

NATIONAL RAILWAY LABOR CONFERENCE

251 – 18th STREET, SOUTH, SUITE 750, ARLINGTON, VA 22202 / TELEPHONE: 571-336-7600

BRENDAN M. BRANON
Chairman

JEFFREY F. RODGERS
Vice Chairman

MICHAEL P. MARATTO
General Counsel

Via email & USPS

March 11, 2022

Ms. Patricia Sims
Director of Mediation Services
National Mediation Board
1301 K St NW # 250E
Washington, DC 20005

Re: Mediation Case Nos. A-13985 & A-13986

Dear Ms. Sims:

This letter responds on behalf of the National Carriers' Conference Committee ("NCCC") to the request of the BMWED and SMART-MD ("Unions") for release from mediation and a proffer of arbitration in the above-captioned Mediation Case. The Unions assert that the parties have exhausted any reasonable prospect of reaching an agreement through the mediation process, and so should be allowed to move to the next step in the major dispute procedures under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*

The NCCC disagrees. Under the RLA, the parties in a dispute over proposed changes in collective bargaining agreements are required to exert "every reasonable effort" to settle the dispute at each stage prescribed by the Act, including the period of direct conferences after the service of Section 6 Notices and following the invocation of mediatory assistance by the National Mediation Board ("NMB"). 45 U.S.C. §§ 152 First, 155, 156. The parties are far short of exhausting "every reasonable effort" to reach agreement, and hence the Unions' request is premature.

1. The Record of Bargaining to Date Does Not Support Release

The history of bargaining – or the lack thereof – between the parties to date supports the NCCC's position that the Union's request for release is premature. As explained below, the bargaining record has hardly been developed – let alone reached a point where release is appropriate.

First, just prior to exchange of Section 6 notices in November 2019, a threshold dispute arose over whether the parties were required to bargain on a multi-employer basis. BMWED filed lawsuits against several of the carriers that are part of the NCCC multi-employer group and represent about half of the entire freight rail industry, and the carriers subsequently filed their own lawsuit to enforce their right to engage in national handling. Those lawsuits were subsequently consolidated in federal court in the District of Columbia, where they remain pending today. For those carriers directly targeted in this litigation, BMWED has maintained that it cannot be required to participate in national handling and that any such participation in this round would be voluntary on their part. Therefore, until the litigation is fully and finally resolved, BMWED can simply withdraw from national handling with those carriers (again, representing about half of the entire industry). It is unclear when the issue will be decided, or if the dispute will need to continue in the appellate courts. Until this foundational dispute is resolved or the BMWED abandons the legal positions it has maintained to date, the exact make-up of the parties to be subject to any conclusive agreement arising from national handling with the BMWED will remain uncertain. This reason alone provides significant basis to exercise caution in concluding that bargaining efforts have been exhausted.

Second, there was substantial delay and gaps in conducting conferences in 2020, which had not yet even begun by the onset of the COVID-19 pandemic in March of 2020. And since the pandemic began, it has had a major impact on the schedule for and progression of bargaining, such that the parties have had far fewer meetings and discussions than would normally be the case at this stage of the round. While there was a preliminary and informal meeting of the principal negotiators to discuss process in mid-December 2019, the parties' first conference did not take place until April 15, 2020. That conference was conducted by video, during which the NCCC made an extensive presentation to the Unions outlining the carriers' position on various fundamental issues.

But then, at the Unions' insistence, bargaining essentially ceased for nearly six months. The NCCC made requests to conduct additional conferences, and the Unions repeatedly refused. The Unions asserted that video conferences – the only reasonable option in light of the status of the pandemic at that time – were unacceptable. More specifically, they contended that while “the video conference was adequate for a one-sided presentation, the experience confirmed to us that it is not an appropriate medium for actual bargaining; so we believe that actual bargaining will have to wait for a change in the Covid-19 environment.” Based on that assertion, the Unions cancelled a conference that had been set for May 19-20, 2020. The NCCC then offered dates in July or August, and the Unions declined. In mid-June, the NCCC emailed an additional presentation to the Unions in an effort to make at least some progress and received no response.

The Unions finally agreed to meet via videoconference on September 30, 2020. Following that session, the parties conducted only four additional sessions – all virtual and most lasting no more than an hour or two outside of time spent in caucus. Overall, the parties met for a total of approximately 12 hours prior to the Unions' filing for mediation, and only in a virtual format that the Unions themselves have characterized as not a “viable” approach to bargaining.

The Unions filed for mediation on June 14, 2021, 10 days after providing their first proposal to the carriers and without even another discussion or meeting. Since then, the parties

have conducted a total of five videoconference mediation sessions, including the most recent meeting on January 28, 2022. Again, each session has been relatively short, usually lasting only about an hour or, at most, two. In total, excluding caucus time, the parties have spent only about six hours making presentations to each other in mediation. And, as discussed further below, during none of these meetings did the Unions engage in the bargaining process in any meaningful way.

This is hardly the extensive or exhaustive record of bargaining portrayed by the Unions in their request for release. By comparison, in the last bargaining round, the NCCC met in direct, in-person negotiations with the coalition that ultimately reached the lead settlement on 13 days before the parties entered mediation, and then met in mediation on approximately 14 days. Much more remains to be done in mediation with BMWED and SMART-MD in this round.

