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# Keeping the Economy on Track: The Role of Mediation, Super Mediation, and the National Mediation Board in Rail Labor Disputes

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# KEEPING THE ECONOMY ON TRACK: THE ROLE OF MEDIATION, SUPER MEDIATION, AND THE NATIONAL MEDIATION BOARD IN RAIL LABOR DISPUTES

*Chelsea Hill*

The threat of strike action by America’s railway workers in late summer 2022, in response to an inability to agree to a new contract acceptable to both management and labor,<sup>1</sup> raised fears of a national economic shutdown.<sup>2</sup> Although an agreement is pending ratification by rail union membership,<sup>3</sup> a potential rail strike in an already-fragile economy highlighted an inherent tension in the way collective bargaining in the rail industry is governed under the Rail Labor Act (“RLA”).<sup>4</sup> The RLA established a procedure-heavy process with designated roles for multiple federal government actors and an emphasis on mediation, establishing a new, independent executive agency, tasked with handling rail labor disputes, called the National Mediation Board (“NMB”).<sup>5</sup> The most recent round of rail labor contract negotiations showcased the importance of the neutral mediation stage and the NMB in preventing economic shutdown, while also underscoring the politicization of rail negotiations under the RLA.

NMB-led mediation is a crucial stage in the multistep procedure created by the RLA. Passed in 1926, the RLA aims to protect interstate commerce while ensuring workers’ bargaining

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<sup>1</sup> Noam Schreiber and Niraj Chokshi, *Workers Say Railroads’ Efficiency Push Became Too Much*, NY TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/business/economy/railroad-workers-strike.html> [https://perma.cc/L6ZR-ZGLL].

<sup>2</sup> Josh Funk, Josh Boak, and Zeke Miller, *Tentative Labor Deal Averts Threat of Nationwide Rail Strike*, AP NEWS (Sept. 15, 2022), <https://apnews.com/article/biden-economy-strikes-congress-94089be6a4f469444da99fec9dde1b3e> [https://perma.cc/2TU6-DRQ8].

<sup>3</sup> As of October 22, six of the twelve rail unions involved in negotiations had ratified the new collective bargaining agreement (“CBA”); the ratification procedure is expected to be complete by late November. *Bargaining Status FAQ – October 2022*, NAT’L RY. LAB. CONF., <https://raillaborfacts.org/news/bargaining-status-faq-2022/> (last visited Oct. 22, 2022) [https://perma.cc/8YUL-MWUY].

<sup>4</sup> See generally Rail Labor Act of 1926, 45 U.S.C. §§ 151-88.

<sup>5</sup> For the purposes of this blog, we will only discuss the RLA as it applies to the rail industry, but it is worth noting that the statute was amended in 1936 to govern labor relations for air carriers as well. *Id.*

rights.<sup>6</sup> Under the RLA, collective bargaining agreements (“CBA”s) for rail workers remain in place until both sides agree to a new CBA.<sup>7</sup> If direct negotiations between management and unions do not result in an agreement, parties may move into mediation through the NMB.<sup>8</sup> The NMB, comprised of three board members appointed by the President and confirmed by the Senate, then steps in and assigns a mediator.<sup>9</sup> Mediation under the RLA is compulsory but not binding, serving to guide the parties towards mutual agreement. If the Board determines that agreement is unlikely under mediated negotiations, or is petitioned to this effect by either party, the NMB makes a “proffer” of binding arbitration, which both parties must agree to in order for arbitration to commence.<sup>10</sup> If a party does not agree to the proffer, the NMB releases the parties from mediation, initiating a 30-day “cooling off” period, after which either party may engage in self-help.<sup>11</sup> The end of the 30 days is commonly known as the “strike deadline.”<sup>12</sup>

Additional negotiations may be conducted under the guidance of the NMB during the cooling off period, with added pressure to reach an agreement exerted by the looming strike deadline.<sup>13</sup> This stage is called “super mediation.”<sup>14</sup> If an agreement is not achieved through super mediation, the NMB may recommend that the President convene a Presidential Emergency Board (“PEB”) to issue recommendations through non-binding arbitration, with Congress potentially

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<sup>6</sup> *Id.* at § 151(a).

