IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

BNSF RAILWAY COMPANY, Plaintiff-Counterclaim Defendant, v. INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, Defendants-Counterclaim Plaintiffs.	)	Civil Action No. 4:22-cv-052-P

DEFENDANT-COUNTERCLAIM PLAINTIFF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN'S MEMORANDUM IN OPPOSITION TO BNSF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendant-Counterclaim Plaintiff Brotherhood of Locomotive Engineers and Trainmen ("BLET") submits this memorandum in opposition to the motion for a preliminary injunction of Plaintiff-Counterclaim Defendant BNSF Railway Company ("BNSF"). Not surprisingly, BNSF's claims that the unilateral changes it has made to its attendance policy without bargaining with the Unions are insignificant, minor disputes for arbitration. Nothing could be further from the truth.

Rather, BNSF's positions are frivolous and, as such, it is not entitled to insist on arbitration so that it can reap additional monthly profits pending the long and laborious process of arbitration. The status quo provisions of the Railway Labor Act ("RLA"), 54 U.S.C. § 151, *et seq.,* depend on this Court preventing such misconduct so that the statutory process of collective bargaining achieves an agreement. Allowing the railroad to make desired, and even necessary, changes to wages, hours and terms of employment alleviates the pressure to settle the agreement. It also incentivizes a moral hazard to change terms such as these – forcing employees to work more – when there are no real economic damages recoverable in arbitration. The Court must not take the invitation to upset the balance achieved by Congress and the courts to let BNSF change the status quo and attendance terms in the agreement without negotiation as provided under the RLA.

First, BLET submits that BNSF's arguments about union business leave are based completely on meaningless semantics. This underscores their frivolous nature as a RLA minor dispute. Moreover, BNSF's effort to diminish its facial discrimination against union leave is unavailing. The law does not permit such discrimination nor interference with employees' right to designate their representatives under Sections 2 Third and Fourth of the RLA, 45 U.S.C. §§152 Third and Fourth.

Second, BNSF's rewriting of the labor agreement's referenced time off sections is likewise spurious. From the outset, it has simultaneous argued that the new Hi Viz policy is not a change at all but simply a codification of existing practices, but then said that without this drastic change the railroad's operations will be severely disrupted and the national supply chain problem greatly exacerbated. Query: How can the Court ascribe any credibility to the railroad's factual representations when it is willing to say anything here to get to its desired result?

Third, BNSF's arguments that it has not committed a major dispute by flagrantly violating the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq*, are also frivolous. Again, its policy is directly contrary to U.S. Department of Labor interpretations and federal court holdings. It has no basis to pass a facially illegal policy where it concedes the BLET cannot even arbitrate the matter nor litigate the matter at all. There is no arguable basis under the labor agreement – including "management rights" allowing BNSF to institute a flagrantly illegal policy punishing the use of FMLA, and then spuriously claim it has not altered the status quo. If BNSF would have proposed this in bargaining, it would have been bad faith bargaining – trying to negotiate an illegal term. Instead, it went further and brazenly imposed it unilaterally. While BNSF wants to wait years under this policy until some employee contests it, thereby reaping the rewards of unlawfully increased "availability," it is not above the law. This is a major dispute.

Lastly, the balance of harms does not support BNSF. Again, its factual claims that it needs this change to be "competitive" are unavailing. Economic necessity is not a defense to a breach of the status quo. Indeed, such economic necessity is exactly why Congress froze the status quo – so that one or both of the parties become pressured to settle the agreement. BNSF's hollow motive of getting a comparative advantage in availability against its competitors does not justify its breaches of the law, but instead underscore its unlawful motive.

