IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BNSF RAILWAY COMPANY, Plaintiff, v. INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, Defendants.	§ § § § § § § § § § § § § § §	Civil Action No. 4:22-CV-00052-P

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

As this Court has observed, it often seems as though railroads and labor unions cannot agree about anything. Labor disputes in this industry are distressingly common and vitriolic. The dispute in this case – about the High Visibility Attendance Program ("Hi Viz" or the "Program") announced by BNSF Railway Company ("BNSF") – is a quintessential example, and the latest in a long string of highly contested disagreements about attendance standards. The defendant Unions (BLET and SMART-TD) (collectively, the "Unions") have referred to the new Program in highly incendiary terms, calling it the "worse and most egregious attendance policy ever adopted by any rail carrier." *SMART-TD and BLET rail unions initiate steps to strike BNSF properties*, Jan. 13, 2022, available at https://www.ble-t.org/pr/news/newsflash.asp?id=13515.

The good news is that there are well-established mechanisms for resolving these kinds of disputes. As outlined in BNSF's Memorandum in Support of its recent Motion for a Temporary Restraining Order (ECF No. 7), the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, provides for mandatory and binding arbitration over exactly this sort of matter. *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 303-04, 312 (1989) ("*Conrail*"). If the Unions are correct that Hi Viz is unreasonable or runs afoul of specific contract rights, they can obtain full and complete relief on the employees' behalf, including back pay. Likewise, an arbitrator can also address the Unions' related claims about "union business" lay-offs; if the Program is unreasonable in that respect, an arbitrator can order BNSF to suspend or revise those provisions. There are also separate statutory remedies for employees able to establish a violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, including, in unusual circumstances, injunctive relief. 29 U.S.C. § 2617(a)(1)(B). These procedures are more-than adequate to resolve even this sort of highly contentious dispute between railroads and their unionized employees.

But the one thing that Unions *cannot* do to force a resolution is threaten a strike. As the Supreme Court explained in *Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957), strikes would, as a practical matter, circumvent the RLA's mandatory and exclusive statutory procedures for dispute resolution. *Id.* at 39-41; *see also Louisville & N. R. Co. v. Brown*, 252 F.2d 149, 153 (5th Cir. 1958) ("[I]t would completely frustrate the jurisdiction and authority of the board . . . if the economic pressure of a strike could be brought to bear to compel a favorable decision"). And so long as the dispute implicates agreement interpretation, a railroad has a right to proceed with its interpretation, absent compelling proof that the arbitration panel would be unable to provide a remedy. *Conrail*, 491 U.S. at 307. Thus, the correct approach here is to enjoin strikes and require the parties to utilize the available arbitral (and/or statutory) procedures for settling their competing claims.

As this Court recognized in its recent grant of a temporary restraining order (ECF No. 30), the propriety of a strike injunction does not turn on whether the disputed Program is good or bad policy, but on whether the parties' dispute should be characterized as "major" or "minor" under the RLA. *Id.* That inquiry, as this Court further noted, depends on whether BNSF's proffered interpretation of the parties' agreements is "arguably justified." *Id.* (quoting *Conrail*, 491 U.S. at 307). In BNSF's earlier Motion, we outlined the extensive case law governing the application of that standard. ECF No. 7 at 9-13. We explained that BNSF has a long past practice of setting and modifying attendance standards, and that its implied rights in this regard have been upheld in arbitration. *Id.* at 13-16. Those factors, standing alone, establish that BNSF has *at least* an "arguable" right to proceed. We also showed that the balance of harms and the public interest support an injunction, especially when the Unions can obtain a full remedy if they prevail, whereas BNSF can never recover its losses if forced to delay implementation. *Id.* at 20-21.

Exactly the same legal standards and analysis applies at the preliminary injunction phase. As this Court has noted, the standards for a TRO and a preliminary injunction are "the same." *See Greer's Ranch Cafe v. Guzman*, 540 F. Supp. 3d 638, 644-45 (N.D. Tex. 2021). However, to avoid repeating everything BNSF has already argued in its earlier Motion, we respectfully refer the Court to the portions of BNSF's brief referenced above, and, in the Argument below, focus on addressing the Unions' contentions – including with respect to union business layoffs and the FMLA – regarding the major-minor inquiry, as well as briefly addressing the (mostly derivative) issue of the balance of harms.

