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

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| BNSF RAILWAY COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION,<br><br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. 4:22-cv-0052-P |

# DEFENDANT SMART-TD'S BRIEF IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

SANFORD R. DENISON
Tex. Bar No. 05655560
Baab & Denison, LLP
6301 Gaston Ave., Suite 550
Dallas, TX 75214

KEVIN C. BRODAR
General Counsel
Ohio Bar No. 52854
ERIKA DIEHL-GIBBONS
Associate General Counsel
Ohio Bar No. 86424
SMART-TD
24950 Country Club Blvd., Ste. 340
North Olmsted, OH 44070

*Counsel for Defendant International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division ("SMART-TD")*

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Defendant the International Association of Sheet Metal, Air, Rail, and Transportation Workers – Transportation Division ("SMART-TD" or the "Union") submits the following as its Brief in Support of its Motion for Preliminary Injunction.

## I. INTRODUCTION

SMART-TD is seeking declaratory and injunctive relief against Plaintiff Burlington Northern Santa Fe Railway Company's ("BNSF" or "the Carrier") under the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 151-88, based upon the Railroads' unilateral change in the "rates of pay, rules and working conditions" in contravention of the Act. By unilaterally imposing a draconian availability policy, the Carrier has imposed changes to the rules and working conditions without engaging in the required bargaining procedure set forth in Section 6 of the RLA, 45 U.S.C. § 156, entitling the Union to a status quo injunction.

## II. FACTUAL BACKGROUND AND LEGAL LANDSCAPE

### A. Background of the Parties

BNSF is a common carrier by railroad engaged in interstate commerce, and is a "carrier" as defined by the RLA. 45 U.S.C. § 151 First. (Docket Entry ("D.E.") 5, BNSF Am. Compl. ¶ 3). SMART-TD is the duly authorized "representative" of the employees working in the crafts or classes of Yardmasters and train service employees, including Conductors, employed by BNSF. 45 U.S.C. § 151 Sixth. (D.E. No. 5 ¶ 2). SMART-TD is governed by a Constitution, and has a tripartite structure: the International is the administrative head; semi-autonomous, mid-level bodies known as General Committees of Adjustment ("GCA"), which are responsible for negotiating and enforcing the collective-bargaining agreement ("CBA") with their respective carrier on their respective territories; and locals, where membership is held. (D.E. 22-1, Ferguson Decl. ¶ 2). SMART-TD GCA GO-001 is the subordinate body with jurisdiction over certain

predecessor railroads including the former Great Northern line. (*Id.* Decl. ¶ 3). The General Chairperson ("GC") of GCA GO-001 is Joseph M. LaPresta. (*Id.*). SMART-TD GCA GO-009 is the subordinate body with jurisdiction over the former Atchison Topeka & Santa Fe ("AT&SF"). (*Id*). The GC of GCA GO-009 is Scott Swiatek. (*Id.*). SMART-TD GCA GO-009 is the subordinate body with jurisdiction over the former Coastlines. (*Id*). The Acting GC of GCA GO-017 is Johnny Martinez. (*Id.*). SMART-TD GCA GO-020 is the subordinate body with jurisdiction over the craft or class of Yardmasters employed by BNSF and its predecessors (*Id*). The GC of GCA GO-020 is Justin Schrock. (*Id.*). SMART-TD GCA GO-341 is the subordinate body with jurisdiction over the former ATSF Coast and Los Angeles Junction. (*Id.*). The GC of GCA GO-341 is Matthew Burkart. (*Id.*). SMART-TD GCA GO-386 is the subordinate body with jurisdiction over the former Great Northern. (*Id,*). The GC of GCA GO-386 is Larry Miller. (*Id.*). SMART-TD GCA GO-393 is the subordinate body with jurisdiction over the former AT&SF Western lines. (*Id,*). The GC of GCA GO-393 is Kevin Kime. (*Id.*).

**B. Collective Bargaining Under the Railway Labor Act**

Collective bargaining between railroads and their employees' representatives over "rates of pay, rules, and working conditions" is governed by the RLA. 45 U.S.C. § 151, *et seq*. The primary directive of the RLA is set out at the very beginning of the Act.

