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 SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendant-Counterclaim Plaintiff Brotherhood of Locomotive Engineers and Trainmen ("BLET") submits this memorandum in support of its motion for a preliminary injunction against Plaintiff-Counterclaim Defendant BNSF Railway Company ("BNSF"). BLET requests that the Court enjoin BNSF's unilateral implementation of its new Hi Viz attendance policy ("Hi Viz policy") because the policy violates the status quo, repudiates various provisions of the parties' agreements, and interferes with employees' right to designate their representatives all in violation of Sections 2 First, Third, Fourth and Seventh and Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. §§152, First, Third, Fourth and Seventh and 45 U.S.C. §156, as well as violates the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq*. The BLET further requests that, with respect to the unilateral changes to the *status quo* already made by BNSF, the Court order BNSF to restore the *status quo* and to abide by such *status quo* unless and until changed by mutual agreement with the BLET through ongoing collective bargaining pursuant to Section 6 of the RLA, 45 U.S.C. § 156.

FACTUAL BACKGROUND

BLET is the representative of the craft or class of Locomotive Engineers ("engineers") employed by BNSF. (EFC Doc. 38, *BLET Amended Verified Complaint* ("*BLET VC*") ¶ 3) BLET and BNSF are parties to multiple collective bargaining agreements ("CBAs") that govern the rates of pay, rules, and working conditions of BNSF's engineers represented by BLET. (*Id.* ¶ 6) BLET and BNSF have been engaged in negotiations over amendments to the parties' CBAs pursuant to Section 6 of the RLA since November 2019, including negotiations over issues related to attendance. (*Id*. ¶ 7, 8) Despite BNSF's obligation to maintain the *status quo* while the parties are engaged in Section 6 negotiations under the RLA, on January 10, 2022, BNSF announced that it

was unilaterally implementing new attendance standards under its Hi Viz policy to be made effective February 1, 2022. (*Id.* ¶ 10).

As detailed below, this new Hi Viz policy alters the terms and conditions of employment of engineers by repudiating and/or rendering meaningless several provisions of the parties' agreements. Specifically, the Hi Viz policy 1) penalizes Union officials for laying off work for Union business, including to represent employees, and restricts employees in choice of representatives in violation of existing CBAs (*BLET VC* ¶13-21), 2) repudiates the parties' CBA guaranteeing employees reasonable lay off privileges (*Id.* 22-25), 3) repudiates CBA language that gives employees 24 hours to select a new assignment when displaced by a senior engineer (*Id.* 26-30), and 4) repudiates employees' contractual vacation and personal day rights (*Id.* 31-33). Further, the Hi Viz policy penalizes employees for FMLA usage by restricting employees who are on FMLA leave from earning good attendance credits under the policy. (*Id.* ¶ 38-39). Since this aspect of the Hi Viz policy is patently illegal under the FMLA, this also represents a major dispute under the RLA.

Because the Hi Viz policy and its alteration to engineers' terms and conditions of employment is a violation of multiple provisions of the RLA, BLET is entitled to an injunction prohibiting BNSF's implementation of the policy.

ARGUMENT

I. THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF

Under the law of this Circuit, preliminary injunctive relief is appropriate if (1) there is a substantial likelihood that the moving party will prevail on the merits, (2) there is a substantial threat of irreparable injury, (3) the balance of harms tips in the movant's favor, and (4) the public interest supports an injunction. *See, e.g., Pendergest-Holt v. Certain Underwriters at Lloyd's of*

London, 600 F.3d 562, 568-69 (5th Cir. 2010); *Plains Cotton Co-op. Ass'n v. Goodpasture Comput. Serv., Inc.*, 807 F.2d 1256, 1259 (5th Cir. 1987).

However, in cases where a party has alleged violations of the RLA, the court need not make a finding of irreparable harm or injury and may issue a preliminary injunction to put an end to the non-moving party's actions. *See, e.g., Bhd. of Ry. Trainmen v. Central of Georgia Ry.*, 305 F.2d 605, 609 (5th Cir.1962) ("the public interest, if nothing else, would make injunctive relief appropriate if not compelled."); *see also Consol. Rail Corp.* ("*Conrail"*) *v. Ry. Lab. Executives' Ass'n*, 491 U.S. 299, 303 (1989) (holding that violations of the statutory requirements of the RLA may be enjoined without the customary showing of irreparable injury); *Wright v. Union Pac. R.R. Co.*, 990 F.3d 428, 435 (5th Cir. 2021); *Wheeling & Lake Erie Ry. Co.* 789 F.3d 681, 691 (6th Cir. 2015) (same). Moreover, the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101, *et seq.*, does not deprive this Court of jurisdiction to issue the requested injunctive relief. *See Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952).