* * * *

It is worth emphasizing that a strike injunction does *not* preclude the Unions – or the employees they represent – from asserting any claims. BNSF has affirmatively offered to arbitrate, and while the Unions have not replied, they can initiate that process at any time. ECF No. 8 at 161-162; *see also* 45 U.S.C. § 153. Furthermore, by filing counterclaims under the RLA, *see* ECF Nos. 35 & 38, the Unions have now tacitly acknowledged that they can obtain a ruling on their various objections without a strike.[1] So the immediate question before the Court is not whether the merits of these disputes will be decided, but just where and how. Extending the current TRO to a preliminary injunction will have the salutary effect of channeling these disputes into the usual peaceable resolution procedures, thereby avoiding the risk of rail strikes, which President Truman once called a "nationwide tragedy, with worldwide repercussions." Statement by the President Upon Issuing Order Averting a Railroad Strike, May 10, 1948, available at https://www.trumanlibrary.gov/library/public-papers/95/statement-president-upon-issuing-order-averting-railroad-strike.

[1] As discussed below, the Unions cannot bring claims under the FMLA in their own right, but the employees they represent are free to do so. *See infra* at 16-17.

SUPPLEMENTAL STATEMENT OF FACTS

In its Appendix in support of the Motion for a Temporary Restraining Order, BNSF sets out the relevant facts in two declarations and a series of supporting exhibits. *See generally* ECF No. 8. For the most part, those facts are the same, and so we will not repeat them here. Additional facts in support of the pending Motion are provided in the attached Supplemental Appendix ("Suppl. App."), and include the following:

(1) Under BNSF's staffing models, employee availability is critical to train operations. Supp. App. 1-2 at ¶¶ 3-7. Absenteeism has been a serious problem. *Id.* 6 at ¶ 12.

(2) Contrary to the Unions' assertions, train service employees enjoy substantial time off, and there is no empirical proof that they are over-worked. *Id.* 4-6, 8 at ¶¶ 9-10, 20.

(3) The new Hi Viz attendance rules treats all similar forms of unpaid leave, including FMLA leave, the same. *Id.* 9-11 at ¶¶ 23-29.

(4) Hi Viz does not punish employees for marking off for union business. Nor is there any reason to believe that handling of the "Good Attendance Credit" will interfere with union representation. Hi Viz does not apply at all to full-time union officers. Moreover, there are 1,300 additional BNSF employees available to handle union business, and who routinely cover for each other and/or reschedule duties as necessary, meaning that it is pure speculation that there will be any impact at all. *Id.* 11-13 at ¶¶ 30-37.

(5) BNSF's existing attendance rules do not provide a buffer for paid leave or otherwise guarantee that employees will not be called to work prior to a paid leave period, and Hi Viz does not change that approach. *Id.* 13-14 at ¶ 38.

(6) BNSF would be seriously harmed by any delay or interruption in the implementation of Hi Viz. *Id.* 26 at ¶ 3 (Garland Decl.). Current levels of employee availability are degrading BNSF's ability to operate trains in a timely manner. *Id.* 27-28 at ¶¶ 4-7.

ARGUMENT

The strikes threatened by the Unions should be enjoined. In Part A below, we discuss in why BNSF's position is "arguable" under *Conrail*. First, we note that the Unions do not contest the existence of BNSF's past practice of modifying attendance standards, and therefore cannot plausibly deny that BNSF has a solid basis for its contractual position. Second, we address the "union business" issue and explain that neither the Unions' cited agreements nor the RLA's anti-interference provisions undercut the conclusion that this dispute is minor. Third, we respond to the other agreement provisions cited by the Unions, showing that BNSF has a non-frivolous position that each such provision is consistent with the Hi Viz Program. Fourth, we rebut the Unions' claim that there is any violation of the FMLA and show that, regardless, that issue is not relevant here. Fifth, we provide a further response to the Unions' continued reliance on the fact that attendance is one of the subjects of ongoing bargaining. Finally, in Part B, we confirm, as this Court has already found, that the balance of harms and the public interest continue to support injunctive relief.

I. BNSF IS LIKELY TO PREVAIL ON THE MERITS.

A. The Unions Have No Rebuttal to BNSF's Past Practice Evidence.

As BNSF has shown, the railroad has a long and well-established practice of unilaterally altering attendance standards, consistent with its implied managerial rights. ECF No. 7 at 13-17; *see also Burlington N.& S.F. v. BLET*, No. 4:99-cv-675-Y (N.D. Tex. 1999) ("BNSF and its predecessors have a history of implementing policies regarding availability for work, attendance, and absenteeism . . . for at least twenty years."). That past practice evidence establishes that BNSF has an "arguable" position. *See BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transportation Workers – Transportation Div.*, No. 4:21-CV-0432-P, 2022 WL 138518, at *6 (N.D. Tex. Jan. 14, 2022).