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions …

45 U.S.C. § 152 First (emphasis added). This is not a mere exhortation, but a directive to the parties, *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 577 (1977), and "has been described as the 'heart' of the RLA." *United Air Lines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 243 F.3d 349, 361 (7th Cir. 2001) (citing *Brotherhood of R.R. Trainmen v.*

*Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969)).

The status quo provisions command that a carrier must maintain current working conditions, and that unilateral changes in those conditions are prohibited absent engaging in the required bargaining process. 45 U.S.C. §§ 152, Seventh, 156.

To resolve disputes between the parties, the RLA established two separate mandatory dispute resolution procedures: one for "minor disputes" and one for "major disputes." These terms are not found in the RLA's text, but are shorthand terms developed by the courts to describe the Act's dispute resolution procedures. *See generally Consol. Rail Corp. v. Ry. Labor Exec. Ass'n*, 491 U.S. 299, 307 (1989) ("*Conrail*"). A "major dispute" is a dispute over contract formation or amendment of a collective-bargaining agreement ("CBA"). *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945). Such disputes arise where a CBA does not exist or where one of the parties seeks to change the terms of an existing CBA. *Conrail*, 491 U.S. at 302. "The issue in a major dispute 'is not whether an existing agreement controls the controversy'; instead, the focus is on 'the acquisition of rights for the future, not [the] assertion of rights claimed to have vested in the past.'" *Wheeling & Lake Erie Ry. v. Bhd. Of Loco. Eng'rs & Trainmen*, 789 F.3d 681, 690 (6th Cir. 2015) (hereinafter "*W&LE*") (citing *Burley*, 325 U.S. at 723).

For major disputes, the Act provides a detailed framework for resolution. Under the RLA, a CBA exists in perpetuity and can only be changed through a very specific process. 45 U.S.C. § 156. The "major dispute" procedures are initiated by the service of a bargaining notice under Section 6, 45 U.S.C. § 156. These "Section 6 Notices" are written proposals for changes in CBAs. *See CSX Transp., Inc. v. United Transp. Union*, 395 F.3d 365 (6th Cir. 2005). The "major dispute" procedures include conference, negotiation, and mediation between the parties. 45 U.S.C. §§ 152 Second, 155 First, 156, 160. Until these procedures have been exhausted, the

parties are bound by the Act's "status quo" requirements. *See, e.g., Conrail*, 491 U.S. at 302-03; 45 U.S.C. §§ 152 First, 152 Seventh, 156. Only once these procedures have been exhausted, are the parties free to engage in self-help. *See generally, Burlington N. R.R. v. Bhd. Of Maint. Of Way Empl.*, 481 U.S. 429 (1987); *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969) ("*Shore Line*").

In contrast, a "minor dispute" is a disagreement growing out of the interpretation or application of an existing CBA, rather than an attempt to change CBA terms. *See, e.g., Conrail*, 491 U.S. at 303; *Henegar v. Banta*, 27 F.3d 223, 225 (6th Cir. 1994). "Minor disputes" are required to be addressed by the parties first through handling "on the property," 45 U.S.C. §§ 152 Sixth, 153 First (i), and if the dispute is not resolved through such, by final and binding arbitration. *Id.* § 153 First (i); *see also Conrail*, 491 U.S. at 303.

The issue presented here is a major dispute. BNSF is attempting to ignore the mandatory process by unilaterally imposing changes to the "rules and working conditions." Court intervention is necessary to uphold the Act and maintain the status quo.