II. BNSF'S HI VIZ POLICY REPUDIATES AND RENDERS MEANINGLESS MULTIPLE PROVISIONS OF THE PARTIES' EXISTING AGREEMENTS IN VIOLATION OF RLA, AND THUS GIVES RISE TO A MAJOR DISPUTE

The RLA establishes a dual framework for resolving "major" and "minor" disputes between management and employee representatives. Although the terms "major dispute" and "minor dispute" are not used in the RLA, they figure prominently in RLA jurisprudence. They are "drawn from the vocabulary of rail management and rail labor, as a shorthand method of describing two classes of controversy Congress had distinguished in the RLA." *Conrail*, 491 U.S. at 302. "Major disputes" relate to the formation of a collective agreement or efforts to change the terms of one. *See Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945); *Detroit & Toledo Shore Line Ry. Co.* ("*Shore Line*") *v. United Transportation Union*, 396 U.S. 142 (1969). They are predicated

on Section 2, Seventh and Section 6 of the RLA. *See Conrail*, 491 U.S. at 302. If a dispute is "major," then either party to the dispute may ask the court to issue an injunction preserving the status quo while the parties remain subject to the RLA's negotiation and mediation procedures. *See Shore Line*, 396 U.S. at 148-49 (1969); *Association of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043, 1047 (9th Cir. 2009); *Air Line Pilots Association, Int'l v. Eastern Air Lines, Inc.*, 869 F.2d. 1518, 1520 (D.C. Cir. 1989).

"Minor disputes" are the second class of RLA controversy regulated by the RLA. A "minor dispute" is one that "contemplates the existence of a collective agreement" and "relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . ." *Elgin*, 325 U.S. at 723 (1945). Minor disputes, therefore, generally result from attempts to enforce existing contractual obligations and rights. *Conrail*, 491 U.S. at 302; *Mesa Air Group*, 567 F.3d at 1047. Accordingly, "when 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. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Mesa Air Group*, 567 at 1047, *quoting Conrail*, 491 U.S. at 307.

In the instant case, there is no arguable justification under the parties' agreements that BNSF's Hi Viz policy is permissible or presents a minor dispute because, as detailed below, the policy repudiates and renders meaningless multiple provisions of the parties' existing agreements. Therefore, BNSF's attempt to alter and/or repudiate the parties' agreements outside of the RLA's negotiation framework constitutes a major dispute and BLET is entitled an injunction enjoining BNSF's illegal actions.

A. The Hi Viz Policy Penalizes Union Officials for Laying Off Work for Union Business, Including to Represent Employees, and Restricts Employees in Choice of Representatives in Violation of Existing Agreements

In at least two agreements between BLET and BNSF, Union officials are expressly permitted to lay off work (*i.e.*, to remove themselves from availability to operate a trip) in order to attend union meetings, to represent employees in disciplinary investigations, and to meet with Carrier officials to discuss claims and grievances. BLET submits the Hi Viz policy, which penalizes Union officials for laying off in such situations, repudiates those agreements. (*BLET VC* ¶ 13*)*.

In the first such agreement dated November 24, 2003, "a duly-elected local chairman, acting local chairman, local president or local secretary-treasurer of the Brotherhood of Locomotive Engineers" is permitted to "lay[] off to attend a bona-fide union meeting, represent an employe in a formal investigation, or meet with Carrier official(s) on items such as discussing time claims, grievances, and/or related schedule matters . . . ." (*Id.* ¶ 14; ECF Doc. 21 BLET Ex. 1). This agreement goes on in Section 1.2 to expressly provide, "In 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.*). The second agreement, dated January 1, 1972, in Rule 64 provides substantially similar lay off rights for Union officials and likewise provides, "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 . . . ." (*Id.*; ECF Doc. 21, BLET Ex. 2). The term "lay off" means making yourself unavailable for work and "missing a call" means the same but in relation to being called for work.