The Unions essentially ignore this past practice evidence. They do not deny that BNSF has, in fact, repeatedly modified attendance standards over the years. Nor do they offer any competing historical narrative to suggest that BNSF has, at any point, surrendered its implied contract rights to adjust attendance rules. In these circumstances – where the existence of a past practice is not contested – the dispute is invariably minor. *See, e.g.*, *Conrail*, 491 U.S. at 312, 317 (noting that "essential facts" of past practice are undisputed and that whether such practices are sufficient to justify the carrier's position is a question for arbitration). In a similar case, the Seventh Circuit noted:

> [T[he Union does not dispute that historically the Railroad has made changes to the practices covered by the parties' agreement. At oral argument, counsel for the Union conceded that Phillips' declaration accurately represented that pertinent fact. The Railroad's declaration is enough to show that its position is not frivolous, though it may or may not prevail. Wading through the competing declarations to determine the actual authority the Railroad had to modify the disciplinary policies, based on past practices, is a job for the arbitrator.

Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm. of Adjustment, Ctr. Region) v. Union Pac. R.R. Co., 879 F.3d 754, 759 (7th Cir. 2017). The same is true here.

To be sure, SMART-TD argues that BNSF cannot rely on an implied "managerial prerogative," suggesting that similar arguments by other railroads have been rejected. ECF No. 22 at 11-12. However, that goes to BNSF's alternative argument that *even if* it lacked a specific past practice of modifying attendance standards, it would still be able to rely on its reserved management rights. *See* ECF No. 7 at 16. Moreover, SMART-TD's argument ignores that, unlike in other cases, BNSF can point to arbitral authority involving these same parties and expressly confirming its broad managerial rights to manage attendance. *See, e.g.*, ECF No. 8 at 58 (arbitration award "recogniz[ing]" that BNSF "retains certain rights unless those rights are specifically waived or modified in the terms of a [CBA]," including the "right to manage employees' attendance").

B. It is Arguable That Hi Viz Does Not Conflict With Agreements Respecting "Union Business."

In BNSF's earlier brief, we explained that the new attendance policy does not penalize local union officers who "mark off" for legitimate union business purposes, such as attending a disciplinary investigation. ECF No. 7 at 19; ECF No. 8 at 167. Nevertheless, the Unions contend that Hi Viz conflicts with CBAs providing that absences for legitimate union business purposes "will not be considered as laying off or missing a call." ECF No. 20 at 4. The Unions assert that BNSF's position is frivolous because "the Hi Viz policy does treat Union officials in such situations as being absent from work . . . ." *Id.*; *see also* ECF No. 22 at 14.

However, as discussed at the TRO hearing, the only evidence in the record is that Hi Viz does *not* assess points when a BNSF employee lays off for union business. ECF No. 8 at 167 (Macedonio Declaration ¶ 15) ("employees do not lose points when they are unavailable due to legitimate union business"). There should be no fact dispute on this point, but if there is, BNSF's position is at least arguably justified based on its unqualified representation to the Court that a layoff for union business is not penalized as an "absence from work."

Perhaps realizing that their "penalty" argument is factually unsupportable, the Unions go on to contend that Hi Viz conflicts with the CBAs because employees do not qualify for the Good Attendance Credit when they layoff for union business. ECF No. 20 at 4. But their argument is unsustainable under the agreements' plain language, which provides that employees out on union business cannot be considered as "laying off or missing a call *for purposes of Rule 23 and 24*." ECF No. 21 at 21 (emphasis added). The cross-referenced rules concern procedures for calling engineers into work, and thus the relevant provisions are merely saying that employees on union business will not lose their place in line when they mark back up and are ready to staff a train.

Nothing in the cited provisions says that BNSF must treat time spent on union business as equivalent to performing regular service. Nor do these provisions otherwise specify how any time spent on union business must be considered for purposes of earning attendance credits or bonuses. In other words, while the CBAs may prohibit *penalizing* union business mark-offs, they at least arguably do not require the railroad to *reward* union business mark-offs with credits toward good attendance. As BNSF's witness notes, "[t]here is a clear and obvious distinction between treating a day marked off on union business as an absence (prohibited) and treating such a day as something other than a regular work day (allowed)." Supp. App. 12 at ¶ 34.