2. The Carriers Are Engaged in Good Faith Bargaining

The Unions' characterization of the NCCC as entrenched and unyielding is consistent with their usual rhetoric, but inaccurate. The carriers view their proposals as subject to negotiation and will give full consideration to any counterproposal(s) the Unions make. The carriers are not seeking concessionary agreements but rather have acknowledged that final agreements must include fair compensation changes, with the amount of increases to be determined based on narrowing of other issues. Nor are the carriers seeking to eliminate employee benefits under our health care proposals. Instead, we seek to negotiate over the allocation of the continued escalation of the plans' costs and to ensure the plans are best structured to help our employees and their family members engage with the healthcare system and achieve better health outcomes. Although there are many challenges to bridging our differences, there is no reason to conclude at this point that the mediatory efforts of the NMB have failed, or will fail, in helping us reach voluntary agreements.

Indeed, to this point, the Unions have hindered negotiations by refusing to engage in the bargaining process. For example, the Unions have refused to discuss any of the carriers' proposed health care changes. As in other recent rounds, the NCCC has explained that continued evolution of the health plans is a priority, yet the Unions will not entertain any negotiation, even refusing to participate in the kind of joint costing and evaluation exercises the parties have used in the past. At present, there are more than a dozen discrete issues that are ripe for further discussion on the topic of health care alone.

The Unions also have simply rejected the carriers' proposed changes in work rules. The NCCC has tried different approaches, including a proposal for small working groups, that the Unions have also rejected each time. We have tried focusing on specific topics, including some that the Unions have proposed, such as discipline, bereavement leave, and consolidation of agreements, but have received no substantive response. The carriers have even tried making unilateral offers to withdraw or accept certain proposals in an effort to advance negotiations. However, the Unions have not embraced these offers – much less reciprocated.

One particular example of the bargaining dynamic to date is the parties' discussion of bereavement leave. The Unions had proposed expanding bereavement leave, including widening

the list of family members that qualify and increasing the number of days of available bereavement leave from three to four. When the carriers responded with their willingness to expand the list of family members that qualify but not the number of days per event, the Unions regressed and are now demanding to expand the number of days of leave to five as well as an expansion of the circumstances in which such leave can be used. The carriers also had noted a willingness withdraw a proposal relating to consolidation of agreements on a cost neutral basis upon resolution of the bereavement issue, but this was ignored by the Unions. That is hardly a productive approach.

Rather than engage on issues, the Unions insist that the NCCC make a comprehensive wage proposal as a precondition for any further negotiations. However, as the carriers have explained, we have not felt we can determine an appropriate wage proposal until we have some understanding of what other items, including any of the proposals the carriers have made, will be included in negotiations. The carriers have publicly committed to a fair and reasonable compensation package while the Unions have demonstrated no willingness to even consider the carriers' priorities.

The Unions' extensive delays throughout the first year of bargaining, coupled with their rejection of every element of the carriers' proposals, are the principal reasons why reasonable efforts to conclude the negotiations have barely been attempted and certainly have not been exhausted.

3. The Broader Context of the Bargaining Round Does Not Support a Release

As the NMB is aware, the pending mediation with these two unions is a relatively small part of the national bargaining currently taking place in the freight rail industry. The NCCC is also in negotiations with the Coordinated Bargaining Coalition ("CBC"), which represents about 80% of the railroads' employees. The CBC only recently filed for mediation, and so the parties have not yet started mediated bargaining. Mediation sessions are currently being scheduled.

Those negotiations between the NCCC and CBC encompass many of the same issues confronting the parties here. And while it will necessarily take much dedicated effort, the CBC and the NCCC may very well be able to make progress toward reaching agreement. In prior national bargaining rounds, the Board has recognized that it should not consider any individual or group negotiations in national handling in a vacuum, but rather must be cognizant that a premature release in one set of negotiations could have a significant adverse effect on all other negotiations. The same approach is appropriate now when considering whether to prematurely terminate mediation between the NCCC and the two unions that are not part of the CBC.

Finally, the Unions cite several other factors – including the external economic environment and the carriers' financial performance – in support of their request for a release. These factors do not relate to the status of bargaining and are not relevant to determining whether a release is justified. Accordingly, these factors should have no bearing on the NMB's analysis.

* * * *

The carriers are committed to making every reasonable effort to reach fair and timely agreements with every organization and group in national bargaining. The complexity and number of issues that must be resolved will require serious good faith bargaining by all parties. As a statutorily mandated function of the Board, mediation efforts should be continued unless it is evident that “all reasonable efforts to reach a voluntary agreement through mediation have failed.”¹ The carriers respectfully submit that such a conclusion cannot be reached at this time in the mediation cases at issue. For all of these reasons, we urge the NMB to deny the Unions’ requests to terminate mediation.

Sincerely yours,



Brendan M. Branon

Cc: Richard Edelman (via email & USPS)
Gerald Fauth III, Chairman, NMB (via email)
Linda Puchala, Board Member, NMB (via email)
Deirdre Hamilton, Board Member, NMB (via email)
John Livingood, Senior Mediator, NMB (via email)
NCCC members (via email)

¹ NMB Answer to Question No. 18, “Frequently Asked Questions: Mediation.” (NMB Website)