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David Sparkman, Editor **Volume 11, Issue 6** **April 1, 2023**

Railroads Face Rapid Reckoning

Well, that didn't take long.

In the last issue, we predicted that there would be serious consequences for the railroads arising from the Norfolk Southern (NS) derailment in East Palestine, Ohio. It happened more quickly than we had anticipated, and resulted in prospective regulatory policy and legislative changes in that could impact all of us.

The fallout rapidly spread far beyond the topics of railroad safety practices and regulation to encompass employment policies, along with operational and financial management practices at the nation's largest freight railroads.

The rail safety issue even arose in the opposition voiced by Sen. Elizabeth Warren (D-MA) in the weeks prior to the Surface Transportation Board's decision to approve a merger between the Canadian Pacific and Kansas City Southern railroads.

Before the board acted to okay the merger in mid-March, Sen. Warren urged the STB act to block it, stating that the combination would cause greater concentration in an industry that didn't need any more, having an "adverse impact on competition, service disruptions, jobs and rail safety."

The Ohio derailment already had drawn a growing number of substantial lawsuits and federal investigations, with fines for NS and new regulations in the offing for the entire industry.

Not long after Norfolk Southern announced an extensive new safety program, the Association of American Railroads, which is made up of North America's Class 1 railroads, launched its own new safety agenda that all of its members have agreed to observe. The sheer ambition of the plan gives an indication of how the Ohio incident is reshaping the industry's reaction to public and political attitudes toward the rail industry.

In the immediate aftermath of the Ohio incident, Transportation Secretary Pete Buttigieg seemed to belittle its importance by pointing out that railroads experience more than a thousand derailments each year.

By contrast, the_AAR safety plan announced a goal of zero accidents and injuries, embracing a zero-based safety approach that has been adopted over the past 30 years by policymakers and government officials in Europe and North America for traffic safety on roads and highways. This embrace of zero-based planning already was taken up by federal agencies, states, and municipalities.

Immediate actions in the AAR safety plan in the short term include paying much closer attention to remote sensors that detect overheated bearings in wheel assemblies (which may have been the cause of the Ohio derailment) and making improvements in tank car design.

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All seven Class I railroads are joining the Federal Railroad Administration's voluntary program for reporting of safety issues and gathering real-time data on the contents of each railcar.

The zero-based approach was previously endorsed by the Federal Highway Administration and applied to road design and highway planning, while the National Highway Traffic Safety Administration applies it when addressing vehicle design.

Soon after she took office, National Transportation Safety Board Chair Jennifer Homendy endorsed the zero-based approach in regard to highway safety. Following the Ohio incident, she declared that "This was 100% preventable. We call things accidents. There is no accident. Every single event that we investigate is preventable."

FRA Gets Ready to Act

Look for the Federal Railroad Administration to act as well. By instituting new equipment regulations. The NTSB an NS union believe wheel bearings in overheated, *causing* a fire and derailment.

The rail union also blamed the railroad's failure to adequately maintain remote sensors place along the track that are expected to locate and report overheating bearings (also called hotboxes), and all but one of them were found not to be working.

As a result, FRA issued an advisory warning to railroads, urging them to evaluate their policies and procedures related to the use and maintenance of hot bearing wayside detectors, referencing a series of specific hazardous materials derailments going as far back as 2015.

In addition, the agency announced on March 2 that it would conduct a nationwide inspection of rail lines that are used by high-hazard flammable trains (HHFTs) and those hauling large amounts of hazardous materials.

Railroads can expect more action after it was discovered that there were no existing federal regulations pertaining to the design and operations of these remote sensors.

Both FRA and NTSB initiated a special investigation into Norfolk Southern's organization and safety culture, citing a string of accidents tracking back to 2021, and including an NS employee's death a month after the Ohio event.

As expected, members of Congress quickly entered the fray as well, with as small bipartisan group of senators introducing legislation aimed at improving rail safety, including employment practices.

"Through this legislation, Congress has a real opportunity to ensure that what happened in East Palestine will never happen again," said Sen. J.D. Vance (R-Ohio), who introduced the bill along with Sen. Sherrod Brown (D-Ohio).

The Senate measure would boost fines for safety violations and stiffen the safety standards set for trains carrying hazardous materials and make rail car inspections more frequent. In adherence to rail union wishes, the bill also would ensure that trains carrying hazmat shipments have two-person crews and address outstanding issues surrounding sick leave for rail workers.

Testifying at a Senate hearing on the legislation held on March 9, Alan Shaw, Chief Executive Officer of NS, reportedly declined to endorse all the provisions of the bill, but he was willing to offer that, "we are committed to the legislative intent to make rail safer" through its own safety initiatives.

Although no one has been able to firmly establish a direct link between the major railroads' extreme cost-cutting operational model called Precision Scheduled Railroading (PSR) and deterioration of safety, critics including rail labor unions have blamed inadequate sick leave and overworked rail workers for degrading safety.

