Lawyers for BNSF gloat that the unions have “never prevailed” in court in 33 years

Tom Carter
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Following federal district judge Mark T. Pittman’s emergency order on January 25 blocking a strike by 17,000 BNSF workers over a new draconian availability policy, the company and the unions have filed cross-motions for preliminary injunctions in the federal court case. The unions are arguing that the old policy should remain in place until the dispute is litigated, while the company is demanding that the judge extend the January 25 emergency order for the duration of the case.

After the judge’s January 25 emergency temporary restraining order, the judge entered a further order on February 10 extending the original order until February 22. At this point, there is no hearing or deadline docketed for a decision on the cross-motions for preliminary injunctions, but the judge is likely to make a decision before the temporary restraining order expires on February 22.

The two unions involved, the International Association of Sheet Metal, Air, Rail, and Transportation Workers–Transportation Division (“SMART-TD”) and the Brotherhood of Locomotive Engineers and Trainmen (“BLET”), cover approximately 17,000 BNSF workers out of 35,000 total BNSF workers in the United States. Workers in both these unions voted overwhelmingly in favor of a strike last month.

The dispute turns in part on whether the conflict over management’s new “ Hi-Viz ” attendance policy is deemed a “major” or “minor” dispute under the Railway Labor Act (RLA), a nearly century-old legal framework aimed at suppressing strikes by railway workers. On January 25, the judge ruled that the new policy was likely to be ruled “minor” and declared that a strike would be “illegal,” setting the stage for the company’s unilateral imposition of the policy on February 1.

The new “Hi-Viz” policy, a “points-based” system that penalizes workers taking time off for any reason, has an especially provocative and gratuitous character under the circumstances of the COVID-19 pandemic. The aim of the new policy is to squeeze more availability out of the existing workforce, laying the foundation for future cost-cutting, harassment, and layoffs.

In the latest round of court filings last week, lawyers for BNSF gloated that for 33 years, the unions have never won an argument in court that a dispute was “major.” Using contemptuous language in a brief filed Thursday, the company lawyers compared the unions to Don Quixote tilting at windmills, who “remains undaunted by both his repeated failures and his inability to comprehend the world around him.”

Pointing to a pro-management decision under the RLA by the Supreme Court in 1989, the lawyers for BNSF wrote that it “has been almost 33 years since the Supreme Court’s decision” and “the railroad unions. .. have challenged BNSF Railway. .. and its predecessors in literally dozens of cases over the classification of disputes as ‘major’ or ‘minor’ under the Railway Labor Act. .. They have *never* prevailed, yet they continue to tilt at this windmill time and time again [emphasis in original].”

This brief, which was filed in opposition to the unions’ request for an order maintaining the status quo, represents the combined effort of BNSF’s in-house lawyer David M. Pryor; Washington, DC transportation industry law specialist Donald Munro of the law firm Jones Day; and the Fort Worth, Texas law firm of Kelly Hart & Hallman.

The Jones Day law firm, an international institution employing 2,500 attorneys, boasts annual revenues of over $2 billion. Munro’s clients, according to his Jones Day profile, “include all of the Class I railroads in the United States, as well as major and regional airlines, airline service providers, and commuter railroads.”

It also was a major player in the 2014 bankruptcy of Detroit, in which the city’s creditors looted the city’s assets. Kevyn Orr, a former partner at the firm, was appointed the city’s unelected emergency manager, and Jones Day raked in $58 million in fees for its services.

Reading the BNSF-Jones Day brief, one gets a sense of what BNSF management really thinks of its workers.

Referring to a 2002 case where a different union had repeatedly launched strikes over issues that were deemed "minor" in court, the company lawyers wrote: "BLET and SMART-TD have not – in most cases – displayed the same tendency to strike without warning, but they do exhibit a similar stubborn inability to distinguish major from minor."

But the company's brief is not just revealing as to the real attitude of management towards workers. To the extent the unions have not substantially prevailed against BNSF in a similar case in 33 years, this is an indictment of the entire American judicial system, and especially the framework of capitalist "labor relations," according to which industrial struggles are forcibly channeled into government-controlled proceedings that are weighted in favor of the employers.

As far as the company and its lawyers are concerned, the whole process amounts to an exercise in theater, with all the participants simply going through the motions for the sake of appearances. At the end of the day, the company always gets its way. The BNSF-Jones Day brief describes "decades of wasteful and repetitive litigation that inevitably serves as a pointless prologue to arbitration of the merits of the parties' disputes."

Even the judge took note of the essentially theatrical character of the proceedings, commenting in a footnote in his January 25 order that in his experience, "prologued [sic] fights in federal court between unions and management only delay the inevitable negotiations between the parties."

To that extent, these court papers also expose the union bureaucracies themselves, which have collected dues from their members for decades while constantly telling their members to place their hopes in a legal framework within which the union cannot realistically expect to win.

In fact, for all their theatrical posturing in court, the union bureaucracies welcome and thrive on this oppressive "labor relations" framework, which provides them an excuse for their failure to secure any gains for workers for decades as well as a legal pretext for their relentless suppression of strikes. This is exemplified by the union response to the January 25 order, which was to dutifully enforce it and instruct BNSF workers that they were not allowed to talk to the press.

It is true that the judge's order did prohibit the union from striking and from directly agitating for a strike and required the union to instruct its members not to engage in "self-help," meaning wildcat pickets or other physical efforts to take matters into their own hands. But nothing in the judge's order could or does prevent rank-and-file workers from verbally expressing their opinions to whomever they please, from informing the press regarding the facts of their situation, or from assembling in meetings for the purposes of discussing their strategy. These rights are all protected in the US by the First Amendment.

The January 25 court order blocking the strike was itself a travesty of justice and its reasoning was absurd on its face. The judge claimed that if there was an "illegal strike," then "BNSF would suffer substantial, immediate, and irreparable harm." But such harm would be entirely self-inflicted, since BNSF could avoid a strike altogether by maintaining its existing attendance policy.

In addition, it goes without saying that "harm" to a company's bottom line is the whole point of a strike. If no strike was allowed to cause "harm" to the company, one might as well outlaw all strikes altogether. In fact, this is the entire purpose of the legal framework set up by the RLA.

The judge also wrote, "The record further establishes that a strike would exacerbate our current supply-chain crisis—harming the public at large, not just BNSF." In fact, this demonstrates the real motivation behind the ruling is political—legally compelling workers to remain on the job in order to pump out profits for Wall Street.

Berkshire Hathaway, which owns BNSF, saw its stock price rise from approximately $456,900 on January 24, the day before the judge's emergency order blocking the strike, to $479,370 as of the end of the day Friday, February 11. This represents a significant increase over a period of under three weeks, signaling that Wall Street approves of the company's conduct.

Over the past year, the price of Berkshire Hathaway stock has risen by a total of $110,037, or a staggering 29.8 percent. Over the past five years, the price has risen $226,532.00, representing a near-doubling of its total market capitalization over 60 months. Swimming in these giant piles of wealth, intoxicated by the smell of money overflowing around them, the oligarchs at the helm have decided that now is the time to make working conditions for employees even more intolerable and oppressive.

The latest rounds of legal theater in federal court demonstrates the need for workers to take the initiative out of the union bureaucracy and into their own hands. This must be done by forming a rank-and-file committee composed of BNSF workers, excluding from membership union bureaucrats, to challenge the unions' conduct of the dispute and formulate and fight for their own strategy and demands.