The Unions also cite to agreement provisions allowing for union representation in employee disciplinary proceedings. ECF No. 20 at 4-5; ECF No. 22 at 14-15. They cannot, of course, plausibly contend that Hi Viz *directly* restricts these rights – the Program obviously says nothing about union representation. So instead they rely on the notion that Hi Viz will have an *indirect* chilling effect on representation, making union officers less likely to assist members for fear of running afoul of attendance protocols. *Id.*

For several reasons, it is at least arguable that the Unions are wrong. *First*, any chilling effect theory is predicated on the idea that "working" local officers will be unable to earn the Good Attendance Credit in the normal course of their union duties. But employees did not have *any* attendance credit opportunities under the prior system, and there is no evidence that those attendance standards affected the willingness or ability of local officers to perform their union duties. ECF No. 8 at 166-67 (Macedonio Declaration ¶ 13). *Second*, there is no reason to assume that a local union officer who is seeking a Good Attendance Credit would be unable to do so. There are more than 1,300 BNSF train service employees who use union business mark-off codes. Supp. App. 11 at ¶ 30. If a particular employee wants to remain available for work, he can simply ask a colleague to cover any union business duties. *Id*. 13 at ¶ 36.

Third, enforcement of union business deadlines are very flexible. In fact, "BNSF's labor relations officials routinely grant union requests for deadline adjustments." *Id*. An employee can simply request that BNSF adjust deadlines if he wants to earn a Good Attendance Credit. *Id.* 12-13 at ¶ 35. So while "all discipline decisions are tailored to the individual facts," it is "highly doubtful" that BNSF would "hold an employee accountable under Hi Viz where the sole reason the employee stood for discipline was legitimate use of [union business] code layoffs and the employee had also made the attempts described above to work around [union business]/Good Attendance Credits conflicts." *Id.* 13 at ¶ 36.

For all of these reasons, it is rank speculation to claim that the new Program will undermine the Unions' ability to serve their members. That is especially so when the only empirical evidence in the record shows that the heaviest users of union business markoffs in the recent past would not even have come close to risking discipline under the Hi Viz metrics. ECF No. 8 at 168, 189.

Nevertheless, the Unions assert that the impact on union business will be so severe that the Hi Viz policy "strikes a fundamental blow" against the Unions and therefore violates the protections of Section 2 Third and Fourth of the RLA, 45 U.S.C. §§ 152 Third, 152 Fourth. ECF No. 22 at 15 (quoting *Dempsey v. Atchison, T. & S.F. Ry*., 16 F.3d 832, 841 (7th Cir. 1994)). But that assertion necessarily implicates the disputed issues of contract interpretation outlined above, as well as the related question of whether the Program is a "reasonable" attendance rule as applied to working union officers. *See* ECF No. 8 at 58 (arbitration award applying reasonableness standard). As BNSF has noted, courts do not let unions side-step the *Conrail* test by just re-characterizing a dispute as a "statutory" matter. ECF No. 7 at 17. If the carrier's position is arguable, then the Unions cannot strike, even if they are pursuing a separate claim under Sections 2 Third and Fourth.

C. It Is Arguable That Hi Viz Does Not Contradict Agreements on "Reasonable Layoff" Privileges.

Next, BLET argues that Hi Viz conflicts with CBA rules allowing for "reasonable lay off privileges." ECF No. 20 at 5. More specifically, it claims that the Program will result in a "shock[ing]" reduction in days off, and therefore "utterly repudiates" the right to reasonable layoffs.

That is not so, for several reasons. First, BNSF denies that BLET is accurately characterizing the way the Program works. Supp. App. 8 at ¶ 20.[2] Second, the rule in question actually says that BNSF "shall maintain a sufficient number of engineers to permit reasonable lay off privileges . . . ." ECF No. 21 at 47. There is no evidence that BNSF has failed to do so, and whether it has depends at least in part on what is "reasonable" in this context, which, as noted above, is exactly the question that an arbitrator must address. ECF No. 8 at 58. Third, and in any event, BNSF has already prevailed on this point in arbitration. In 2010, BLET filed a claim challenging BNSF's then-existing attendance policy. The Union argued, among other things, that the policy violated this same 1994 CBA provision regarding "reasonable lay off privileges." Supp. App. 32-33 (*BLET v. BNSF*, Award No. 27028, NRAB First Div. (Kohn, Arb.) (March 5, 2010)). The arbitrator rejected that argument, explaining that the "Carrier has the right 'to manage employees attendance,'" and that "[t]he Organization's assertion that the Carrier failed to maintain a sufficient number of Engineers so as to permit reasonable layoff privileges has not been demonstrated in this record." *Id.* at 35. It is hardly "frivolous" for BNSF to contend that the same reasoning will apply to any challenge to Hi Viz.

