IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	§ § § § § § §	Civil Action No. 4:22-CV-00052-P
Defendants.	§	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR A TEMPORARY RESTRAINING ORDER

COMES NOW, Plaintiff BNSF Railway Company ("Plaintiff" or "BNSF") and files this Reply Brief in Support of its Motion for Temporary Restraining Order. In support of granting Plaintiff's Motion, Plaintiff respectfully shows the Court as follows:

1. BNSF's Policy Does Not Violate the FMLA

It is undisputed that BNSF's Hi Viz policy does not assess attendance points to employees for FMLA qualifying absences. Because the Unions cannot argue that the policy directly penalizes employees for using FMLA leave, they instead argue that the policy does so indirectly, by resetting the time period to earn Good Attendance Credits to zero when an employee takes FMLA leave (along with a longer list of other unpaid leaves). *See* ECF No. 8 at 179-80 (Section 2(b)(ii)-(iii)).[1]

[1] Defendants raised this issue for the first time in briefing filed an hour prior to the TRO hearing and not in the weeks of discussions over BNSF's Hi Viz policy.

By treating FMLA leave no better and no worse than other forms of unpaid leave, BNSF's policy is fully compliant with the FMLA. In 2008, the Department of Labor revised its regulations to address the question of how employers should treat FMLA leave in connection with attendance awards, bonuses, and policies, such as "perfect attendance" incentives. Employers had long argued that it would be unfair to employees who do not miss work to treat them the same as employees who take intermittent FMLA leave; employee groups argued the opposite. *See* 73 Fed. Reg. at 67984. In resolving this issue, the Department concluded that employees who take FMLA leave are entitled to be treated the same for attendance purposes as employees who take "equivalent" forms of leave – no better, and no worse:

> Allowing an employer to disqualify employees taking FMLA leave from bonuses or awards for the achievement of a specified goal unless the bonus is awarded to employees on an equivalent leave status for a reason that does not qualify as FMLA leave puts employees who take FMLA leave on equal footing with employees who take leave for non-FMLA reasons. The Department does not view this as interference because employees taking FMLA leave are not being treated differently than employees taking equivalent non-FMLA leave. Accordingly, employees taking FMLA leave neither lose any benefit accrued prior to taking leave, nor accrue any additional benefit to which they would not otherwise be entitled.

Id. at 67985.

Thus, the Department concluded that "if an employer's policy is to disqualify all employees who take leave without pay from such [attendance] bonuses or awards, ***the employer may deny the bonus to an employee who takes unpaid FMLA leave***." *Id.* (emphasis added). *See also id.* (denying "reward for achieving the job-related performance goal of perfect attendance" does not violate the FMLA); 29 C.F.R. § 825.215(c)(2) (2009) ("If a bonus . . . is based on the achievement of a specified goal, such as . . . ***perfect attendance***, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless [the bonus is]

otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.") (emphasis added).

The Department's interpretation has been repeatedly upheld by the federal courts. *See, e.g., Bailey v. Pregis Innovative Pkg., Inc.*, 600 F.3d 748, 752 (7th Cir. 2010) (an "employee does not accrue absenteeism forgiveness when on [FMLA] leave, because that . . . is a reward for working."); *see also Keeler v. Aramark*, 483 F. App'x 421, 423 (10th Cir. 2012) (employer lawfully denied holiday pay to employee whose use of FMLA leave prevented him from meeting generally applicable eligibility requirements for it); *Jefferson v. Time Warner Cable Enters. LLC*, 584 F. App'x 520, 523 (9th Cir. 2014) (unpaid leave is a valid basis to deny a bonus to an employee). And, as the Seventh Circuit has noted, this principle of equal-but-not-better treatment governs the application of attendance policies as well as the application of bonus or other compensation programs. *Bailey*, 600 F.3d at 751-52.

The Unions ignore these principles and point only to the Sixth Circuit's recent decision in *Dyer v. Ventra Sandusky*, LLC, 934 F.3d 472, (6th Cir. 2019). In that case, the Sixth Circuit reversed a summary judgment in favor of the employer on an FMLA interference claim because it found genuine issues of material fact whether other forms of unpaid leave were treated the same for purposes of the point-reduction policy. *Id* at 478. To the extent that *Dyer* also suggested that an employer's good attendance credit policy must treat FMLA leave *better* than other forms of unpaid leave – by "pausing" any accrual of time toward such a credit until the employee returns from leave – such a ruling is inconsistent with the majority rule, discussed above, that an employer need only treat FMLA leave the same as equivalent forms of leave. Nor has *Dyer* been adopted or cited in any other circuit.

2. Alleged Violations of the FMLA Do Not Control Whether a Dispute is Minor Under the RLA.

It is well-settled that the distinction between major and minor disputes under the RLA is a separate question from whether an employee or union can articulate a claim under some other federal or state law arising from the same or related carrier actions. *See Hawaiian Airlines v. Norris*, 114 S.Ct. 2239 (1989) (outlining principles with respect to RLA preemption based on "independent" statutory claims). That is certainly true with respect to claims under the FMLA. For example, in 2007, the BLET challenged Union Pacific's attendance policy as both a violation of the RLA and a violation of the FMLA. The court concluded that the RLA claim raised a minor dispute that had to be arbitrated even though, as it subsequently concluded, the union had a valid claim under the FMLA on one particular (and, for purposes of this case, inapposite) aspect of the Union Pacific attendance policy. Minute Entry at 3, *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, No 1:07-CV-00160, (N.D. Ill. Jun. 21, 2007), ECF No. 37 at 2 (App. at 2) (discussing Count II and holding dispute over implementation of attendance policy was minor dispute under RLA even though union contended policy violated FMLA); *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 612 F. Supp. 2d 954 (N.D. Ill. 2008)(addressing the FMLA claim). This illustrates that whether there is or is not an FMLA violation is distinct from the analysis of whether the parties are engaged in a major or minor dispute.

In short, because BNSF's policy for awarding Good Attendance Credits applies equally to a wide variety of similarly-situated leaves of absence, the policy does not violate the FMLA. 29 C.F.R. § 825.215(c)(2). If the Unions contend otherwise, their remedy is to bring a claim under the FMLA; they cannot resort to a work stoppage further disrupting the nation's commerce.

For the reasons stated, BNSF's motion for a temporary restraining order should be granted.

Respectfully submitted,

/s/ Russell D. Cawyer

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CERTIFICATE OF SERVICE

On January 24, 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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