AMERICAN CHAIN OF WAREHOUSES
linking you to your markets

ACWI ADVANCE

David Sparkman, Editor **Volume 11, Issue 10** **June 1, 2023**

Railroads Feel Heat in Congress

Congress has turned the spotlight on the nation's freight railroads regarding both continuing safety and service problems, and it is more likely the legislators will take action to address them.

The prospect of policymakers actually making real changes improved following the fiery train derailment in East Palestine, Ohio, that grabbed public attention earlier this year and gave the Biden administration a black eye because of its initial inaction. Federal officials tried to make up for their embarrassment by generating new rules and members of Congress stepped up as well.

On May 11, the Senate Commerce Committee voted to approve the Railway Safety Act, which now goes on to the full Senate for a vote. It had been introduced in the Senate by Republican J.D. Vance and Democrat Sherrod Brown, both from Ohio.

Only one Republican on the committee other than Vance voted for it, however, and some Republican lawmakers have voiced opposition to provisions like the one that would require two engineers operate a train – something long supported by rail labor and opposed by railroad management, who believe trains can safely function with only one..

Decades ago, the head of a major shipper group explained to me that his organization was more successful in getting trucking rather than rail reforms because, while the trucking industry was diverse and largely made up of small companies, the railroads were multibillion-dollar corporations who are in a position to play an outsized role on the political scene, particularly when it comes to all-important financial contributions.

That may not be the case here, but so far, the Republican politicians who are objecting to the bill were not known to have expressed any interest in train crew sizes and inspection requirements in past years, for example.

Opponents noted that the original bill was only 18 pages long and has now expanded to 80, but Vance said that was the result of input that came from industry stakeholders, including railroads, rail unions and shippers.

"This bill has changed a lot from what I introduced just a few short months ago," Vance observed. "We've made a number of concessions to the rail industry, a number of concessions to various interest groups, which is why we have so much bipartisan support in this body, but also we have a lot of support from industry."

In the months since the East Palestine derailment, the Federal Railroad Administration also has initiated rulemakings and issued industry advisories about equipment safety and maintenance issues in an attempt to polish its image after initially being perceived as being slow to react.

(Continued on next page)

The Class 1 rail lines also have been negotiating individually with labor unions to secure additional sick leave for their members.

Of course, if the rail safety bill passes the Senate it would possibly face a more difficult future in the House of Representatives, which is controlled by Republicans. At the same time the Senate was acting the House Transportation and Infrastructure Committee held a hearing on railroads that included testimony from rail shippers and union representatives as well as rail industry executives.

Service Failures Persist

The committee members got an earful about continuing safety and services failures. Greg Regan, president of the AFL-CIO Transportation Trades Department blamed squarely on the railroads' extreme cost-cutting operations model called Precision Scheduled Railroading (PSR).

PSR seeks to generate the highest possible profits by maintaining the lowest possible operating ratios. To achieve these profits, railroads have stripped rail networks of their physical and human capital, Regan explained.

This included Class 1 railroads slashing their total workforce by 30% and cutting their investments in infrastructure, like rail yards and essential equipment like rail cars and locomotives.

Regan also linked the impacts of PSR on service and operations to poor rail safety. "Contrary to the railroads' rhetoric, the industry's safety record is worsening, not improving. Safety failures are pushing the system to the breaking point and this breakdown is negatively affecting shippers."

He said that Congress could help by passing the common carrier obligation legislation introduced in the last Congress by Sen. Tammy Baldwin (D-WI), which drew support from rail shippers and unions. This is a requirement that rail carriers serve all shippers equally and without discrimination.

The obligation is embodied in rail regulatory law but needs to be clarified to meet current needs in the face of rail regional monopolies. Similar legislation was introduced in the House last session.

Agreeing was Chris Jahn, president of the American Chemistry Council, a member of the Rail. Customer Coalition, a nationwide group of rail shippers.

ACC members report that rail service problems continue to disrupt supply chains and inflate prices for consumers. "These problems will not fix themselves.," Jahn observed. "Policymakers need to adopt reforms that incentivize railroads to make their networks more resilient and help prevent a future supply chain crisis."

This year Jahn said his chemical producing and processing members have reported that a Mid-Atlantic facility in the was unable to make 30 shipments to close out the first quarter due to lack of service. In another case, a key production facility in Virginia has frequently received less than two out of three scheduled switches per week.

Council members also report congestion at the New Orleans interchange, with trains being held there for up to two weeks. "When railroads send additional crews and locomotives to clear up congestion in one location, it often creates problems in other areas," Jahn pointed out.