ARGUMENT

I. THE UNION BUSINESS LEAVE PROVISIONS OF THE BNSF HI VIZ ATTENDANCE POLICY ARE A MAJOR DISPUTE AND UNLAWFUL DISCRIMINATION

First, BSNF tries to justify its adverse actions under its policy against union leaders who take contractual union business leave *through pure semantics*. It claims that it has an arguable basis to enact the policy notwithstanding the labor agreement's provisions prohibiting BNSF from considering union business leave as unavailability for work, by claiming that it is not "penalizing" employees for taking such leave, rather it is just trying to "incent" them. That is, because it does not assess discipline points under the Hi Viz policy but simply docks employees from earning good attendance points if they take union business leave, it is privileged to make this change. This is *semantic* nonsense. (*BLET Ex. 1, Pierce Dec.* ¶¶ 15).

It is undisputed that BNSF's Hi Viz policy grants thirty points to each employee and removes such points for unavailability. This removal of points is not discipline *per se*; it only makes the employee more likely to receive discipline once a certain threshold is reached. Likewise, the good attendance period of fourteen days does not create or remove discipline, it just makes it less likely to be disciplined because successful completion of the fourteen days earns back four points. It is immaterial whether BNSF considers any portion of the policy "disciplinary" versus an "incentive." (*Id.*) The fact of the matter is that denying Union officials the ability to lay off for Union business without losing their good attendance credit is adverse employment action against Union officials for exercising their contractual rights just as much as the discipline that will inevitably follows is.

BNSF totally ignores the November 24, 2003, Memorandum of Agreement between the parties (ECF Doc. 21, BLET Ex. 1). This union business leave agreement in Section 1.2 expressly provides that "[i]n the application of the foregoing a union officer laying off for the purposes stipulated *will not be considered as laying off or missing a call*." (*Id*.) (emphasis added). Rather than citing this plain prohibition on even considering union business leave as "laying off or missing a call" (being unavailable for work duties), it cites the 1972 Rule 64 language that provides a narrower protection: "In the application of the foregoing, a Local Chairman laying off for the purposes stipulated will not be considered as laying off or missing a call for purposes of Rule 23 and 24 . ." (*Id.*; ECF Doc. 21 at 21. BSNF concedes that the Rule 23 and 24 references are to placement on the staffing boards).

However, the November 24, 2003 Memorandum of Agreement contains no such limitation. Under it, BNSF is prohibited from considering union business leave as being unavailable. Indeed, BNSF concedes in the Supplemental Declaration of Salvatore Macedonio that laying off means temporarily removing oneself from the list of available employees. (Page ID 605) (*BLET Ex. 2, Cunningham Dec*. ¶ 7).

The Hi Viz Policy on its face considers engineers who take union business leave as being unavailable. It concededly breaks "good attendance" for use of union business leave, as if the person was unavailable or absent. It lumps union business in with other disapproved absences which break the good attendance period. There is literally no argument to the contrary. BNSF's sole argument is a semantic one saying that labor agreement "may prohibit penalizing union business mark-offs" but arguably does not prohibit the railroad "rewarding" good attendance except for union business leave. But the Section 1.2 of the November 24, 2003 agreement says nothing about this semantic distinction. It categorically prohibits BNSF from *considering* union

business leave as being marked off. It is impossible to conclude anything other than BSNF is treating union business leave as a layoff or missed call, *i.e.,* being unavailable for work. *BNSF has simply rewritten the labor agreement to say that it can consider use of union business leave under the attendance policy.* As such, it is plainly a major dispute.

Further, BNSF's arguments that its interference with the labor contract's provisions allowing for union representation at employee disciplinary proceedings is of no consequence are equally meritless. BNSF speculates that union leaders will not be disciplined under the new policy and can have other Union leaders "cover" for them so as to not run afoul of the policy.

The problem with BNSF's argument is that the labor agreements provide that members may choose their representatives for such hearings. RLA Section 2 Third and 2 Fourth prevent the carrier from interfering with the employee's choice of representatives. That is exactly what the Hi Viz policy does: it issues adverse action against a chosen representative through forfeit of good attendance points needed to avoid discipline. The chilling effect on the chosen representative is manifest. While the member may want a particularly forceful representative, BNSF will be able to discourage such representation. The BLET does not agree that BNSF's "empirical evidence" is credible at all. Union leaders will be disciplined to be sure. (*BLET Ex. 3, Psota Dec.* ¶¶ 4-9).

