To Avoid A Rail Strike, Congress Tread A Well-Worn Path

By **Charles Shewmake** (December 2, 2022)

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On Dec. 1, the U.S. Senate passed House Joint Resolution 100, which had been approved by the U.S. House of Representatives only one day before. The legislation to avoid a national rail shutdown, which President Joe Biden called for on Nov. 28 and signed on Dec. 2, is extraordinary but not unprecedented.

The whole saga is an example of how differently labor relations under the federal Railway Labor Act, or RLA, can be from the laws governing other industries.

The RLA, which also covers airlines, is a piece of legislation that was the result of a 1926 compromise between rail labor and rail management.

One of the ostensible compromises in the RLA is that there is the preference for unionization — state right-to-work laws are inapplicable to RLA carriers, while union security agreements are lawful.

But on the other hand, the RLA makes strikes or work stoppages more rare than in other industries.

As an example, for noncarrier employers covered by the National Labor Relations Act, strikes can and often do commence upon the expiration of a three- or five-year contract term.

Under the RLA, contracts never technically expire but remain in effect until changed through a series of statutory processes.

These processes are typically called "major disputes," and strikes are permitted only in major disputes at the end of a series of processes that was described by the U.S. Supreme Court in the 1969 Detroit & Toledo Shore Line R.R. v. United Transportation Union as "almost interminable."

For example, the current round of bargaining, which concluded when House Joint Resolution 100 was signed by the president, began in November 2019.

However, this almost interminable process does eventually end and, at the end of this major dispute process, if the dispute is not otherwise resolved, the president of can appoint a Presidential Emergency Board, or PEB, to investigate the dispute and make recommendations to assist in finding a resolution.

The National Mediation Board terminated its mediation efforts in the dispute in June, and the current PEB, 250, was established by Biden on July 15. PEB 250 issued its report on Aug. 17.

Its recommendations addressed various issues, and its proposals on wage increases will amount to a 24% compounded wage increase by 2024, with 14% of those increases effective immediately, along with certain other bonuses.

PEB 250's recommendations resulted in tentative agreements, subject to ratification, with five of the 12 rail unions involved in this round of bargaining.

However, the three largest rail unions representing engineers, conductors and maintenance-of-way employees, did not reach an accord until September when the Biden administration intervened.

After marathon bargaining sessions, tentative settlements were reached with all of the unions and railroads involved in the current round of bargaining.

However, the story did not end with those high-level negotiations. According to the various union constitutions, the tentative agreements needed to be ratified by the membership.

While most of the settlements were approved, the employees represented by four of the unions voted to reject the tentative agreements. That is, they were not ratified.

While most of the involved union membership has ratified their agreements, even the unions who settled with the carriers would still almost certainly honor any picket lines established by:

- The Brotherhood of Maintenance of Way Employees Division;
- The Brotherhood of Railroad Signalmen;
- The International Brotherhood of Boilermakers; or
- The largest rail union, SMART TD, which represents the operating crafts — conductors and some locomotive engineers.

The unions that failed to ratify the agreements had agreed to a standstill agreement through Dec. 8. Thus, a national rail strike was possible as early as 12:01 a.m. on Dec. 9 and would have cost the U.S. economy between $1 billion and $2 billion per day.

The railroads did not want this to happen. The large segments of American industry that depend on railroads did not want it to happen. And if they were speaking candidly, most of the unions' leadership, who had settled under the auspices of the White House-inspired negotiations in September, did not want it to happen.

But a crippling rail strike was a very real possibility in the absence of some extraordinary resolution.

Congressional Involvement

Since at least the 1960s, major dispute strikes in the rail industry that were not otherwise resolved have typically been resolved quickly by an act of Congress.

The federal legislation to end these disputes has typically been based on the recommendations of the particular PEBs that had investigated the dispute. This was again the case with House Joint Resolution 100.

While any outcome where the president and Congress become involved in a labor dispute may seem far-fetched to those not familiar with the process, the PEB process, or even the threat of the PEB process, has resolved several RLA bargaining rounds over the decades.

Since the passage of the RLA in 1926, such disputes have been resolved by congressional

action at least 12 times.

The possibility of a congressional intervention to end a dispute is especially likely when, as here, the majority of the nation's railroads were engaged in the process of national handling involving all or most of the railroads and most of the rail unions.

That is because if virtually all of the nation's railroads are affected by a strike, it makes the emergency, and the need for congressional action, that much more pressing.

According to industry sources, a strike in the current operating environment, if not halted by congressional legislation or otherwise resolved, would have idled more than 7,000 trains daily and could quickly affect supply chains and certain work commuters.

The case of locomotive firemen is one such example of congressional involvement ending a dispute. In the steam era of locomotives when locomotives were powered by steam engines that were powered by wood or coal, there could be as many as five different crafts of employees operating a train — engineers, conductors, brakeman, switchmen and locomotive fireman — with five different unions representing each of these crafts of employees.

These steam engines were fueled and tended by locomotive firemen. But during the years around World War II, steam engines were increasingly replaced by diesel engines, and there was no clear need for a locomotive fireman to tend nonexistent fires.

However, RLA agreements never technically expire and the locomotive firemen remained on train crews long after the fires were gone. Even though diesel engines were routine in freight service by the 1950s and trains no longer needed a fireman, the elimination of the fireman position was a very contentious subject for railroads and did not occur until a process initiated following congressional intervention in 1963 and the enactment of Public Law 88-108.

There was a brief railway strike in 1991 at the conclusion of the 1988 national bargaining round. That 1991 rail strike was resolved by the passage of Public Law 102-29 but thereafter certain unions challenged the constitutionality of that law.

The unions' claims against that strike-ending law, including claims that congressional intervention violated the U.S. Constitution, were ultimately rejected by the U.S. District Court for the District of Columbia in United Transportation Union v. U.S., and that court decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in 1993.

Thus, there is ample precedent for such congressional action like House Joint Resolution 100.

Charles W. Shewmake is a partner at Holland & Knight LLP and former general counsel of BNSF Railway Corp.