Unfortunately, many ACC members and other rail customers have no competitive transportation options because of concentration in the industry resulting from mergers. He said that about 75% of his member companies are captive to one Class I railroad with no viable transportation alternatives.

"Policymakers must address one of the central problems undermining the freight rail network and the nation's supply chain – lack of competition amongst carriers," Jahn said.

Congress needs to encourage the STB to complete proceedings in a timely manner, he explained. ACC members, along with other shippers in the customer coalition, support the widespread imposition of reciprocal switching, imposed either by the STB or by legislation passed by Congress.

Congress also should establish minimum service delivery standards to enforce the common carrier obligation, he urged, along with reforming the rail demurrage process and forcing railroads to regularly report demurrage income to the STB.

NLRB Decides Threats Are OK

The National Labor Relations Board restored federal labor law protection for employee threats and profanity when it occurs during what the board holds is legally protected activity under labor law.

Broad free speech protections regarding wages and working conditions exist under Section 7 of the National Labor Relations Act, Until the Trump era, the NLRB had confirmed that this protection included abusive and profane language, which employers could not ban or discipline except in extreme cases.

The Trump-era board said an employer could discipline or discharge employees for this kind of misconduct – even in cases where happened in connection with what is called protected concerted activity, says attorney David Phippen of the Constangy Brooks Smith & Prophete law firm.

The Biden-appointed NLRB has now chosen to return to the position that it gets to decide ultimately whether the worker misconduct is severe enough – in the board's subjective view – to be unprotected.

"There is no bright line for employers," Phippen explains. "Even when it comes to egregious misconduct such as use of racial epithets, sexual harassment, threats of violence, threats of damage to property or person, or abusive conduct or obscene comments and gestures, employers may be at risk if they take action based on the employee's behavior – even if the action was taken solely because of the misconduct and not because of the protected concerted activity."

He adds, "Employers may want to be more circumspect in their decision making when considering discipline or discharge for employee misconduct that takes place along with even arguably protected concerted activity. We expect this board majority to take a broad, if not an almost all-encompassing, view of what constitutes protected concerted activity."

Medical Failure Charges Grow

OSHA has weaponized its enabling law's General Duty Clause in an effort to help union organizers by attacking Amazon for maintaining what it asserts are unsafe fulfillment centers.

The GDC is part of the Occupational Safety and Health Act of 1970, which created OSHA. It holds that employers have the general duty to maintain a safe and healthy workplace for their employees even in the absence of specific regulations.

The agency recently issued charges and fines under the GDC umbrella for Amazon, who OSHA holds has medically mismanaged workers' injuries.

The agency imposed such a GDC citation to an Amazon fulfillment center in Castleton, NY. It charges that the medical mismanagement of 10 employee injuries caused or were believed to be likely to cause additional harm or impair recovery.

OSHA says Amazon delayed evaluation, care and treatment of injured workers from a medical provider other than the onsite medical staff, whose performance OSHA alleged was inadequate.

It also accuses Amazon of prematurely returning injured workers to work, which allegedly resulted in worsening of the injuries, exacerbation of pain and impairing recovery.

This year, OSHA has cited Amazon for violations at seven fulfillment centers It also currently has 20 open inspections at Amazon locations.

Attorney Lawrence Halprin of the Keller and Heckman law firm says it would be a good idea for employers with onsite clinics or similar arrangements to ensure its they have appropriate medical protocols developed or reviewed by physicians, and properly documented.

Taking these preventive measures will go a long way to protecting your operation from unexpected GDC charges of medical failure, he adds. "If an OSHA inspector hands your site representative a medical access order, it would be prudent to consult legal counsel."

Age Influences Hiring Choices

Recent research shows that 30% of workers say they felt unfairly treated due to their age at some point in their career. Of these workers, 72% say it even made them feel like quitting their job.

The nationwide study was conducted by the Society of Human Resource Management.

The data collected between February and April 2023 holds particular significance due to the current trend of delayed retirement, SHRM observed.

"More individuals are choosing to work beyond traditional retirement years, resulting in the emergence of a multi-generational workforce. Understanding and addressing age discrimination is essential to fostering inclusive work environments that value employees of all ages"

They study also found:

- 11% of human resource professionals agree older employees are not always treated as fairly
.
- 26% of workers 50 and older were targets of age-related remarks at work over the past six months.
- Among workers 50 and older, 1 in 10 say in the past six months they have often or always felt less valuable at work compared to younger workers.
- 17% of HR professionals say they have received reports of perceived ageism in their workplace.
- SHRM says HR professionals who work for organizations with diversity, equity and inclusion training are significantly less likely to report that age played a role in decisions made in the job application process (26%) compared to organizations that do not offer such training (40%).
- Common age stereotypes remain somewhat prevalent. According to the HR managers polled, older employees are more likely to be perceived by others as not competent with technology (49%), resistant to new ways of doing things (38%), and stubborn or grumpy (48%).