Moreover, on its face the policy exempts unpaid military leave from any penalty for being unavailable but punishes the use of the similar unpaid union leave. It thus targets this leave and the union activity associated with it for harsher treatment on its face. This is thus a facially discriminatory policy, just as in *Atlas Air, Inc. v. Air Line Pilots Ass'n,* 232 F.3d 218, 226 (D.C. Cir. 2000)("where the challenged modification to the status quo is far from merely formal" and has "a real and material impact on the conditions of employment and is justified on no other grounds than union certification, we may presume that the carrier's actions were motivated by

anti-union animus and are in violation of RLA Section 2, Third and Fourth)." Since on its face employees who take contractual union leave are disadvantaged while employees performing voluntary military duty such as National Guard or Naval Reserves are not so disadvantaged, the Hi Viz policy patently discriminates against the Union. Just like the unlawful profit-sharing provision in *Atlas*, which took away the "benefit" based upon support for the union, the removal of the self-proclaimed good attendance "benefit" based upon union activity violates Sections 2 Third and Fourth of the RLA. The chilling effect on the Union is presumed, as it violates the RLA.

II. VARIOUS TIME OFF PROVISIONS OF THE BNSF HI VIZ ATTENDANCE POLICY CREATE A MAJOR DISPUTE

First, BNSF's arguments that it has provided reasonably lay off privileges is likewise spurious. While it tries to make the claim that engineers may enjoy many days of paid time off, this claim is both false and beside the point. The agreement speaks of being able to lay off, not of paid time off. Indeed, BNSF does not dispute that under its Hi Viz policy, engineers will suffer a reduction in days to lay off from *84 to a mere 22 days per year*. (*BLET VC ¶ 25*). That is nearly a seventy-five percent reduction. On its face, it is a ludicrous position and is close to simply rewriting the agreement and eliminating any ability to lay off. In fact, BNSF has laid off two thousand employees, engineers are working to the hilt, and they are unable to get the paid time off they want (or need) approved by the railroad. (*Pierce Dec.* ¶ 23). A theoretical six weeks of vacation or multiple personal days are useless if you cannot take them. (*Pierce Dec.* ¶¶ 15; *Cunningham Dec.* ¶ 11). It is no answer that the BLET did not prevail in an arbitration in 2010 with this claim. The subject Hi Viz policy must be judged against current standards, where the railroad has laid off thousands of employees during a pandemic and supply chain crisis, forcing the remaining workers to work much more, all the while making abundant profits. BNSF under the Precision Scheduled

Railroading model has simply raced to the bottom on staffing, and now is cutting out all reasonable lay off privileges. (*Pierce Dec*. ¶ 23). Plain and simple, this is a major dispute.

It is ironic that BNSF claims that it established its Hi Viz policy to address the lay off abuses of certain engineers who take off on weekends or for the Super Bowl. This is specious. Rather than targeting employees who abuse the system (if there are any), this new policy targets *everyone*. BSNF is thus transparently the party that is abusing the system – by creating a major dispute as to lay off privileges. (*Pierce Dec.* ¶ 25).

Second, BNSF again erroneously relies upon its frivolous semantic argument that by breaking an engineer's period of good attendance for failing to exercise displacement rights within two hours (as opposed to within twenty-four as provided by the labor agreement), it is not punishing them but rather providing a "benefit." (*Pierce Dec.* ¶ 15). BNSF has repudiated the contractual twenty-four hours to select a new position when displaced, creating yet another major dispute.