Despite the unambiguous language of these agreements that prohibit BNSF from considering a Union official who removes himself from availability for an assignment for the stipulated purposes as "laying off," the Hi Viz policy *does* treat Union officials in such situations

as being unavailable for work and denies such Union officials Good Attendance Credits when exercising their contractual right to lay off for union business or to represents employees. This penalty that is applied to Union officials for exercising their contractual right is clearly intended to and will have the effect of restricting Union officials from laying off to conduct Union business or to represent members because doing so places their own continued employment in jeopardy. By penalizing Union officials in such circumstances, BNSF Hi Viz policy renders the contractual right previously possessed by Union officials in these agreements illusory and effectively repudiates the agreements. (*BLET VC* ¶¶ 13-14).

Further, multiple agreements between the parties expressly grant employees the right to select the representative of their choice in formal disciplinary investigations that may be scheduled by the Carrier. For example, in the January 1, 1972 agreement reference above, Rule 50(c) expressly permits employees to "obtain a representative or representatives of his choice, if desired." (*BLET VC* ¶ 17; ECF Doc. 21, BLET Ex. 2). In an agreement dated February 1, 1947, in Section C. it states, "At the investigation the employe may present witnesses in his behalf and *may be assisted by his committeeman or an employ of his choice*." (*Id.* ¶ 18; ECF Doc. 21, BLET Ex. 3) (emphasis added). In an agreement dated March 1, 1981, Rule 50(A) states, employees "may arrange for representatives of their choice to assist them in the investigation." (*Id.* ¶ 19; ECF Doc. 21, BLET Ex. 4). And, in an agreement dated July 1, 2005, Article 29 makes multiple references to an employee being represented by "an Engineer of his choice," which has historically and nearly universally been a Union official. (*Id.* ¶ 20; ECF Doc. 21, BLET Ex. 5).

By applying the Hi Viz policy to Union officials and penalizing them for laying off to represent members in disciplinary investigations, BNSF has effectively repudiated employees' contractual right to their choice of Union official representative because, as explained above, such

Union officials will be unable to provide such representation where their own continued employment becomes at risk. Thus, the Hi Viz policy not only repudiated Union officials right to lay off to represent employees, but also the employee's concomitant contractual right to the representative of their choice.

Where an express provision of a CBA are altered or repudiated by a carrier prior to exhausting the mandatory, RLA dispute resolution procedures, an injunction is clearly warranted to restore the status quo pending mediation. *Wheeling,* 789 F.3d at 697; *Int'l Bhd. of Teamsters v. Kalitta Air, LLC,* 2015 WL 6561715 (E.D. Mich. Oct. 30, 2015)*; IAM v. VIASA*, 575 F. Supp. 297 (S.D. Fla 1983); *IAM v. Northwest Airlines, Inc.,* 674 F. Supp. 1387 (D. Minn. 1987). In the instant case, BNSF's Hi Viz policy repudiates the parties' CBAs entitling Union officials to lay off for union business or to represent employees by penalizing them for exercising this right, while simultaneously rendering employees' contractual right to the representative of their choice meaningless if such representative may only appear to represent the employee at the risk of their own continued employment. Thus, implementation of the Hi Viz policy constitutes a major dispute with regard to the right of Union officials to lay off, and BNSF should be enjoined from it outside of reaching agreement with the BLET through the RLA's major dispute process.

B. The Hi Viz Policy Repudiates the Parties' Agreement Guaranteeing Employees Reasonable Lay Off Privileges.

In an agreement dated April 4, 1994, dealing with engineer extra board assignment, in Section 1(a), the parties expressly agreed that "[t]he Carrier shall maintain a sufficient number of engineers to permit reasonable lay off privileges and to protect the service including vacations and other extended vacancies." (*BLET VC* ¶ 22; ECF Doc. 21, BLET Ex. 6). "Reasonable lay off privileges" are tied to attendance and the policies implemented by the Carrier related to such. (*Id.*). Thus, in order for any given attendance policy to be consistent with the parties' April 4, 1994

agreement, it must not be so restrictive or harsh so as to deny employees' reasonable lay off privileges. The draconian Hi Viz policy, however, does just that and any arguments that the Hi Viz policy permits reasonable lay off privileges is obviously insubstantial.