OSHA Creates Falls Program

OSHA launched a National Emphasis Program (NEP) targeting employers for greater investigation and enforcement actions if their workers have suffered what the agency believes is an excessive number of workplace falls.

"Considering that falls remain the leading cause of fatalities and serious injuries in all industries, the agency has determined that an increase in enforcement and outreach activities is warranted," said OSHA in its May 1 announcement.

Falls are always among the top five of annual workplace injuries in OSHA's yearly rankings. Falls to a lower level accounted for 13% of all worker fatalities between 2014 and 2021. About 36.5% of all deaths in the workplace occurred because of employees falling in all circumstances, according to the most recent statistics.

Although the NEP covers fall prevention in all industries, the largest number of inspections will take place in the construction industry.

Inspections under the NEP will include two categories – programmed inspections and self-referrals. Programmed inspections are based on neutral selection criteria for both construction and targeted non-construction activities.

Although such inspections initially should be limited to evaluating worker exposure to fall hazards, they can expand if injury records, plain view hazards or employee interviews indicate other potential safety and health hazards or violations

State OSHA Plans must notify OSHA whether they intend to adopt the NEP or already have in place policies and procedures that are at least as effective as the federal OSHA program, with final adoption to be accomplished within six months.

Retail Sales Up Slightly in April

Retail sales stabilized in April as measured by the National Retail Federation, whose data doesn't include restaurant, auto or gas station sales.

NRF's calculation of retail sales showed April was up 0.6% from March and up 2% unadjusted year over year. In March, sales were down 0.7% month over month but up 3.4% year over year (Y/Y). NRF's numbers were up 3.7% unadjusted year over year on a three-month moving average as of April.

The U.S. Census Bureau reported that overall retail sales in April were up 0.4% from March and up 1.6% year over year. In March, the bureau had said that sales were down 0.7% month over month but were up 2.4% Y/Y.

"Retail sales rebounded in April, reflecting consumer resilience in the face of elevated economic uncertainty," commented NRF President Matthew Shay. "Moderating price levels, continued labor market strength and wage gains have increased consumers' ability to spend."

Inflation and mixed economic reports continue to concern consumers, he added "However, they remain cautious and concerned about the current economic environment. Retailers continue to provide competitive pricing and convenience to help cost-sensitive consumers stretch their budgets."

NRF Chief Economist Jack Kleinhenz, also noted that retail customers are showing caution while continuing to buy various consumer goods.

"Consumers remained engaged in April. Shoppers are being selective and price-sensitive, but we continue to expect that spending will see modest gains through the course of the year."

Kleinhenz observed that year-over-year sales growth slowed, which he offered "was partly because of upward revisions to last year's data but also an early indication that credit conditions are tightening, and excess savings are shrinking."

According to the federation's latest data, April sales were up in four out of nine retail categories on a yearly basis, led by online sales, health and personal care stores and general merchandise stores, and also rose in four other categories on a monthly basis.

Where the Sales Are

Specifics from key sectors that were reported by the federation include:

- Online and other non-store sales were up 1.2% month over month seasonally adjusted and up 6.4% unadjusted year over year (Y/Y).
- Health and personal care stores were up 0.9% month over month seasonally adjusted and up 5.8% unadjusted Y/Y.
- General merchandise stores were up 0.9% month over month seasonally adjusted and up 4.1% unadjusted Y/Y.
- Grocery and beverage stores were down 0.2% month over month seasonally adjusted but up 2.9% unadjusted Y/Y.
- Clothing and clothing accessory stores were down 0.3% month over month seasonally adjusted and down 4.1% unadjusted Y/Y.
- Building materials and garden supply stores were up 0.5% month over month seasonally adjusted but down 5.7% unadjusted Y/Y.
- Electronics and appliance stores were down 0.5% month over month seasonally adjusted and down 8.2% unadjusted Y/Y.
- Furniture and home furnishings stores were down 0.7% month over month seasonally adjusted and down 8.8% unadjusted Y/Y.
- Sporting goods stores were down 3.3% month over month seasonally adjusted and down 9.1% unadjusted Y/Y.

NRF also said imports in March were up 5% from February – which saw the lowest levels since May 2020 – but down 30.6% year over year. Ports haven't reported April numbers, but are projected the month at 1.73 million TEU, down 23.4% year over year. May is forecast at 1.83 million TEU, down 23.5% from last year's 2.4 million TEU.