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[2] *See also* Supp. App. 28 at ¶ 9 (Declaration of Matthew Garland). As Mr. Garland explains, the average BNSF road employee has 24 hours of time at home between trips and 32 days of paid vacation per year. *Id.* And the average terminal employee has at least 12 hours of time at home between shifts, 2 days of scheduled rest per week, and 28 days of paid vacation per year. *Id.* BNSF expects that "[b]y increasing availability and reducing the number of employees who take excessive unplanned time off, BNSF employees overall should have more time at home with their families because they will be called upon to cover shifts or travel less." *Id.*

D. It Is Arguable That Hi Viz Does Not Conflict With Displacement Rights.

Next, BLET argues that BNSF's new Program "repudiates" CBA provisions that give employees 24 hours to select a new position when displaced or "bumped" by a more senior employee. ECF No. 20 at 6-7. BLET complains that if an engineer takes a full 24-hour period to select a new assignment, BNSF "penalizes" the employees by resetting the 14-day period in which to earn a Good Attendance Credit. *Id.* at 7.

However, BLET fails to mention that the Unions have repeatedly lost on this point in arbitration. The governing rule in the industry is that contractual displacement rights do *not* preclude a railroad from applying its normal attendance rules if an employee delays in exercising those rights. For example, one arbitrator has explained the rule as follows:

> As the Carrier argued, 'negotiated limitations on time in displaced status have no connection with employee accountability for attendance.' The Board thus concurs with the Carrier's position that ***employees who fail to make themselves available by delaying their exercises of seniority*** when junior employees are available for displacement ***may subject themselves to scrutiny under the Availability Policy***."

Supp. App. 39 (*UTU v. CSXT*, PLB 6823, Award No. 36 (Ross, Arb.) (Jan. 23, 2007) (emphasis added)). *See also, e.g., id.* 45-46 (*UTU v. Union Pacific*, PLB 6753, Award No. 27 (Binau, Arb.) (June 24, 2005)); *see also, e.g., id.* 42-44 (*BLET v. Norfolk Southern*, PLB 7717, Award No. 48 (Simon, Arb.) (Feb. 21, 2017). (Additional awards are also provided in the Supplemental Appendix.) The language of the BNSF agreements is functionally identical, and so here again, it cannot be frivolous for BNSF to contend that it will prevail on this issue.

Moreover, the Unions' argument again rests on the false premise that failing to achieve a Good Attendance Credit is a penalty. Employees are not punished when they fail to obtain extra-credit. And nothing in the cited CBA language provides that an engineer utilizing the full 24-hour period to select a new assignment should be treated the same as someone who is working for purposes of attaining extra-credit.

E. It Is Arguable That Hi Viz Does Not Conflict With Paid Leave Rights.

BLET also argues that the new BNSF attendance rules "repudiate" and interfere with employees' contractual rights to take paid leave, including vacation and personal leave. ECF No. 20 at 7-8. The Union does not, of course, try to argue that the Program punishes use of authorized paid leave; it is well aware that employees do not lose any points when they exercise those leave rights. *See* ECF No. 8 at 176. Instead, the Union asserts that a problem could arise if an employee is called to work *before* a paid leave begins, noting that an employee might wish to decline an assignment that could extend into a period of paid leave, but might lose points for doing so. ECF No. 20 at 8.

As explained by BNSF's witness, the issue that BLET identifies is nothing new, but rather is exactly how the attendance system has worked for many years. He testifies as follows:

> Any Union suggestion that train-service vacations, once scheduled, are not subject to movement or modification is simply incorrect. Under the current ATG, if a train-service employee is called to work the day before a vacation day and that trip would extend into the scheduled vacation, the employee is still expected to staff that train. If they do not, that missed call or lay off is subject to outcomes under the current ATG (for example, if the employee either lays off to ensure their vacation starts as originally scheduled or if they intentionally miss the call they may be subject to discipline). Moreover, BNSF has for decades had the power to modify vacations based on the railroad's "needs of service." And BNSF has invoked that right to cancel or modify vacations as required to ensure that trains are staffed. In such situations, employees are either able to reschedule the vacation or are paid for the time if those vacation days are not used in the calendar year.

Supp. App. 13-14 ¶ 38.

Given this past practice, it cannot be frivolous for BNSF to contend that continuing to apply these rules under Hi Viz is permissible. And any claim by the Unions that Hi Viz will be more restrictive or cause more problems with respect to paid time off is, at this point, entirely speculative.

F. The FMLA Does Not Bar a Strike Injunction.

After running through their list of alleged contract violations, the Unions turn to the FMLA. *See* ECF No. 20 at 11; ECF No. 22 at 15. They contend that Hi Viz is an "illegal policy" under the FMLA because of the way it calculates the period for earning a Good Attendance Credit. ECF No. 20 at 13. From there, they leap to the conclusion that an alleged violation of a separate federal law is sufficient to show that the parties are engaged in a "major dispute." *Id.* Again, the Unions are wrong in multiple respects.