The change in the number of days employees in 7-day a week, un-assigned service (*i.e.*, scheduled 7-days a week, 24-hours per day unless they have laid off or are on paid leave) may be off in any given year from the prior BNSF attendance policy is outrageous, shocks the conscience and in no way can be considered to allow maintenance of reasonable lay off privileges. This is because employees in 7-day a week, un-assigned service prior to implementation of the Hi Viz policy are permitted to lay off or be absent, outside of contractual paid leave (e.g., vacation or personal days) up to 24 weekend days and 60 weekday days per year. Once the Hi Viz policy is put into effect, however, by the BLET's calculation, those same employees will be reduced to be off only 7 weekend days and 15 weekday days per year without placing their employment in jeopardy. In other words, through BNSF's Hi Viz policy employees in 7-day a week, un-assigned service will suffer a reduction in days that an employee may lay off from 84 (24 weekend plus 60 weekday) to a mere 22 days per year. (*BLET VC* ¶ 25). Most American workers have the weekend off or at least 2 days off each week, providing them 104 days of time off work plus vacation. The more than seventy percent of time off reduction in the BNSF policy results in less than two days off per month. *Much of the time, this policy is requiring engineers to be available to work seven days a week.*

This change being implemented by BNSF not only shocks the conscience, it also plainly repudiates such employees' contractual right to reasonable lay off privileges because any argument that such a reduction is arguably justified under the CBA language is obviously frivolous and insubstantial. Thus, implementation of the Hi Viz policy constitutes a major dispute with regard

to employees' right to reasonable lay off privileges, and BNSF should be enjoined from implementing it outside of reaching agreement with the BLET through the RLA's major dispute process.

C. The Hi Viz Policy Repudiates Agreement Language That Gives Employees 24 Hours to Select a New Assignment When Displaced by a Senior Engineer.

In an agreement dated June 24, 2007, BLET and BNSF agreed to the following language regarding an employee being displaced, also known as bumped, from an assignment by a more senior employee:

> I. An engineer displaced from a run or assignment by a senior engineer or whose assignment is reduced or abolished as part of a board adjustment in accordance with schedule rules and/or agreements will have displacement rights to any assignment/board on which he holds active engineer's seniority. This displacement must be exercised within 24 hours of notification of displacement. In the event displacement is not exercised within 24 hours, such engineer will be required to displace the junior engineer working at the location. For those engineers who are displaced while off for any reason, the notification process will begin upon markup and they must also place within 24 hours of notification.

(*BLET VC* ¶ 26; ECF Doc. 21, BLET Ex. 7). This contract language gives an employee who is displaced up to 24 hours to select a new assignment, and if no new assignment is selected in that 24 hours, the employee then bumps the most junior engineer at the location as default. (*Id*. ¶ 27).

The new Hi Viz policy, however, penalizes an employee if he does not select a new assignment *in less than 2 hours* by breaking an employee's ability to earn Good Attendance Credit and resetting the 14-day period in which to earn such credits. (*Id*. ¶ 28). Thus, the intended effect of this portion of the Hi Viz policy penalizing employees who exercise their contractual entitlement to wait up to 24 hours to select a new assignment or to just default to a new assignment after 24 hours, is to render the above referenced language illusory and effective repudiated it. To be clear, by penalizing engineers for utilizing existing contractual entitlements with regard to

selecting a displacement assignment, BNSF has altered existing terms and conditions of employment as embodied in the displacement language and repudiated the language. Thus, implementation of the Hi Viz policy constitutes a major dispute with regard to employees' displacement rights, and BNSF should be enjoined from implementing it outside of reaching agreement with the BLET through the RLA's major dispute process.

D. The Hi Viz Policy repudiates Employees' Contractual Vacation and Personal Day Rights.

The 1947 National Agreement between BLET and the involved rail Carriers (including BNSF) grant BLET represented employees vacation rights based upon years of service. The 1947 National Agreement has been modified by subsequent National Agreements as well as by the 2007 on property agreements between BLET and BNSF. (*BLET VC* ¶ 31; BLET Ex. 7). Insofar as BNSF engineers in un-assigned/on call basis service are concerned, pre-approved vacation days and Personal Leave Days have a fixed start time, even though the involved employees do not have fixed on duty/call times. As a result, the involved engineers are routinely called in the hours preceding their fixed time to start their contractually provided vacation and personal leave time for round trips out of town that could exceed 24-48 hours. (*Id.* ¶ 32).