This was traced directly to the slashing of tens of thousands of workers from railroad payrolls that began six years ago as PSR was adopted.

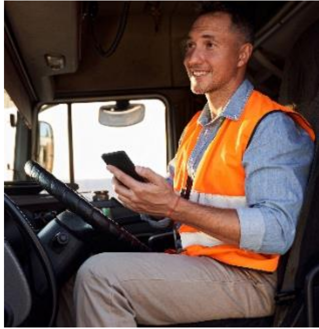
Rail workers' ire over the sick leave issue came close to shutting down the nation's rail system in a threatened strike just before Christmas last year, which thrust the issue into public awareness. Look for question about PSR as a factor exacerbating rail safety to receive more attention in the future.

Since last year, the lingering bad feelings and negative publicity generated by the sick leave issue and possible strike also caused NS and CSX to negotiate expansion of some of their workers' leave allowances with two of their unions.

The NS agreement negotiated with the two unions was publicly announced just three days following the Ohio derailment.

Feds Reducing Truckers' Fees

The Federal Motor Carrier Safety Administration has proposed reducing some annual registration fees for truckers, freight brokers, freight forwarders and leasing companies for 2024 in anticipation of the same fees going up in 2025.



The fees apply to the national United Carrier Registration (UCR) Plan which was created by Congress in 2005. It requires these companies operating in interstate commerce to submit annual fees based on fleet size to supplement funding for state highway motor carrier registration and safety programs in 41 states.

FMCSA said it's planning to reduce the fees for 2024 by 9% after having granted a fee reduction of 31% in 2023 as well.

Depending on the number of power units that are owned or operated by the motor carrier or truck leasing company (from 0 to 1,001 and over), the dollar amount reduced from 2023 will vary between $4 and $3,453.

According to FMCSA, the reductions came after a change had been made earlier in how the fees would be calculated by the UCR Plan Board, which is responsible for supervising the UCR and for establishing the rate for payments.

"The UCR Plan Board did not make a fee recommendation for the 2025 registration year, but the recommendation for the 2024 registration year anticipates an increase in fees for 2025, following the large fee decreases in the previous years," FMCSA explained.

Because the state UCR revenue entitlements would remain unchanged, FMCSA contends that the states participating in the program would not be impacted by this rule. In addition, the UCR agreement does not affect a participating state's annual registration of interstate and intrastate hazardous materials carriers or hazardous waste carriers.

Highly Paid but Due Overtime

The United States Supreme Court has ruled that, despite earning more than $200,000 per year, an employee earning a daily rate is not exempt from overtime pay under the Fair Labor Standards Act.

The 6-3 decision held that the FLSA requires time-and-a-half pay for work over 40 hours a week, even for workers whose compensation far exceeds the minimum wage.

The plaintiff in the lawsuit was paid at least $963 per day (and up to $1,341 per day in some circumstances). The justices ruled that a high-earning employee is not compensated on a "salary basis" when their paycheck is based solely on a daily rate calculated by the number of days worked.

"The Supreme Court's decision serves as an important reminder to employers that employees who are high earners are not automatically exempt from overtime wages," said attorney Mark Wallin of the Barnes & Thornburg law firm.

All parts of the test for exemption must be satisfied – salary level (amount), salary basis (consistent unit), and duties (i.e., executive, or administrative), he added. Otherwise, overtime wages must be paid, regardless of how much the employee earns.

Because the employee was not paid on a salary basis, the court ruled that, he could not satisfy the highly compensated employee (HCE) exemption (or any of the white-collar exemptions) under law and as a result is nonexempt and entitled to overtime pay, explains attorney Shira Yoshor of the Greenberg Traurig law firm.

"Employees who are highly compensated but not guaranteed to be paid the same amount every week no matter how many hours they work are likely to be considered nonexempt and eligible for overtime," she added.

"To ensure compliance, employers should consider reviewing pay practices to determine whether employees earning over $107,432.00 per year are in fact being paid on a salaried basis. If not, employers risk overtime exposure."

Open Pay Info Said to Help

Many employers are concerned that revealing pay ranges in job postings could lead to negative outcomes, but new research shows organizations have found that they lead to favorable outcomes.

In a recent survey, 42% of more than 1,300 HR professionals sampled by the Society of Human Resource Management said that their organizations operate in locations that legally require pay ranges be included in job postings.

When not required by law, however, over two in three (67%) HR professionals say their organization voluntarily list start pay in their job postings at least sometimes, often, or always.

What's more, 32% of these organizations began including start pay information in their job postings within the past year – signaling some employers may be planning ahead in anticipation of new pay transparency trends, SHRM discovered.

The survey also shows 70% of those organizations listing pay ranges on job postings say that doing so has led to more people applying to their postings.