**C. Current Situation**

SMART-TD and BNSF are parties to CBAs on a national and local level that control the terms and conditions of employment. (D.E. 22-1, Ferguson Decl. ¶ 2). Over two years ago, in November 2019, BNSF served a Section 6 Notice on SMART-TD. (*Id.* ¶ 5, Exhibit ("Ex.") A). SMART-TD did the same in short order, serving BNSF with their Section 6 notices. (*Id.* ¶ 5, Ex. B). Key in both notices were not only the traditional topics of wages and healthcare, but also work rules, which the carrier noted would "figure prominently" in this round of bargaining. (*Id.* ¶

5, Exs. A, B).[1] Indeed, front and center in this round of bargaining are quality of life issues, including employee availability for work and sick leave. (*Id*.). For example, contained within SMART-TD's Section 6 Notice was a proposal to "establish additional rest opportunities and the ability to mark off for family needs, visits to a primary care physician, and emergencies related to quality of life, without penalty;" and to "[e]stablish paid sick leave for all train and engine service employees, without censure or discipline." (*Id*. ¶ 5, Ex. B). Similarly, contained within NCCC's Section 6 Notice was a proposal wherein it sought to negotiate "better and more predictable work schedules" to "enhance employee quality of life." (*Id*. ¶ 5, Ex. A). For over two long years the parties have been discussing these topics. Proposals and costing have been sent back and forth across the table. (*Id.* ¶ 5).

Critical to note here, and why this is such a major issue for the union, is that unlike many industries and businesses, the railroad operates 24 hours a day, 7 days a week, 365 days a year without rest. (LaPresta Decl. ¶ 5). With this type of operation, railroad employment is still among the most dangerous occupations in the United States. (*Id.*). BNSF employees are constantly working around and among large moving equipment, in a setting where hearing is negated, with temperatures often in the extremes, in all weather conditions, for long hours, for all hours. (*Id.*). Not being fully rested and alert is the fuel for the loss of a limb or one's life. (*Id.*). BNSF's employees work these jobs to keep freight moving, only asking to be able to do so safely.

Many of BNSF's employees are in what is known as "unassigned service," *i.e.*, they have NO regular off days. (*Id.* ¶ 6). They must be available 24/7 and "plan" the rest of their lives

[1] "National handling" is bargaining in the form of a multiemployer and multi-union groups. (*Id*. ¶ 5). The parties have additionally been bargaining on a local level over various matters. (*Id*.).

around railroad operations. (*Id.*). If they need to care for a sick child, they are required to mark off of work. (*Id.*). If they need to address the issues of an aging parent, they are required to mark off of work. (*Id.*). If they need to care for themselves or their spouse, they need to mark off work. (*Id.*). If they have to be at home for a repair person or to fix a problem themselves, they are required to mark off of work. (*Id.*). While this constant living on the edge of a regular life is difficult and fatiguing, it was, until the imposition of the Hi Viz policy, accomplished without always being under threat of termination. However, as of February 1, these types of everyday life events, including just needing a break and marking off that has long been earned, now carries a rapid and heavy penalty. (*Id*. at 7-8).

Unfortunately, despite over two years of bargaining, the carriers have not been willing to make any substantive move in negotiations on these quality of life issues and the existing work rules and practices regarding attendance must sit as they were back in 2019, as mandated by the status quo provisions of the Act.

Despite these matters being in active negotiation for over two years, and the status quo requirement of the Act attaching, on January 4, 2022, BNSF, via zoom, notified the General Chairpersons that it planned to impose its new High Visibility ("Hi Viz") attendance policy and would present details regarding the policy the following day. (*Id.*) BNSF refused to answer any questions posed by the GCs.[2] Indeed, it went around the GCs and dealt directly with the Local Chairpersons in a January 6 meeting. (D.E. 22-1. Ferguson Decl. ¶ 6, Ex. C).

[2] However, BN did state that no information would be distributed to the employees and local union officers until all the GCs questions and concerns were answered. (*Id*. ¶ 6). Despite such representations, on January 6, 2022, various BNSF General Managers began holding zoom meetings directly with SMART-TD Local Chairpersons, wherein the General Managers provided the LCs with more information that had been provided to the GCs. (*Id*. ¶ 6).

