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, Defendants.	§ § § § § § § § § § § § §	Civil Action No. 4:22-CV-00052-P

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

NOW COMES, Plaintiff BNSF Railway Company and files this Appendix in Support of its Reply in Support of Its Motion for Temporary Restraining Order.

EXHIBIT	DESCRIPTION	PAGE NO.
1	Minute Entry in Civil Action No. 1:07-cv-00160; *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R.* (N.D. Ill. Jun. 21, 2007), ECF No. 37	App. 1 - 3

Respectfully submitted,

/s/ Russell D. Cawyer

David M. Pryor
Texas Bar No. 00791470
BNSF RAILWAY COMPANY
2500 Lou Menk Drive, AOB-3
Fort Worth, Texas 76131-2828
Tel.: (817) 352-2286
Fax: (817) 352-2399
David.Pryor@BNSF.com

Donald J. Munro
D.C. Bar No. 453600
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Email: dmunro@jonesday.com

Russell D. Cawyer
State Bar No. 00793482
Taylor J. Winn
State Bar No. 24115960
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Facsimile: (817) 335-2820
russell.cawyer@kellyhart.com
taylor.winn@kellyhart.com

ATTORNEYS FOR PLAINTIFF
BNSF RAILWAY COMPANY

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
Russell D. Cawyer

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	George W. Lindberg	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 160	DATE	6/12/2007
CASE TITLE	BLET, et al. v. Union Pacific Railroad Co.		

DOCKET ENTRY TEXT

Defendant's motion to dismiss the first amended complaint [25] is granted in part and denied in part. The motion to dismiss is denied as to Count II and the individual claims in Count I related to Union Pacific's method for calculating FMLA leave. The motion to dismiss is granted as to Counts III, IV and the individual claims in Count I related to the claims in Counts III and IV to the extent that those counts are stayed pending the outcome of an RLA arbitration regarding the interpretation of disputed provisions within the 1952 Agreement.

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Before the court is defendant Union Pacific Railroad Company's ("Union Pacific") motion to dismiss plaintiffs' First Amended Complaint ("complaint") pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Plaintiffs are five individual locomotive engineers A.K. Schad, Dustin Etherton, Mark Alexander, Paul Moeller, and T.D. Curtis and their labor organization, The Brotherhood of Locomotive Engineers and Trainmen, General Committee of Adjustment, Central Region ("BLET") (collectively "plaintiffs"). In November 2004, Union Pacific adopted a new attendance policy, the TE&Y Attendance Policy, which applied to the plaintiff engineers. According to plaintiffs' four-count complaint, Union Pacific's new attendance policy has resulted in: (1) the denial of plaintiffs' individual rights to medical leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*. (Count I); (2) an unlawful shortening of their right to twelve weeks of FMLA leave (Count II); (3) denial of their right to contractual leave in reprisal for using their FMLA leave (Count III); and (4) a violation and repudiation of the parties' 1952 Laying Off and Leave of Absence Agreement ("1952 Agreement") (Count IV). Counts I, II, and III are made on behalf of all plaintiffs and purport to also be made on behalf of a class of people plaintiffs have defined as all locomotive engineers employed by Union Pacific who are similarly situated to the individual plaintiffs. Count IV, related to the parties' 1952 Agreement, is solely brought by BLET and the individual plaintiffs are not a party to that count.

Union Pacific has moved to dismiss Count II of the complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. Union Pacific seeks to dismiss Counts III and IV pursuant to Fed.R.Civ.P. 12(b)(1), arguing that the court lacks jurisdiction to decide those counts because they raise issues of contract interpretation and must be submitted to binding arbitrated under the Railroad Labor Act ("RLA"), 45 U.S.C. § 151. Union Pacific also argues that Count IV is barred by the applicable statute of limitations. Finally, Union Pacific moves to dismiss Count I, arguing that Count I is nothing more than a collection of challenges by the individual plaintiff engineers to the application of the policies at issue in Counts II though IV.