Third, BNSF has done the same with paid leave such as vacation and personal leave. By preventing an employee from laying off prior to taking a vacation so that he can protect his vacation start, BNSF is just rewriting this past practice without negotiation and greatly diminishing the ability of the engineer to even take a scheduled vacation. (*Pierce Dec.* ¶ 20). That is a major dispute. Note that it is ironic that Mr. Macedonio emphasizes the amount of paid time off that can be taken by the employee in arguing for the reasonableness of the policy in terms of gross time off, but he does not mention a thing about how basic vacation will be hard to take in nearly every instance because of these changes. Moreover, BNSF's argument that it has a past practice under the current attendance policy of disciplining an employee for laying off after a call to work prior to vacation, the Hi Viz policy is different in that it treats every layoff *prior to being called* as an

adverse event. Indeed, BNSF's alleged right to cancel or modify vacations is beside the point. In this instance, BNSF is not cancelling a vacation due to needs of the service, it is just raising the specter of *discipline in every single case* a lay off occurs prior to vacation – *regardless of the needs of the service.* BNSF has not raised any relevant, legitimate argument to advance an arguable basis to diminish the ability of employees to take contractually negotiated paid time off. This is thus a major dispute.

III. THE FMLA PROVISIONS OF THE BNSF HI VIZ ATTENDANCE POLICY VIOLATE THE FMLA AND ARE A MAJOR DISPUTE

BNSF argues that its passage of a completely illegal FMLA policy is not a major dispute because it does not turn on contract interpretation under *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 303-04, 312 (1989) ("*Conrail*"). Of course, BNSF tries to sidestep its entire argument in this case that it is entitled to enact the Hi Viz policy because it has management rights under the contract. It has previously argued that in this industry, railroads have a contractual "reserved right" to make such changes. Now, in this connection BNSF does not even mention such alleged contractual rights, lest the Court recognize this question for what it is: a basic contract question over whether BNSF has an arguable basis under the CBA to make such a policy.

BNSF sidesteps this because the answer of course is that there is no arguable basis for it to impose a flagrantly illegal policy under the CBA. Again, it is like passing a rule saying African Americans cannot earn overtime. That would flagrantly violate Title VII of the Civil Rights Act. There simply is no good faith basis for taking such action. BNSF may want no one to use FMLA for fear of discipline (breaking good attendance credit) so that it will get more availability and make more profits until an employee files suit and the case is litigated, but this behavior is the exact thing which *Conrail* prohibits*:* frivolous action in the name of contractual privilege.

It is not an answer that no federal court has addressed this issue. That is because no rail carrier in the history of the RLA has ever taken the brazen position, as here, that its management rights places it above the law to enact purely illegal policies. It is also ironic that BNSF argues that the Unions have no standing to litigate the legality of the FMLA claim in a separate suit. That just underscores how major this dispute is. Under BNSF's claims, the Unions are powerless to rectify this illegal policy and alteration to employees' terms and conditions of employment. However, that is the very definition of a major dispute that violates the status quo.

Likewise, it is disingenuous to argue that this major dispute can be resolved in arbitration. Adjustment boards under the RLA concededly interpret the CBA. They do not rule on statutory claims such as RLA violations or independent statutes. There is no FMLA language in the CBA to interpret. Moreover, no adjustment board will say that the policy is "unreasonable" because it violates the FMLA, as they will recognize their charge is not to interpret federal law. In reality, this type of illegal self-help is much worse than simply rewriting a contractual provision: it is self-help that flagrantly violates federal law with absolutely no arguable basis.

In fact, this question does not involve an arguable individual termination in violation of federal law like the cases cited by BNSF, or an arguable policy not in compliance with railroad regulation for instance. It involves a frivolous claim of compliance with the FMLA. That is what makes it a major dispute: there is no arguable basis to take such action under the CBA.