On January 10, 2022, BNSF officially announced its intentions to implement its "Hi Viz" Policy effective February 1, 2022. (*Id.* ¶ 6). Under this new policy, employees are to begin with 30 points, which are then deducted based on certain enumerated unavailability events, including fatigue, sickness, and family emergency. (*Id.*). The policy then provides for "good attendance credits," where an employee is awarded four points for any 14-day period in which they work without an "unavailable" event. (*Id.*). If an employee is absent from work because of federally protected leave under the Family Medical Leave Act ("FMLA") or off on union business, s/he is not eligible for any good attendance credit for that 14-day period. (*Id.*). The policy will have particularly devastating effects on employees working in unassigned service, who are required to be on-call 24/7 and have no scheduled rest days. (LaPresta Decl. ¶¶ 6, 8-15). These effects will be compounded for disabled employees and those who need time off to care for their families' serious medical conditions, as well as all for employees to deal with pandemic-related situations. (*Id.* ¶ 4, 6-15).[3] These employees will be required to choose between working sick and fatigued, and attending to their family and union obligations. (*Id.* ¶ 15).

## III. PROCEDURAL HISTORY

BNSF filed the instant Complaint on January 13, 2022, in the Northern District of Texas, Dallas Division, which was subsequently amended on January 17, 2022. (D.E. 1, Compl.; D.E. 5, Am. Compl.). BNSF sought assurances from the GCs that they viewed the dispute as "minor" under the RLA and would not strike. (*Id.* ¶ 8). When the GCs declined to do so, as is their right, BNSF filed a Motion for Temporary Restraining Order on January 18, 2022, which was

[3] Indeed, time off to deal with the unexpected pandemic-related situations is particularly important at this time. (LaPresta Decl. ¶¶ 3-4). Such may include time off due to an employees' personal sickness, family sickness, quarantine, side effects of vaccines, childcare, and remote learning for children. (*Id.*).

subsequently granted. (D.E. 6, 7, 30).[4] In accordance with the schedule set by the Court (D.E. 37), Plaintiff's moved for its Preliminary Injunction on January 31, 2022 (D.E. 39, 40, 41), and Defendant now moves for its Preliminary Injunction.

## IV. LEGAL STANDARD

The following is considered by courts when deciding whether to grant injunctive relief:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

*Texans for Free Enter. v. Texas Ethics Commn.*, 732 F.3d 535, 375 (5th Cir. 2013) (internal citations omitted). As demonstrated herein, the Union's case meets these factors. By unilaterally implementing its Hi Viz attendance policy, BNSF prematurely resorted to self-help in violation of their statutory status quo requirements and the Union is entitled to an injunction restoring the status quo. *See Conrail*, 491 U.S. at 303; *see also W&LE*, 789 F.3d at 691.

## V. SUMMARY OF ARGUMENT

Throughout the pandemic, BNSF employees have risked their safety as frontline workers to ensure that there are minimal disruptions to the supply chain. In response, BNSF unilaterally instituted a new attendance policy whereby employees are required to always remain available 95% of the time or be penalized. This policy could not come at a worse time for the workers and the country, at a time when morale is extremely low, where supply chain issues continue to mount, and while the pandemic continues on. Importantly, BNSF's new policy violates the RLA,

[4] The same day, Judge Lynn ordered BNSF to show cause why the lawsuit was filed in the Dallas Division. (D.E. 10). BNSF filed its response to the order to show cause on January 19, 2022, asserting in part that a 1999 decision on BNSF's availability policy was heard in the Dallas Division and that any strike would impact its operations under the jurisdiction of that Division. (D.E. 12, 13). The very next day, the case was transferred to the Fort Worth Division and subsequently reassigned to the Honorable Judge Pittman.

as it changes the "rules and working conditions" in effect during the ongoing round of bargaining, bargaining which concerns these exact topics. Further, such ignores that the policy changes interfere with rights afforded under federal law, including the RLA's rights to union representation and the FMLA. Because SMART-TD has shown it is likely to succeed on the merits, its requested injunctive relief should be granted.

## VI. ARGUMENT

### A. SMART-TD is Likely to Succeed on the Merits that BNSF's Actions Constitute a Major Dispute Under the Railway Labor Act.

*1. The Status Quo Provisions under the RLA.*

The RLA's purposeful directive bars a carrier from unilaterally altering the existing "rules and working conditions" or the terms of the bargained-for agreement. 45 U.S.C. § 152 First, Seventh. Any change can only be accomplished through the required process of Section 6. 45 U.S.C. § 156. Despite such, BNSF here has altered the "rules and working conditions" without engaging in any negotiations. Such unilateral change violates the Act and should itself be enjoined.