A Rule 12(b)(1) motion to dismiss tests the federal jurisdiction of a complaint. *See* Fed. R. Civ. P. 12(b)(1). Plaintiffs bear the burden of proving the existence of subject matter jurisdiction. *Int'l Harvester*

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Co. v. Deere & Co., 623 F.2d 1207, 1210 (7th Cir.1980). The court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiffs. *Long v. Shorebank Dev. Corp.,* 182 F.3d 548, 554 (7th Cir.1999).

The purpose of a motion to dismiss under Rule 12(b)(6) is to "test the sufficiency of the complaint, not to decide the merits" of the case. *Triad Assocs., Inc. v. Chicago Housing Auth.,* 892 F.2d 583, 586 (7th Cir.1989). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court views "the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from those allegations in his or her favor." *Lee v. City of Chicago,* 330 F.3d 456, 459 (7th Cir.2003). Dismissal is appropriate only when it appears that there are no set of facts that could entitle plaintiff to relief. *See Henderson v. Sheahan,* 196 F.3d 839, 846 (7 Cir.1999).

First, the court turns to Count II and Union Pacific's argument that plaintiffs cannot state a claim for relief based on Union Pacific's alleged miscalculation of the amount of leave its engineers are entitled to under FMLA. According to plaintiffs, prior the adoption of the TE&Y Attendance Policy in November 2004, Union Pacific allowed its engineers 84 days of FMLA leave each year. After November 2004, Union Pacific adopted a new method for calculating the engineer's applicable leave under FMLA, which plaintiffs contend violates §§ 2612 and 2615 of FMLA. Union Pacific's new calculation method reduced the number of days of FMLA leave for most, if not all, of its engineers. Union Pacific argues that Count II should be dismissed because it believes that its new calculation method complies with all the provisions of FMLA. As the court stated above, the purpose of a Rule 12(b)(6) motion to dismiss is to "test the sufficiency of the complaint, not to decide the merits" of the case. *Triad*, 892 F.2d at 586. Plaintiffs have alleged that Union Pacific's new calculation method violates FMLA. Whether the new calculation method does in fact violate FMLA is not properly before the court at this stage in the proceedings. Accordingly, Union Pacific's motion to dismiss is denied as to Count II.

Next, the court addresses Union Pacific's motion to dismiss as it relates to Count IV. In Count IV, BLET alleges that the TE&Y Attendance Policy repudiates the parties' 1952 Agreement by taking away the engineers' contractual right to "layoff[1]." According to BLET, for more than fifty years, engineers have had an absolute right to layoff from work when they are ill or injured under the 1952 Agreement. BLET also states that the 1952 Agreement provides engineers a discretionary right to layoff for personal business if other engineers are available to operate their locomotives. BLET claims that the TE&Y Attendance Policy has eradicated the engineers' right to layoff under the 1952 Agreement in violation of the RLA. Union Pacific disagrees with BLET's characterization of the 1952 Agreement and contends that the plaintiff engineers have never had an absolute right to layoff and that layoffs have always been within Union Pacific's discretion. Union Pacific further argues that Count IV raises a dispute over the interpretation of the 1952 Agreement, which constitutes a "minor" dispute under the RLA and must be arbitrated. BLET characterizes the dispute as "major" and not subject to mandatory arbitration under the RLA.

Section 3 of the RLA confers exclusive and mandatory jurisdiction over all "minor disputes" to specialized arbitration boards. *See Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 304 (1989). A dispute is "minor" if it can be resolved by interpreting an existing agreement. *Id*. at 305. When parties disagree over whether a dispute is major or minor, the dispute must be deemed minor unless the carrier's interpretation of the agreement is "'not arguably justified,' 'obviously insubstantial,' 'spurious,' [or] 'frivolous.'" *Consolidated Rail Corp.*, 491 U.S. at 306 (citation omitted). A questionable or improbable interpretation of an agreement by the carrier is not necessarily "frivolous" for purposes of Section 3 of the RLA. *NRLC v. IAM*, 830 F.2d 741, 749 (7th Cir. 1987).