<sup>7</sup> *The Bargaining Process: Railway Labor Act*, NAT’L RY. LAB. CONF, <https://raillaborfacts.org/bargaining-essentials/bargaining-process/> (last visited Oct. 8, 2022) [<https://perma.cc/89W6-6XD4>].

<sup>8</sup> Mediation may be requested by either party, or the NMB can step in of its own volition. *Mediation Overview & FAQ*, NAT’L MEDIATION BD., [https://nmb.gov/NMB\\_Application/index.php/mediation-overview-faq/](https://nmb.gov/NMB_Application/index.php/mediation-overview-faq/) (last visited Oct. 8, 2022) [<https://perma.cc/ZKB7-FYN6>].

<sup>9</sup> *Id.*

<sup>10</sup> *Negotiations Process*, OUR CONTRACT <https://ourcontract.org/resources/negotiations-process/> (last visited Oct. 8, 2022) [<https://perma.cc/LE5K-FNJS>].

<sup>11</sup> Self-help in labor context typically refers to actions such as strikes on the part of unions or, for management, activities such as lockouts or unilateral alterations to the terms of employment. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Nat’l Mediation Bd., *supra* note 8.

<sup>14</sup> *Id.*

mandating the ultimate outcome through statute.<sup>15</sup> Mediation in the RLA reflects the heightened emphasis that rail labor and management “exert every reasonable effort”<sup>16</sup> to reach voluntary agreements acceptable to both sides, necessitating fewer negotiations and decreasing the potential for either party to disrupt the national economy through self-help in the future.

But the RLA process is not without criticism, particularly regarding the influence of government and politics.<sup>17</sup> While politics and presidential intervention are not rare in private sector labor negotiations,<sup>18</sup> the respective roles of the NMB—comprised of political appointees<sup>19</sup>—the President, and Congress render political considerations highly significant in rail bargaining. Much has been made, for example, about the impact a rail strike would have on this November’s midterm elections.<sup>20</sup> Some industry commentators called the NMB’s decision to release the parties from mediation after only three months politically motivated<sup>21</sup> because two

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<sup>15</sup> Typically, Congressional intervention serves to mandate the parties accept the recommendations of the PEB. *Id.*

<sup>16</sup> 45 U.S.C. § 152.

<sup>17</sup> See George P. Shultz, *Why the Government Shouldn’t Intervene in Strikes*, CHI. BOOTH REV. (Oct. 10, 1963) <https://www.chicagobooth.edu/review/why-government-shouldnt-intervene-strikes> (arguing against government intervention in labor disputes from the political right) [<https://perma.cc/FKM5-M4PC>]; see also Joe Burns, *The Federal Government Is Trying to Stop Railroad Workers From Striking*, JACOBIN (Sept. 9, 2022), <https://jacobin.com/2022/09/railroad-workers-unions-strikes-peb-law> (critiquing the RLA process from the political left) [<https://perma.cc/Z9WL-RDND>].

<sup>18</sup> See *Examples of Presidential Intervention in Labor Disagreements*, AP NEWS (Feb. 13, 1997) <https://apnews.com/article/a7ee2160bf0a3612c7cfdac6358e543a> (notably, half of the examples listed here involve disputes arising under the RLA) [<https://perma.cc/VPV8-V2S4>].

<sup>19</sup> Efforts were clearly made to address the potential for politicization of the RLA process, with the three NMB members prohibited from all belonging to the same political party. However, a simple quora is needed to conduct business, meaning two members of the same party can act on behalf of the body. Nat’l Mediation Bd., *supra* note 7

<sup>20</sup> See Sam Sutton, *Railroad Strike Threatens Fragile Economy as Midterms Loom*, POLITICO (Sept. 14, 2022, 8:00AM), <https://www.politico.com/newsletters/morning-money/2022/09/14/railroad-strike-threatens-fragile-economy-as-midterms-loom-00056557> [<https://perma.cc/3N7Q-3MKY>]; see also, Karl Evers-Hillstrom, *Potential Rail Strikes Threatens to Kneecap U.S. Economy Ahead of Midterms*, THE HILL (Sept. 7, 2022, 6:00AM) <https://thehill.com/business-a-lobbying/3631591-potential-rail-strike-threatens-to-kneecap-us-economy-ahead-of-midterms/> [<https://perma.cc/Y6AD-PJHS>]; Jake Epstein, *The White House Is Racing to Prevent a Railroad Worker Strike, Fearing It Could Cripple the Economy and Hurt Democrats in the Midterms*, BUSINESS INSIDER (Sept. 12, 2022, 12:41PM) <https://www.businessinsider.com/white-house-railroad-worker-strike-democrats-midterms-2022-9> [<https://perma.cc/3E6B-PFXL>].