1. The Major-Minor Inquiry Does Not Turn on the Presence or Validity of a Separate Statutory Claim.

As a threshold matter, an asserted FMLA violation is not determinative of – or even relevant to – whether a dispute is "major" or "minor" under the RLA. It is important to keep in mind that the whole point of the major-minor inquiry is to distinguish between contract interpretation and contract repudiation. As the Supreme Court explained in *Conrail*, this is an exercise in distinguishing between, on the one hand, disputes over "the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case," and, on the other hand, attempts to circumvent the prohibitions of Section 2 Seventh of the RLA, which bars a "unilateral imposition of new contract terms." 491 U.S. at 304-06. But regardless of whether the answer is interpretation or repudiation, the inquiry is about the *contract*, i.e., the parties' labor agreement. It has nothing to do with the parties' rights or obligations under other laws or regulations. That is why the Supreme Court's articulation of the legal test focuses solely on *contract* rights: "Where an employer asserts a *contractual* right to take the contested action, the ensuing dispute is minor if the action is arguably justified by *the terms of the parties' collective-bargaining agreement*." *Id.* at 307 (emphasis added); *see also, e.g.*, *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal*, 2022 WL 138518 at *5 (N.D. Tex. 2022) (same).

So far as BNSF is aware, no federal court has ever considered extrinsic statutory claims when analyzing whether a dispute is major or minor. Nor have the Unions cited such a case. Indeed, to the extent any similar arguments have come up in previous litigation, courts have dismissed such assertions as beside the point of the *Conrail* test. For example, in *Brotherhood of Maint. of Way Employes Div. v. BNSF Ry.*, 834 F.3d 1071 (9th Cir. 2016), the railroad and the union were engaged in a dispute over employee discipline. The union argued that the major-minor inquiry was inapplicable because the case was properly viewed as a "statutory" question of retaliation. *Id.* at 1077. The court disagreed, noting that because the railroad had asserted "a "contractual right to take the contested action," the dispute "fits squarely within the major/minor framework from the RLA and *ConRail*." *Id.* The court further noted that under the union's theory, an "invocation of any statutory argument supporting its strike, regardless of its strength, would shake off the burdens of *ConRail* and make its strike lawful and unenjoinable. Such a reading of *ConRail* is untenable." *Id.*

Moreover, the Unions' theory – that their FMLA claim means this dispute is "major" – is inconsistent with another line of authority holding that, in most circumstances, there is no overlap between the RLA and a separate statutory cause of action. More specifically, as BNSF explained in its recent reply brief, it is well-settled that most non-RLA claims do not require contract interpretation. ECF No. 24 at 4 (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994)). That includes claims under the FMLA. *See* ECF No. 24 at 4 (citing cases). In fact, SMART-TD makes a similar point in its own brief, arguing that any FMLA issue is separate from any disputed question of contract. ECF No. 22 at 16-17. If, as the Unions themselves admit, any FMLA claim is "independent" of the RLA, then by definition the RLA major-minor inquiry is "independent" of the FMLA. Hence, the Court does not need to decide whether the Program violates the FMLA in order to issue a preliminary injunction.

2. Hi Viz Does Not Penalize Employees for Taking FMLA Leave.

Even if an alleged FMLA violation were relevant to the major-minor inquiry, BNSF has at least an arguable basis for its position that Hi Viz does not contravene the FMLA. Again, this was addressed in BNSF's recent reply brief. *See* ECF No. 24 at 1-3. To summarize, the Hi Viz Program does not treat FMLA leaves any less favorably than comparable forms of unpaid leave with respect to the Good Attendance Credit. Supp. App. 10-11 at ¶ 29. Therefore, under Department of Labor regulations and the weight of case law, the Program is lawful. 29 C.F.R. § 825.215(c)(2) (2009); *see also, e.g.*, *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 752 (7th Cir. 2010).