In order for plaintiffs to proceed on their claim that the TE&Y Attendance Policy eradicates their right

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1. The parties have defined the term layoff as an unpaid, excused absence from work.

to layoff under the 1952 Agreement, the court must first be able to determine what right to layoff the 1952

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Agreement provides the plaintiff engineers. This is an issue of contract interpretation and is subject to mandatory arbitration unless Union Pacific's proffered interpretation of the 1952 Agreement is frivolous, or not arguably justified. On the present record, the court cannot characterize Union Pacific's interpretation as either. Neither the prior 1991 arbitration award, nor the plain language of Section 1 of the 1952 Agreement, the only two documents plaintiffs cite in support of their argument that Union Pacific's interpretation is not arguably justified, support such a finding. Therefore, Union Pacific's motion to dismiss is granted in part as to Count IV. The court will stay all proceedings as to Count IV, pending binding arbitration of the meaning of the disputed provisions of the 1952 Agreement pursuant to the applicable provisions of the RLA.

Union Pacific also moves to dismiss Count IV on the ground that it is barred by the six-month statute of limitations applicable to claims alleging a breach of the "status quo" under the RLA. *See BLE v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 919 (7th Cir. 1985). Plaintiffs do not specifically address this argument in their response brief in opposition to the motion to dismiss. A violation of the applicable statute of limitations can be a basis for a Rule 12(b)(6) motion to dismiss if the violation is apparent on the face of the complaint. *Jones v. Boch*, 127 S.Ct. 910, 920 (2007). In the complaint, plaintiffs state that it was not clear that Union Pacific was attempting to change the 1952 Agreement when it adopted the TE&Y Attendance Policy in November 2004. Plaintiffs assert that the implications of the adoption of the TE&Y Attendance Policy only became apparent over time. Because it is not clear from the face of the complaint exactly when plaintiffs became aware that the status quo was allegedly breached, the court will not dismiss Count IV as untimely. Union Pacific may have a valid statute of limitations affirmative defense, however, the facts in the complaint are not sufficient to support a finding that Count IV is untimely at this stage in the proceedings.

The court now turns to Count III. In that count, plaintiffs claim that Union Pacific has violated FMLA by taking away plaintiffs' contractual right to layoff under the 1952 Agreement as reprisal for their use of FMLA leave. There is no dispute that this court has jurisdiction to hear statutory claims involving alleged FMLA violations. However, when plaintiffs brings a federal statutory claim based on their preferred interpretation of a collective bargaining agreement, as is the case here, that claim must be stayed pending arbitration of the disputed interpretation of the agreement. *Tice v. American Airlines, Inc.*, 288 F.3d 313, 315 (7th Cir. 2002). Because plaintiffs' FMLA violation claim is predicated on their interpretation of the 1952 Agreement, namely that they have a contractual right to layoff, the court must stay Count III pending the outcome of a binding arbitration regarding the meaning of the disputed provisions of the 1952 Agreement. Therefore, the motion to dismiss is granted as to Count III to the extent that all proceedings as to Count III will be stayed pending the outcome of the above-referenced RLA arbitration.

Finally, the court addresses the allegations in Count I. The court agrees with Union Pacific that the allegations in Count I are merely a collection of challenges by the individual plaintiff engineers to the application of the policies at issue in Counts II through IV of the complaint. Therefore, to the extent the allegations in Count I include challenges by individual plaintiffs related to the statutory claim in Count II of the complaint, the motion to dismiss is denied. The individual claims in Count I that challenge Union Pacific's method for calculating FMLA leave will not be stayed pending the RLA arbitration. To the extent the allegations in Count I include challenges by individual plaintiffs related to the claims in Counts III and IV, the motion to dismiss is granted to the extent that those individual claims will be stayed pending the outcome of the RLA arbitration.

In summary, Union Pacific's motion to dismiss is granted in part and denied in part. The motion to dismiss is denied as to Count II and the individual claims in Count I related to Union Pacific's method for calculating FMLA leave. The motion to dismiss is granted as to Counts III, IV and the individual claims in Count I related to the claims in Counts III and IV to the extent that those counts are stayed pending the outcome of an RLA arbitration regarding the interpretation of disputed provisions within the 1952 Agreement. It is so ordered.