Section 2, First which, as noted above, "has been described as the 'heart' of the RLA," provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise …

45 U.S.C. § 152, First (emphasis added). Section 2, Seventh provides:

> No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees as a class as embodied in agreements **except** in the manner prescribed in such agreements or in section 156 of this title.

45 U.S.C. § 152 Seventh (emphasis added). These provisions command that the Carrier must

maintain current "rules and working conditions," and that unilateral changes to those "rules and working conditions" are prohibited absent engaging in the required bargaining process set forth in Section 6. 45 U.S.C. § 156 ("In every case where such notice of intended changes has been given … rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon … .) (emphasis added). The words of the statute here are clear and must be given meaning.

Collectively, these provisions constitute the status quo provisions of the Act, and may be enforced by the issuance of a status quo preliminary injunction against a carrier without the necessity of showing irreparable harm. *See Conrail,* 491 U.S. at 303 ("[T]he district courts have subject matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures, without the customary showing of irreparable injury."); *see also Detroit & T. S. L. R. Co. v. United Transp. Union,* 396 U.S. 142, 156-57 (1969) ("*Shore Line*") (citing Section 2 Seventh, 45 U.S.C. § 152 Seventh); *Chicago & Nw.,* 402 U.S. 570 (citing Section 2 First, 45 U.S.C. § 152 First); *W&LE*, 789 F.3d at 691. Where a carrier violates the status quo, as BNSF has done here, the conditions that existed prior to the violation must be restored. *Shore Line*, 396 U.S. at 156-57; *W&LE*, 789 F.3d at 695.

*2. The Current Dispute is Major.*

Where carriers attempt to ignore and change the terms of the agreement, as BNSF has done here, courts have found the disputes to be "major." *See* 45 U.S.C. § 152 Seventh; *Shore Line*, 396 U.S. 142 (enjoining employer's attempt to change working conditions without bargaining); *see also W&LE,* 789 F.3d. at 696 (finding carrier's violation of the crew consist provision to be a major dispute); *Bhd. of Loco. Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 31-32 (1st Cir. 2000) (finding carrier's failure to negotiate right to contract out work in CBA and

subsequent attempt to contract out work to related corporation raised major dispute); *St. Louis Sw. Ry. v. Bhd. of R.R. Signalmen*, 665 F.2d 987, 998 (10th Cir. 1981); *Burlington N. R.R. v. United Transp. Union*, 862 F.2d 1266, 1275 (7th Cir. 1988); *United Transp. Union v. Gateway W. Ry.*, No. 95-0908-CV-W-1 1995 WL 842729, at *2-3 (W.D.Mo. Nov. 14, 1995) (finding major dispute where carrier ignored seniority provisions in contract and promoted employees out of order.)

Indeed, the decision in *W&LE, supra,* is instructive here. There, the carrier had served a Section 6 wanting to reduce crew size. 789 F.3d at 684. The parties started to negotiate, but while they were still in that process, the railroad began occasionally operating trains with a reduced crew. *Id.* at 685. The union strongly objected to those actions and warned the carrier that their actions created a major dispute violating the RLA. *Id.* at 686. The carrier filed suit asserting that the matter was a minor dispute, in much the same way as BNSF does here. *Id.* at 687. The court however did not agree with the carrier. *Id.* at 697. Instead, it found that the carrier's action, while the parties were engaged in negotiations over the very topic the carrier wanted to change, was a major dispute. *Id.*. The analysis of the situation here can be no different. BNSF has changed "rules and working conditions" on the very same topics that are at issue in negotiations without bargaining. *Conrail*, 491 U.S. at 302-03; *Shore Line*, 396 U.S. 142; *Florida East Coast Ry. v. Bhd. of Loco. Eng'rs*, 362 F.2d 482, 483 (5th Cir. 1966) (until railroad complies with "major" dispute process there can be no change in working conditions).