The Sixth Circuit's decision in *Dyer v. Ventra Sandusky, LLC*, 934 F.3d 472 (6th Cir. 2019), cannot carry the weight that the Unions place on it, for several reasons. First, the policy in that case allegedly treated FMLA worse than comparable forms of leave. *Id.* at 474. That is not true here. Supp. App. 9 at ¶ 23. Second, *Dyer* does not hold, as the Unions suggest, that it is a *per se* violation of the FMLA to reset a "good attendance" period when an employee returns from FMLA leave. Rather, the court said it was a jury question whether such a policy interfered with FMLA rights. 934 F.3d at 478. Third, to the extent that *Dyer* did suggest that an employer must pause a good attendance period when an employee takes FMLA leave, it lacks any textual basis in the FMLA for doing so. The statute prohibits "loss of any employment benefit *accrued* prior to the date the leave commenced." 29 U.S.C. § 2614(a)(2) (emphasis added). Under a policy like BNSF's, no benefit "accrue[s]" until after 14 days, so there is no "loss" of benefits when an employee returns from leave. The contrary view requires an employer to treat FMLA leave *better* than other unpaid leave, which is inconsistent with the regulations and case law referenced above. That may be why no court outside of the Sixth Circuit has followed *Dyer*'s reasoning.

3. The FMLA Issue Concerns Only One Detail of the Hi Viz Program

But even if BNSF was wrong about the meaning of the FMLA, it would still not be the case that the Unions are entitled to strike. On its face, the Unions' FMLA objection concerns only one relatively minor detail in the Hi Viz Program: whether there is a reset or pause in the 14 day period for earning a Good Attendance Credit if an employee is eligible for and takes FMLA. Most elements of the Program – the calculation of points, the consideration of "high impact" days, and so on – are unaffected.

In fact, it is unclear whether or when the particular scenario the Union posits might arise. To become a live issue, there would need to be an employee who (1) is eligible and approved for FMLA leave, (2) is repeatedly absent from work for reasons other than the FMLA or other approved leave, (3) runs low on points, (4) therefore needs to earn a Good Attendance Credit, but then (5) takes FMLA leave during a period of otherwise perfect availability, and (6) as a result is denied the Credit. To authorize a strike over such a hypothetical scenario is, to put it mildly, disproportionate (as well as unlawful).

4. Employees, Not Unions, Can Bring Claims Under the FMLA.

If the circumstance outlined above were to occur, the affected employees would, of course, be entitled to bring claims against BNSF under the FMLA. *See* 29 U.S.C. § 2617 (providing cause of action for damages and/or equitable relief). Indeed, as alluded to above bringing an "independent" claim under the FMLA – not a strike – is the proper remedy for any asserted statutory violation of this ilk.

However, such a claim must be brought by the employees, not the Unions. The statutory text plainly authorizes only "employees" to bring suit under the FMLA. 29 U.S.C. § 2617(a)(2); *see also* 29 C.F.R. § 825.400 ("The *employee* has the choice of . . . [f]iling a private lawsuit pursuant to section 107 of . . . [the] FMLA.") (emphasis added). Labor unions are not

"employees" and so cannot bring FMLA claims individually or on behalf of their members. *See, e.g., Port Auth. Police Benevolent Assoc., Inc. v. Port Auth. of N.Y. and N.J.*, 283 F. Supp. 3d 72, 90 (S.D.N.Y. 2017) (dismissing union FMLA claim); *N.Y. Metro Area Postal Union v. Potter*, No. 00-cv-8538, 2003 WL 1701909, at *2 (S.D.N.Y. Mar. 31, 2003) (same); *Burrell v. AT&T Corp.*, 2005 WL 2656124, at *3 (S.D.N.Y. Oct. 18, 2005) ("courts have construed [the FMLA's] definition [of employee] narrowly, refusing to extend standing to unions"); *Cook v. Electrolux Home Prod., Inc.*, 353 F. Supp. 2d 1002, 1019 (N.D. Iowa 2005) (union barred from bringing FMLA suit on behalf of employee); *Local 100, Serv. Employees Int'l Union, AFL-CIO v. Integrated Health Servs.*, 96 F. Supp. 2d 537, 539 (M.D. La. 2000), *order vacated on other grounds*, 2000 WL 33948946 (M.D. La. Sept. 19, 2000). For that reason, too, the Court should reject the Unions' attempt to smuggle an FMLA claim into the *Conrail* analysis.

G. Ongoing Bargaining Does Not Convert This Case Into a Major Dispute.

As BNSF explained in the memorandum supporting its motion for a TRO, "SMART-TD has repeatedly argued in recent cases that a dispute should be viewed as 'major' instead of 'minor' because some aspect of the dispute relates to a subject being discussed by the parties in collective bargaining." ECF No. 7 at 19 & n.8 (collecting cases). Despite the fact that it has never won this point, SMART-TD is once again making the same argument here, asserting that because there are pending Section 6 notices regarding "work schedules," any dispute over attendance is automatically major. *See* ECF No. 22 at 10 ("Once § 6 Notices are exchanged, the working conditions as they exist cannot be changed until the process has been completed."). BLET offers a similar argument. ECF No. 20 at 9-11. As usual, both Unions point to cases like *Detroit & Toledo Shore Line Ry. v. UTU*, 396 U.S. 142 (1969), claiming that carriers must maintain the "status quo" as to everything while collective bargaining is ongoing. ECF No. 22 at 10; ECF No. 20 at 9.