<sup>21</sup> Frank N. Wilner, *NMB Starts Clock Toward Rail Shutdown*, RAILWAY AGE (June 14, 2022), <https://www.railwayage.com/regulatory/nmb-starts-clock-toward-rail-shutdown/> [<https://perma.cc/J3FS-DM89>].

Board members are Democrats with labor backgrounds.<sup>22</sup> Whether or not one agrees with this critique, it seems that the Administration’s pro-labor<sup>23</sup> stance likely motivated the request for release from mediation and refusal of binding arbitration in favor of the potential for PEB recommendations, which have largely been agreed to by the parties.<sup>24</sup>

Despite the inherent tension between neutrality and political pressures, the RLA has remained in place for nearly one hundred years. The focus on mediation and mutual agreement, even accounting for political pressure on the mediation process, seem to be a major reason for the continued reliance on the statute, fostering acceptable outcomes for both sides while avoiding drastic, risky measures like strikes or lockouts. Whether the RLA will be able to overcome challenges posed by industry consolidation,<sup>25</sup> increased automation,<sup>26</sup> and evolving demands on the rail system,<sup>27</sup> however, remains to be seen.

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<sup>22</sup> *Id.*, see also *Broad Members*, NAT’L MEDIATION BD., [https://nmb.gov/NMB\\_Application/index.php/board-members-1/](https://nmb.gov/NMB_Application/index.php/board-members-1/) [<https://perma.cc/37KQ-FUHT>] (last visited Oct. 8, 2022).

<sup>23</sup> See Steven Greenhouse, *Biden Stakes Claim to Being America’s Most Pro-Union President Ever*, GUARDIAN (May 2, 2022, 2:00PM) <https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions> [<https://perma.cc/8SND-JK4G>].

<sup>24</sup> Jeff Berman, *Three Rail Labor Unions Reach Tentative Labor Agreements with U.S. Freight Railroads*, MODERN MATERIALS HANDLING (Aug. 30, 2022) [https://www.mmh.com/article/three\\_rail\\_labor\\_unions\\_reach\\_tentative\\_labor\\_agreements\\_with\\_u.s.\\_freight](https://www.mmh.com/article/three_rail_labor_unions_reach_tentative_labor_agreements_with_u.s._freight) [<https://perma.cc/RM4N-F7F5>].

<sup>25</sup> Marvin Prater, Adam Sparger, and Daniel O’Neil Jr., *Railroad Concentration, Market Shares, and Rates*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV. (FEB. 2014), <https://www.ams.usda.gov/sites/default/files/media/Railroad%20Concentration%2C%20Market%20Shares%2C%20and%20Rates.pdf> (“In 1980, there were 33 Class I railroads in the United States; [as of 2014] there are only 7.”) [<https://perma.cc/9999-GE35>].

<sup>26</sup> Joanna Marsh, *The Future Is Now: Applying Advanced Technologies to Freight Rail Operations*, FREIGHT WAVES (Mar. 31, 2022) <https://www.freightwaves.com/news/the-future-is-now-applying-advanced-technologies-to-freight-rail-operations> [<https://perma.cc/8L98-228A>].

<sup>27</sup> *Employment in Rail Transportation Heads Downhill Between November 2018 and December 2020*, BUREAU OF LAB. STAT. (Oct. 2021) <https://www.bls.gov/opub/mlr/2021/article/employment-in-rail-transportation-heads-downhill-between-november-2018-and-december-2020.htm> (discussing the impact on rail transportation from decreasing reliance on coal for energy, and “uncertain trade environment” caused by shifting trade relationships) [<https://perma.cc/G4KT-QC2M>].