BNSF's effort to distinguish *Dyer v. Ventra Sandusky, LLC*, 934 F.3d 472 (6th Cir. 2019), is unavailing. BNSF misleadingly claims that no other circuit court has followed it. This is a 2019 case. No cases have rejected this holding yet at all. And they will not because the Department of Labor ("DOL") for decades has taken this same interpretation *over five separate presidential administrations*, being expressly affirmed as recently as 2018. See 1999 FMLA Ltr., 1999 WL

1002428, at *2 (January 12, 1999) ("If the employee had 45 days without a recordable [absence] at the time the unpaid FMLA leave commenced, the employer would be obligated to restore the employee to this number of days credited without an [absence])." See also 2018 FMLA Ltr., 2018 WL 4678694, at *2 (August 28, 2018). BNSF ignores the DOL position.

Hedging its bets, BNSF argues that the FMLA is only "one detail" of the Hi Viz policy and does not affect other sections. That is false. The DOL prohibits employers from discouraging the use of FMLA, and that is why the breaking of good service credit is a violation. BNSF's policy will thus discourage engineers from taking FMLA, fostering them to work sick during a pandemic. They may exacerbate their condition too – impacting the use of other leaves or lay off.

Lastly, like the policy in *Dyer, supra,* the Hi Viz policy discriminates against the use of FMLA because it exempts favored military leave from breaking the good attendance credit but punishes FMLA for this reason. On its face, it is discrimination prohibited by FMLA regulation. 29 C.F.R. § 825.220(a)(1). FMLA regulations prohibit employers from "discriminating or retaliating against an employee … for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). Employers, therefore, cannot consider "FMLA leave as a negative factor in employment actions" and must provide an employee who takes FMLA leave with the same benefits that "an employee on leave without pay would otherwise be entitled to [receive]." *Id.* The removal of attendance points is just such a proscribed FMLA "employment benefit" which cannot be taken away because of the use of FMLA. *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 752 (7th Cir. 2010).

Because BNSF has no arguable basis to claim it was privileged to break the law and enact a completely, facially illegal FMLA policy under the CBA, this is assuredly a major dispute that requires the policy to be immediately enjoined.

IV. BNSF BREACHED THE STATUS QUO BY IMPLEMENTING MAJOR DISPUTE ISSUES FROM SECTION 6 BARGAINING

Management cannot seek to change terms in Section 6 negotiations and then failing to obtain such terms, impose them during Section 6 negotiations. *See Wheeling & Lake Erie Ry. Co.* 789 F.3d 681, 691 (6th Cir. 2015) ("*Wheeling*"). Here, the Company did just that with respect to attendance. (*BLET VC* ¶ 8).

In *Wheeling*, the labor agreement stated that "all assignments (regular or extra) shall consist of not less than one (1) conductor." However, the railroad took the position that it could man the trains with crews having no conductor but instead using a management official. The Sixth Circuit rejected the railroad's argument of a past practice contrary to the express language and held that the case posed a major dispute:

> We conclude that BLET has the better argument. The scope rule of the Trainmen Agreement expressly requires the Railroad to assign a union conductor to every train. *See St. Louis Sw. Ry. Co. v. Bhd. of R.R. Signalmen*, 665 F.2d 987, 992 (10th Cir.1981) ("The agreement purports to cover all of the work of the employees and apparently leaves no room for unilaterally contracting out some of the work."). To adopt the Railroad's position would undercut the clear language of the crew consist rule—which was expressly bargained by the parties years ago—without requiring the Railroad to complete the Section 6 negotiations through which the Railroad was seeking to remove the crew consist rule from the Trainmen Agreement. *By serving a Section 6 notice on the union in 2003, the Railroad acknowledged the RLA requirement that it negotiate with the union if it wishes to revise or remove the crew consist provision from the Trainmen Agreement.* Disputes about the making of collective bargaining agreements are major disputes. *Burley*, 325 U.S. at 722–24, 65 S.Ct. 1282. *BLET characterized the issue as a major dispute in all of its written communications with Railroad officials and, importantly, the Railroad and BLET addressed the issue by following the RLA's procedures for negotiating a major dispute.* See 45 U.S.C. § 156. *When their private negotiations over the crew consist rule failed, they engaged in mediation with a NMB mediator. When that was not successful, BLET asked the NMB to encourage the Railroad to participate voluntarily in arbitration, but the Railroad refused.*

Id. at 693 (emphasis added).