In application, the policy violates the employees' right to contractually granted vacation time by assessing disciplinary action to those who by no choice of their own must reject a call to work in order to access their agreed to vacation absence. Taking that additional unpaid leave under the new Hi Viz policy will now trigger the application of either a reduction in points, or the inability to earn points back, thus impeding the employees right to access contractually provided paid leave, in effect repudiating employees' contractual right to vacation in some instances. (*Id.* ¶ 33). Thus, this also constitutes a major dispute.

III. BNSF HAS ALTERED THE *STATUS QUO* IN VIOLATION OF SECTION 2 SEVENTH AND SECTION 6 OF THE RLA

While parties are engaging in the RLA's lengthy process of bargaining and mediation, they "are obligated to maintain the *status quo*, and the employer may not implement the contested change in rates of pay, rules, or working conditions." *Conrail, 491 U.S.* at 302-03. Federal courts have the power to enforce the duty to maintain the *status quo* and enjoin either party from engaging in conduct that violates that duty. *Shoreline*, 396 U.S. 142. The RLA's *status quo* requirement is "central to its design. Its immediate effect is to prevent the Union from striking and management from doing anything that would justify a strike." *Id.* at 150. Section 6 of the RLA, 45 U.S.C. § 156, provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. *Id.* Because 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. *Id.* Any unilateral alteration or abrogation of an existing collective bargaining agreement during a "major" dispute is a violation of the *status quo* under the RLA. *See, e.g., International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 160-61 (5th Cir. 1983) (holding that illegality of unilaterally amending or modifying the terms of a collective bargaining agreement during a "major" dispute is an "unquestioned principle").

In the instant case, BLET and BNSF have been engaged in negotiations pursuant to Section 6 of the RLA since November 15, 2019. (*BLET VC* ¶ 7). As detailed in Section II, above, through its new Hi Viz attendance policy, BNSF has clearly altered the *status quo* that existed on November 19, 2019 by unilaterally altering employees' terms and conditions of employment, and by unilaterally altering and abrogating various provisions of the parties' CBAs. As held by the

Supreme Court, "[i]n a situation in which a party asserting a contractual basis for its claim is 'insincere' in so doing, or its 'position [is] founded upon insubstantial grounds,' the result of honoring that party's characterization would be to undercut 'the prohibitions of § 2, Seventh, and § 6 of the Act' against unilateral imposition of new contractual terms." *Conrail*, 491 U.S. at 306. Here, it would be insincere and frivolous for BNSF to claim that it has not altered the *status quo* with regard to the changes and repudiation of the parties' agreements as detail above in Section II.

Furthermore, even if BNSF argues that its actions are within its management's rights because its actions *arguendo* do not conflict with the terms and conditions of the parties' agreements, the Supreme Court has long held that, "that what must be preserved as the *status quo* are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement." *Shoreline*, 396 U.S. at 143. BNSF simply cannot do as it pleases without negotiating with BLET regarding any change that impacts employees' rates of pay, rules, or working conditions. Here, BNSF violated *status quo* while the parties are actively engaged in the RLA's major dispute process, and, therefore, an injunction is necessary and proper to restore the *status quo*. As noted in *Wheeling, supra*, management cannot seek to change terms in Section 6 negotiations and then failing to obtain such terms, impose them during Section 6 negotiations. Here, the Company did just that with respect to the Hi Viz policy.

IV. BNSF'S HI VIZ POLICY IS A FUNDAMENTAL ATTACK ON THE UNION'S REPRESENTATIVES, VIOLATING RLA SECTION 2 THIRD AND 2 FOURTH

In 1934, Congress amended the RLA largely to strengthen employees' right to organize without carrier interference. *See Virginian Ry. v. System Fed'n*, 300 U.S. 515, 543 (1937); Railway Labor Act Amendment, Pub. L. No. 73-442, 48 Stat. 1185, 1187-88 (1934). These amendments

added a statement of purposes, including: "(2) to forbid any limitation upon the freedom of association among employees or any denial, as a condition of employment or otherwise, of the rights of employees to join a labor organization," and "(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes" of the Act. 45 U.S.C. § 151a. To realize these objectives, Congress modified and expanded Section 2 Third and added Section 2 Fourth and related provisions. *Id.*

Section 2 Third, entitled "Designation of Representatives," provides:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purpose of this chapter need not be persons in the employ of the carriers, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

45 U.S.C. § 152 Third. Section 2 Fourth, titled "Organization and collective bargaining; freedom from interference by carrier," provides in relevant part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier its officers or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . .

45 U.S.C. § 152 Fourth.

In many ways, these protections of employee free choice in representative (or lack of representative) are at the core of the RLA. As the U.S. Supreme Court noted, the Act "was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives." *TWA Inc. v. Independent Federation of Flight Attendants,* 489 U.S. 426, 441 (1989). In fact, "the effectiveness of [the RLA's] private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer . . . ." *Id.*

Viewed together, Section 2 Third and Fourth of the RLA prohibit carriers from taking actions designed to interfere with employees' rights to organize and bargain collectively. *Id.* at 813; *Johnson v. Express One Int'l, Inc.*, 944 F.2d 247, 252 (5th Cir. 1991); *see also Bhd. of Ry. Trainmen v. Central of Georgia Ry.*, 305 F.2d 605, 609 (5th Cir.1962) (railroad "may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood. . . .").

Although courts have normally applied Section 2 Third and Fourth to disputes arising in the pre-certification context consistent with *TWA v. IFFA, supra,* these specific RLA provisions concededly protect the rights of employees in the *post*-certification context after the employees have already organized and selected their designated representative. *See Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139, 141 (2d Cir. 1986). That is, an exception to the pre-certification focus of RLA Section 2, Third and Fourth occurs where the carrier takes action based upon anti-union animus to undermine or destroy the union. Indeed, the Fifth Circuit has for nearly six decades held that this exception states a claim in federal court for post-certification retaliation against the union, *i.e.,* a "representation" claim, as opposed to merely an individual's claim. *See Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry.*, 894 F.2d 1463,

1460 fn. 10 (5th Cir. 1990), *citing Central of Georgia Ry.*, 305 F.2d at 309. Further in *Atlas Air, Inc. v. Air Line Pilots Assoc.*, 232 F.3d 218, 226 (D.C. Cir. 2000), the court held that "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."

In the instant case, BNSF's Hi Viz policy's penalization of Union officials for laying off work to conduct Union business and to represent employees where no such actions have even been taken before, clearly evinces anti-union animus and is a blatant attempt to interfere with employees' choice of representative, a right not only protected under the RLA but, as detailed above, also enshrined in the parties' CBA. Such an attack on the basic fundamentals of union representation is transparently designed to quell Union officials' activities by taking all these officials away from their day-to-day union advocacy in the workplace. To be sure, it is no answer that employees can simply select another representative. *See, e.g., Central of Georgia Ry*., 305 F.2d at 308 fn. 7. The employer does not get to choose the representative, the members do under Section 2 Third and 2 Fourth, and under the parties CBAs. Such interference is expressly what is prohibited by Congress. It is enjoinable to be sure. By analogy, under the National Labor Relations Act § 10(j), 29 U.S.C. § 160(j), the Court readily enjoins efforts to undermine the Union. See *Kinard on behalf of National Labor Relations Board v. Dish Network Corp*., 890 F.3d 608 (5th Cir. 2018).

It is true that in *TWA v. Flight Attendants,* the Supreme Court did write that RLA Sections 2, Third and 2, Fourth protections apply "primarily" in the pre-certification context, *i.e.*, regarding organizing. However, "primarily" means primarily, not never. In *TWA v. Flight Attendants*, the

Supreme Court expressly recognized in the opinion exceptions for carrier actions "inherently destructive" of the union. 489 U.S. a t 442. Moreover, after *TWA v. Flight Attendants* was decided, the Fifth Circuit decided *Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry.*, 894 F.2d 1463 (5th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). In footnote 10, the Fifth Circuit reaffirmed that there exists properly cognizable RLA Sections 2 Third and 2 Fourth claims post-certification which a court *must* decide even if they also may be "minor disputes." The Fifth Circuit wrote:

> [There are] … two types of special circumstances in which federal courts may assert jurisdiction over cases that would otherwise involve minor disputes subject to compulsory arbitration under the RLA. The first such type of special circumstance involves cases in which the extrajudicial dispute-resolution framework of the RLA is either ineffective, *see, e.g., Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 917 (1974), or unavailable, *see, e.g., Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (1970). *See also, Switchmen's Union of North America v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S.Ct. 95, 96–97, 88 L.Ed. 61 (1943) (stating that, "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a rights which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control").
>
> The second type of exceptional circumstance involves actions taken by a carrier for the purpose of weakening or destroying a union. *See, e.g., Central of Ga. Ry.*, 305 F.2d 605, 608–09 (1962). See generally, *Brotherhood of Ry., etc. v. Atchison, Topeka & Santa Fe*, 847 F.2d 403, 411 (7th Cir. 1988). …"

Here, BNSF's clear, discriminatory violations of the RLA by penalizing Union officials who lay off work to represent employees are based upon anti-union animus, are designed to weaken the Union, and definitely fall within this long-standing "exceptional circumstance." On its face, the Hi Viz policy exempts unpaid military leave from any penalty for being unavailable, but punishes use of the similar unpaid Union leave. It thus targets this Union leave and the Union activity associated with it for harsher treatment on its face. This is thus facially discriminatory, as in *Atlas, supra*. Therefore, BLET is entitled to a preliminary injunction enjoying BNSF's violation of Section 2 Third and Fourth of the RLA.

V. BNSF'S HI VIZ POLICY PRESENTS A MAJOR DISPUTE BECAUSE IT IS ILLEGAL ON ITS FACE UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA); THUS, BNSF CANNOT PROVIDE ANY ARGUABLE BASIS FOR THE POLICY UNDER *CONRAIL* BECAUSE IT IS UNLAWFUL

First, the Family Medical Leave Act ("FMLA") prohibits employers from "interfering with, restraining, or denying" an employee's exercise of FMLA rights. 29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220(a)(1). It also prohibits 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*. Similarly, "FMLA leave [cannot] be counted under no-fault attendance policies," meaning employees cannot accrue points for taking FMLA leave under a no-fault attendance policy. *Id*.; *see also* WHD Opinion Letter FMLA2003-4, 2003 WL 25739620 (July 29, 2003). "'[N]o-fault' attendance policies [] do not necessarily violate the FMLA as long as points are not assessed for employees who are absent due to any FMLA qualifying reason." WHD Opinion Letter FMLA2003-4, 2003 WL 25739620, at *1.

However, when a no-fault policy like BNSF's Hi Viz policy provides for a set period of specified attendance that removes attendance points but restarts the period from scratch if the employee misses work due to an FMLA absence, the policy is unlawful. *See Dyer v. Ventra Sandusky, LLC*, 934 F.3d 472 (6th Cir. 2019). In *Dyer*, the Sixth Circuit confronted a no-fault attendance policy that provided for a thirty-day threshold of good attendance for the employee to earn a reduction in previous absence attendance points that are counted for discipline. The employer reset the thirty-day "clock" every time there was an intervening absence. The policy provided that use of FMLA would reset the clock, just like any other absence. The court held that this type of policy impermissibly failed to freeze benefits, such as the period of earned good

attendance, prior to the FMLA leave. Thus, it unlawfully discouraged workers from taking FMLA and was unlawful. The court cited two separate opinion letters from the U.S. Department of Labor (DOL) from 1999 and 2018 which held that no-fault attendance with accrual toward point reduction must, at the very least, be frozen during FMLA leave. The DOL opined that an employer's FMLA obligation to restore an employee to the same or equivalent position includes the obligation to restore the number of days accrued toward absentee point reduction. *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).

In the present case, the Hi Viz policy likewise provides for a set period of good attendance that will cause a reduction in disciplinary points. In this case, that is 14 days of uninterrupted attendance rather than thirty under *Dyer*. On its face, the Hi Viz policy restarts the clock during the 14-day period if FMLA is taken. That is, the progress earned under the 14-day period for point reduction is not frozen, but rather, is forfeited upon return from the FMLA leave. Hence, the Hi Viz policy is identical to the unlawful policy under *Dyer*. Moreover, the policy on its face discriminates against FMLA by exempting unpaid military leave. The unilateral implementation of this illegal policy presents a major dispute and violation of the *status quo* entitling BLET injunctive relief.

