T-Voice acted in a representative capacity, the Board next turned to whether T-Voice dealt with T-Mobile concerning conditions of work or other statutory subjects.

The term "dealing with", explained the Board, contemplates "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5) [of the Act], coupled with real and apparent consideration of those proposals by management." This would require a pattern or practice, over time, in which a group of employees makes proposals to management and management responds by accepting or rejecting, and compromise is not required; this is juxtaposed with a unilateral mechanism, such as an employee suggestion box. T-Voice "dealt with" T-Mobile as many of the "pain points" concerned the conditions of work, including metrics which effected whether CSRs could work in desired areas and on desired shifts. Further, T-Voice was credited for bringing about other benefits to employees such as free Wi-Fi, extra computer monitors, and a loyalty recognition program. There created a pattern of T-Voice representatives making proposals affecting conditions of work, and T-Mobile acting on these proposals. T-Voice expressly solicited employee's "pain points" over a period of 6 months, thus giving rise to a pattern or practice of dealing sufficient to establish that T-Voice was an unlawfully dominated labor organization. Therefore, since T-Voice was a labor organization dominated by T-Mobile in violation of the Act, T-Mobile was ordered to disestablish and cease giving assistance or support to T-Voice.

Republican Member Ring dissented, arguing that T-Voice was not a labor organization because the overwhelming majority of conversations involved customer concerns and other subjects not covered by the Act.

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