Here, the Parties are currently involved in collective bargaining negotiations where employee availability and work schedules are a hotly debated topic. Of note, BNSF, through its bargaining representative the National Carrier Conference Committee, has put forth a proposal in its Section 6 notice wherein it has called for "better and more predictable work schedules" to

"enhance employee quality of life." (D.E. 22-1, Ferguson Decl. ¶ 5, Ex. A). Despite BNSF placing these issues squarely on the bargaining table, they now wish to change them, much in the same way as the carrier did in *W&LE*. However, as is well-settled law, once § 6 Notices are exchanged, the "rules and working conditions" as they exist cannot be changed until the process has been completed. *Shore Line*, 396 U.S. 142; *W&LE*, 789 F.3d at 691. Ignoring this well-settled law BNSF has decided to unilaterally change the availability "rules and working conditions" while the parties were in the midst of actually negotiating them. This violation is particularly egregious during a pandemic and where the employees are taking leave protected by federal law. Such is a major dispute and should be enjoined.

*3. This Matter Presents an Independent Statutory Dispute.*

In addition to major and minor disputes, parties can also raise independent statutory disputes over a carrier's violation other provisions of the RLA and other federal statutes. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994). The Hi Viz policy on its face discriminates against individuals who are union officers unavailable for their railroad work when off on union business and those who take leave under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601–2654. While the policy does not deduct points for such leave, it prohibits employees from crediting points back, unlike military leave and leave for company business. (Ferguson Decl. ¶ 6, Ex. C). In addition, union officers and those on FMLA leave are penalized an extra two or three points if they are unavailable the day before or after such protected leave. (*Id.*). Such violates the RLA and FMLA.

*a. Statutory Violation of the RLA.*

With regard to the violation of the RLA, the policy implicates Sections 2 Third and Fourth. 45 U.S.C. § 152, Third, Fourth. Section 2, Third, states, in pertinent part:

"Representatives ... 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." 45 U.S.C. § 152, Third (emphasis added). Section 2 Fourth, states, in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. … 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 to influence or coerce employees in an effort to induce the them to join or remain or not to join or remain members of any labor organization.

45 U.S.C. § 152, Fourth. While federal courts' jurisdiction may be limited post-certification, *Trans World Airlines, Inc. v. Indep. Fed. of Flight Attendants*, 489 U.S. 426, 440 (1989), it is not absolutely foreclosed. The court will intervene where, as here, "the aggrieved union has no other remedy to enforce the statutory commands which Congress had written into the [RLA].'" *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 234 (1st Cir. 1996) (citing *TWA*, 489 U.S. at 440). In *Wightman*, the First Circuit noted that intervention is appropriate "upon demonstration of carrier conduct reflecting anti-union animus, an attempt to interfere with employee choice of collective bargaining representative, discrimination, or coercion," and "when a carrier commits acts of intimidation that cannot be remedied by administrative means, or commits a fundamental attack on the collective bargaining process or makes a direct attempt to destroy a union." *Wightman*, 100 F.3d at 234. Notably, this is not a direct dealing case, nor is there a contract interpretation question at issue here, as in *Bhd. of Ry. Carmen v. Atchison, Topeka & S.F. Ry.*, 894 F.2d 1463, 1467 (5th Cir. 1990) (finding resolution of dispute over

whether railroad could offer voluntary resignation program turned on interpretation of the contractual agreements between the parties and was therefore "minor").