SMART-TD's most recent defeat on this particular point was in another case involving BNSF. The court's reasoning is representative of the many rulings rejecting the Union's argument:

> The Union believes the fact that BNSF previously attempted to negotiate the change and now brings the Section 6 notice on this point is evidence this is a "major" dispute. Put another way, it is clear that when the Court finds there is a "major" dispute, the parties must proceed to mandatory bargaining and mediation. But, when a party previously put the issue to mandatory bargaining and mediation, does that also mean the issue is *per se* a "major" dispute?
>
> The Court concludes the answer is "no." It is the Court's role to determine whether the dispute is "major" or "minor," and the Court may "substitute its characterization for that of the claimant." The "[f]iling [of] a section 6 notice may kick off a major dispute; it does not transform a minor dispute into a major one." As the Court previously determined this to be a "minor" dispute, the implication is that any previously filed Section 6 notice does not transform this "minor" dispute into a "major" one.

Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. BNSF Ry. Co., 2021 WL 2709143, *7-8 (N.D. Ill. July 1, 2021) (citations omitted).

As for *Shore Line*, it is now well-settled that, under *Conrail*, the threshold question is whether the carrier has an "arguable" contractual basis for its actions. 491 U.S. at 305 n.5 (noting that the *Shore Line* "status quo" concept "has no direct application to a minor dispute"). Accordingly, prior to applying the *Conrail* test, any invocation of the "status quo" is "analytically backward." *CSX Transp., Inc. v. UTU*, 879 F.2d 990, 999 (2d Cir. 1989); *see also, e.g.*, *Flight Attendants v. Mesa Air Group*, 567 F.3d 1043 (9th Cir. 2009) ("Before a federal court can even reach the analysis in *Shore Line* – that is, before a court can decide whether something is an established practice protected by the status quo – it must find that the disagreement in the case is a major dispute."); *Teamsters v. Southwest Airlines*, 875 F.2d 1129, 1133-34 (5th Cir. 1989) (en banc) ("Once bargaining has resulted in an agreement, however, not all disputes over changes in the terms of employment are subject to a continuing duty to negotiate.").

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST CONTINUE TO SUPPORT INJUNCTIVE RELIEF AGAINST STRIKES.

For the same reasons outlined in BNSF's motion for a TRO, an injunction is in the public interest. *See* ECF No. 7 at 20-21. As the Court noted in its recent Order, the country is in the midst of a supply-chain crisis. ECF No. 30 at 2. That situation has not improved in the few days since the Court issued that Order.

Moreover, the balance of harms supports an injunction. BNSF would suffer serious and unrecoverable harm if forced to halt or delay its Program. As the railroad's witnesses explain, BNSF must move ahead with the Hi Viz policy "to remain competitive with other railroads and other modes of transportation, improve efficiency and production, move forward with related business plans, and avoid further significant economic losses that have been occurring due to train crew availability levels under the current attendance policy." Supp. App. 26 at ¶ 3. In addition, "BNSF has strategically structured its 2022 hiring and organizational plans around the implementation of Hi Viz." *Id*.

Under its current attendance policy, BNSF frequently experiences average crew availability of less than 70% on weekends. *Id.* 27 at ¶ 5. This has forced BNSF to stop numerous trains, slowing down its network and delaying shipments across the country. *Id*. By stopping trains, BNSF is impacting:

- Its intermodal network, which moves millions of shipping containers per year;
- Its energy and utility customers, who require millions of tons of coal to operate and maintain heat and power to homes across the country;
- Its chemical and plastics shippers in the Gulf of Mexico region, who manufacturers across North America rely on for plastics for packaging; and
- The Los Angeles/Long Beach Ports, which rely on BNSF to transport cargo from vessels into land transport.

Id. 27-28 at ¶ 7. "Any negative impact on the service to these customers causes a significant harm to the economy and infrastructure of our country." *Id.* It is thus critical that BNSF be permitted to implement and maintain its new attendance rules.

CONCLUSION

For the foregoing reasons, the Court should grant BNSF's motion and enter an order restraining Defendants from engaging in strikes or other forms of self-help until a final judgment can be entered in this case.

Respectfully submitted,

Dated: January 31, 2022.

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CERTIFICATE OF SERVICE

On January 31, 2022, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Russell D. Cawyer
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