VI. ALTERNATELY, BLET IS ENTITLED TO A MINOR DISPUTE INJUNCTION DELAYING IMPLEMENTATION OF THE Hi VIZ POLICY TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE INJURY

In the alternative, to the extent that the Court finds the Hi Viz Policy in whole or in part to be a minor dispute, this Court has jurisdiction to issue an injunction to preserve the status quo and

remedy of arbitration. Courts have recognized that "even where a dispute has been found to be *minor*, a trial court may exercise its equitable power to impose conditions requiring the employer to maintain the status quo pending resolution of the dispute in arbitration." *See ALPA v. Eastern Airlines*, 863 F.2d 891, 922 (D.C. Cir. 1988). Such an injunction falls under the exception to the Norris LaGuardia Act's prohibition on federal court injunctions in labor disputes. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235(1970).

The award of injunctive relief to preserve arbitration has been issued to prohibit strikes over a "minor dispute" conditioned upon the carrier's submitting the underlying minor dispute to arbitration. *See Burlington N. R.R. v. Brotherhood of Maintenance of Way Emps.,* 143 F. Supp. 2d 672, 679–85 (N.D. Tex. 2001), a*ff'd*, 286 F.3d 803 (5th Cir. 2002), *cert. denied*, 537 U.S. 1172 (2003); *cf. Norfolk S. Ry. v. Int'l Longshoremen's Ass'n,* 190 F. Supp. 2d 1021, 1029 (N.D. Ohio 2002) (issuing declaratory judgment that dispute was minor and that "work stoppages are not permitted over this dispute"). Likewise, courts have recognized that unions can seek injunctions to preserve arbitration as well. *See Bhd. of Ry. Clerks, Westchester Lodge 2186 v. Ry. Express Agency*, 329 F.2d 748 (2d. Cir. 1964); *ALPA v. American Airlines, Inc.*, 898 F.2d 462 (5th Cir. 1990); *Bhd. of Maintenance of Way Employees v. Burlington N. R.R.*, 802 F.2d 1016, 1023 (8th Cir. 1986); *Ry. Labor Executives Ass'n v. Norfolk v. W. Ry.*, 833 F. 2d 700, 708 (7th Cir. 1987); *Air Line Pilots Association, Int'l v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1520 n.2 (D.C. Cir. 1989).

In *IAM v. Frontier Airlines, Inc.*, 664 F.2d 538, 541-42 (5th Cir. 1981), the Court recognized that the union was correct that an injunction in aid of arbitration was permissible for a minor dispute, writing:

> First, injunctions may issue to prevent strikes that would deprive the congressionally established grievance procedures of jurisdiction. ***Second,***

> ***injunctions may issue to prevent the carrier from disrupting the status quo when doing so would result in irreparable injury of a magnitude that would render a decision in favor of the unions virtually meaningless, and consequently also deprive the grievance mechanism of jurisdiction.*** Third, the determination of whether carrier action is serious enough to warrant jurisdiction-preserving injunctive relief is addressed to the equitable power of the court, with review restricted as to whether there has been an abuse of discretion.

(emphasis added) (citations omitted).

Here, the actions threatened by BNSF are precisely the type of irreparable injury that render arbitration meaningless. BNSF's draconian Hi Viz policy will effectively force COVID-19 positive engineers who fear for their jobs to eschew tests or eschew staying home from work to stop the spread. They will likely cause more infections at BNSF as well as at BNSF employees' homes and communities. The so-called Omicron variant is widely reported to be incredibly contagious through just airborne exposure, and for the unvaccinated, poses a risk of death. It is resistant to monoclonal antibodies. Arbitration cannot ever remedy the loss of life of engineers, their family members, or the public. There is no sure way for engineers to protect themselves from infection or spreading the COVID-19 infection to others, thus creating a larger risk in communities around the nation in which they travel of injury and death. It is in the public interest to put off the implementation of the Hi Viz Policy pending expedited arbitration. The Court should delay implementation of the policy until arbitration is completed.

CONCLUSION

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

Dated: February 2, 2022

Respectfully submitted,

/s/ James Petroff

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 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