Nearly two-thirds (66%) of organizations that list pay ranges on job postings says it has increased the quality of applicants they're seeing, and 65% who include pay ranges say in postings say it makes them more competitive in attracting top talent.

When it comes to asking applicants and employees, 82% of U.S. workers says they are more likely to consider applying to a job if the pay range is listed in the job posting.

In addition, 74% of U.S. workers say they are less interested in applying to job postings that do not list a pay range, while 73% respond that they are more likely to trust organizations that provide pay ranges in postings than ones that do not.

When considering pay transparency in job postings, organizations will also need to prepare for how doing so may affect current employees – 36% of organizations said this change resulted in more current employees requesting a pay raise.

NJ Temp Law Sets Example

The state of New Jersey has adopted a new law regarding management of temporary workers that could set an example for other states, according to employment attorneys.

The new law, which goes into effect on Aug. 5, imposes sweeping changes to compensation, benefits, and legal protections for temporary workers. Temp agencies and employers that hire through such agencies will bear the cost and burden of future compliance.

The law applies only to temp workers in specified federal job classifications, including transportation and material moving; building and grounds cleaning and maintenance; production; construction laborers, helpers, and construction trades workers.

It requires that temp workers be given no less than the average rate of pay and average cost of benefits of third-party clients' employees who perform the same or substantially similar work.

Employers and staffing agencies must now determine which of their employees are in positions sufficiently similar to temp workers to determine pay and benefits.

Temp staffing agencies cannot deduct from a worker's wages items such as check-cashing fees or expenses for conducting consumer reports, background checks or drug tests. Instead, these expenses must be borne by the employer or the staffing agency.

Temps also are protected from last-minute work schedule changes and cancellations. Temp agencies must be certified by the state labor department and certification requirements will be strengthened.

Fines for violating the new law vary based on the type and number of prior violations and range from $500 to $5,000 for each individual violation.

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Our Weird Economy Gets Weirder

When we chose to say the economy was getting weird in the last newsletter, we had no idea that events were about to prove us to have been more prescient than we ever could have imagined.

Although the last newsletter was dated March 15, the writing was completed a week earlier, before the collapse of the Silicon Valley, Signature and Silvergate banks, which then led to a worldwide banking crisis caused by the Federal Reserve raising interest rates in its attempt to address an inflation crisis that was created in the first place by the U.S. government's persistent adherence to out-of-control spending.

The Federal Reserve in New York

Despite – or possibly because of – the Biden administration's rush to shore up the banking system and its repeated assurances that the worst was past, the economic unraveling continued.

Even before the bank blow-up, the economy was throwing off mixed signals that were being read by expert economists as signs that a recession, a mild slump, or slow growth were coming in the months ahead. Since the crisis began, we saw just how clueless most of these experts were.

But some of their most recent observations may prove to be apt when it comes to the heavy involvement of regional and smaller banks in commercial real estate lending, which is now seen as a worrying sign.

Of course, when you talk about CRE that term covers a broad expanse of land, incorporating multi-family housing (a fancy term for rental apartments), shopping centers, office buildings and industrial real estate, which consists primarily of warehouses and distribution centers.

As we have reported on a regular basis in this publication, IRE is seen as remaining strong even as the economy has slowed down to a degree. One reason is that when the economy is growing, storage space is needed. That also is the case when the economy slows down and stuff isn't moving.

However, fulfillment and other distribution centers are an entirely different business. Most of the growth in that segment of the industry has been driven in recent years by the explosion in ecommerce sales, particularly during the Covid 19 pandemic and lockdowns that prevented people from accessing brick-and-mortar stores.

Earlier it was leaked that Amazon.com plans to cancel, delay, or close no fewer than 99 of its fulfilment centers in the U.S. this year. That news followed reports that Amazon had shuttered about 70 such centers during 2022.

Another blow to the revival of ecommerce and other retail sales growth comes from the burgeoning credit card debt carried by consumers because of inflation and the Fed cranking up interest rates, which triggers rises in credit card interest rates that are now up to nearly 24% in some cases.

This should be of more concern because more Americans are relying on credit cards to deal with inflationary price increases of even basics like food and medicine. Bankrate.com recently reported that 36% of adults owe more money in credit card debt than they have saved.

"It's clear that the less-than-optimal economy, including historically high inflation coupled with rising interest rates, has taken a double-edged toll on Americans," says Mark Hamrick, Bankrate senior economic analyst. "Many resorted to tapping their emergency savings if they have it, or have taken on credit card debt, or some combination.

The New York Federal Reserve Bank also reported that credit card balances rose 15% throughout 2022, and more recent news says that this trend has speeded up during the first few months of 2023.

Other research confirms that consumers also have been cutting back on discretionary spending in response to their burgeoning credit card debt. Because consumer spending drives the economy, these trends also could fuel a recession.