Here, as acknowledged by BNSF, as in *Wheeling*, it served a Section 6 notice on the BLET seeking to make such changes, acknowledging the RLA requirement that it negotiate with the union if it wishes to revise or remove them. (*Pierce Dec.* ¶¶ 10-11). Likewise, BLET characterized the issue as a major dispute in all of its written communications with railroad officials and, importantly, the railroad and BLET addressed the issue by following the RLA's procedures for negotiating a major dispute. (*Pierce Dec.* ¶ 26). Moreover, when their private negotiations over them failed, BNSF simply imposed its policy. *(Id.* ¶¶) 10, 11*).*

As in *Wheeling*, BNSF breached the status quo as to clear, express language. It thus must be enjoined from further application of the policy and the status quo should be restored. *Id*. at 697.

V. THE BALANCE OF HARMS FAVORS BLET, AS BNSF'S RACE FOR PROFITS DOES NOT OUTWEIGH THE NEEDS OF THE NATION IN A PANDEMIC

Lastly, it is indeed ironic again that BNSF latches on to the supply chain crisis to bolster its argument that the public interest is served by allowing it to enact this egregious and illegal policy. In fact, BNSF has furloughed several thousand workers as part of its Precision Scheduled Railroading initiative – in the midst of the "crisis." (*Pierce Dec.* ¶ 23) (*Cunningham Dec.* ¶ 11). That is, it has sent needed engineers and conductors who could help stem the manning issues today to the unemployment line. Instead, to "remain competitive" it insists it must take harsh action on availability with the remaining employees – disciplining them for time off in the middle of a pandemic. *(Id.)* Again, while it wants a short-term *comparative advantage by virtue of this policy*, economic necessity is no warrant for a breach of the status quo. As eloquently put in *Int'l Bhd. of Teamsters v. Kalitta Air, LLC,* 2015 WL 6561715 (E.D. Mich. Oct. 30, 2015):

> … That outside economic forces may incite Kalitta to alter the CBA by raising the pay for new hires does not alter the balance of interests. In fact, those forces

> apparently were contemplated by Congress when it enacted the RLA. As the Sixth Circuit explained, "[b]ecause one party may wish to change the status quo without undue delay, the power granted in the RLA to the other party 'to preserve the status quo for a prolonged period' encourages the moving party to compromise and reach agreement without interrupting commerce." *Ibid.* Permitting unilateral self help in contravention of a specific provision of the CBA — whose terms are presently the subject of negotiations — would be a course "sharply at variance with the overall design and purpose of the Railway Labor Act." *Detroit & T.S.L.R. Co.*, 396 U.S. at 148.

The public interest is not based on an achievement of BSNF's planned competitive business goals or its profit margin, as it implies. It is no wonder that BNSF has failed to mention the human toll on its employees and families that its illegal, draconian policy will inflict. (*Pierce Dec.* ¶ 25) (*Cunningham Dec.* ¶¶ 19-29, 31). Moreover, the public interest is served by preventing BNSF from enacting a policy in direct contravention of the FMLA. In the final analysis, this Court is a court of equity. In this instance, the Court should deny BNSF further injunctive relief and award the injunctive relief prayed for by BLET.

CONCLUSION

Accordingly, for all the foregoing reasons set forth herein, the BLET respectfully requests that the Court deny BNSF's motion for a preliminary injunction and grant the BLET's motion for a preliminary injunction and enjoin BNSF from implementing its Hi Viz policy.

Dated: February 7, 2022

Respectfully submitted,

/s/ James Petroff

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing document(s) with the Clerk of the Court using the ECF System, which will provide electronic notice and copies of such filing to the parties.

/s/ James Petroff