Here, BNSF's policy meets several of these criteria, including interfering with the collective bargaining process. Critical to the union's representation function are the frontline officers known as Local Chairpersons ("LC"). They are key to the enforcement of the terms of the CBA and the proper representation of the members. They are being penalized for performing this necessary and required function. Through no fault of their own, indeed it is the Carrier who controls the timing of the process, they cannot mark off without penalty. Not only are they denied "good points," they also, like every other member, have to deal with personal and family issues. Their marking off for any reason is doubly penalized. For example, it is BNSF who issues notices of investigation to employees. BNSF in its discretion, sets when hearings will be held, usually on short notice. Most hearings are conducted within 10 days. (D.E. 22-1, Ferguson Decl. ¶ 6). Once the notice is sent, the LC has to quickly rearrange their schedule to prepare and attend the hearing. And no matter when the hearing is, this mark off to fulfill the legal obligation to represent a member automatically eliminates any chance for "good attendance credits." (D.E. 22-1, Ferguson Decl. ¶ 6, Ex. C). BNSF by simply scheduling a hearing in the first half of the month and another in the second half will eliminate any "good credits" for a month. Similarly, the filing and progressing of grievances for members takes time and often requires an officer to mark off to prepare for hearings and any subsequent appeals. (*Id.*; LaPresta Decl. ¶ 14). The LC is penalized for this mark off, even though it was not their choice, but was at the insistence of BNSF. If they have had to early mark off to attend to a family matter, they are doubly penalized. Indeed, in one example, if the Hi Viz was in effect in January, the LC would have hit his 30 points and been subject to discipline in just the first month. (LaPresta Decl. Ex. I).

Moreover, and quite critically, this Hi Viz policy interferes with the ability of the union to carry out its legal obligation to represent its membership. *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46-47 (1979) (noting a union has a duty of fair representation); *see also Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). LCs are critical to the representation of members in discipline and rules cases. When representing members with disciplinary matters, LCs are at the Carrier's mercy regarding the scheduling of the investigation hearing. In addition to the investigation itself, an LC will often spend several days preparing for the hearing in advance and drafting the appeals following the investigations. Moreover, BNSF employees who also hold union office have obligations outside of the workplace. To illustrate such, take the single parent of two handicapped children who was formerly a Local Chairperson ("LC"). As applied, it is unlikely that someone would be able to continue with their duly elected position. (LaPresta Decl. ¶ 14). Caring for children with special medical needs is difficult enough. Add the stress of holding other people's livelihoods in your hands and the Carrier threatening termination and assessing attendance points against you would be unbearable. The mandatory mark off to represent a member places an LC in the untenable position of facing discipline for fulfilling their required legal obligation and attending to family needs. As such, this impairs the union's ability to carry out its legal duty of representation, and makes it impossible to retain or attract officers to perform necessary work. Under the Hi Viz policy, these employees will have to choose between their job or their obligations as a union representative. Such oppressive and interfering policy violates the Act.

Moreover, in the rollout itself, BNSF circumvented the GCs, instead talking directly with the LCs to push its Hi Viz policy. (*Id.*). Such is an attempt to interfere with the union's choice of representative, in violation of Sections 2 Third and Fourth, 45 U.S.C. 152 Third, Fourth. Taken

as a whole, these actions absolutely "strike a fundamental blow to union or employer activity and the collective bargaining process itself.'" *Dempsey v. Atchison, Topeka & Santa Fe Ry. Co.*, 16 F.3d 832, 841 (7th Cir. 1994).

*b. Statutory Violation of the FMLA.*

Furthermore, it has been held that the taking FMLA leave as a negative factor in employment actions constitutes interference for purposes of the FMLA.[5] *Demyanovich*, 747 F.3d at 475-76; *see also Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748-750-51 (7th Cir. 2010) ("[W]iping a point off the absenteeism slate is indeed an employment benefit."). Such is consistent with the U.S. Department of Labor's guidance and supporting case law. *See* WHD Opinion Letter FMLA 2018-1-A; *Dyer v. Ventra Sandusky, LLC*, 934 F.3d 472 (6th Cir. 2019).

In *Dyer*, the Sixth Circuit held that the district court's grant of summary judgment to a company was improper because:

> A jury could find that [the company's] no-fault point-reduction scheme interfered with [the plaintiff's] right to take FMLA leave and be restored to an equivalent position with equivalent benefits and other terms and conditions of employment upon return to work. Restarting the 30-day period for eliminating one attendance demerit for intermittent FMLA leave punishes the employee for taking that leave, even though the FMLA leave itself does not count toward the 11-point limit. A jury could find that, by not resetting Dyer's 30-day perfect attendance clock after he returned to work after taking FMLA leave, Ventra Sandusky failed to restore his accrued employment benefits as required by the FMLA. What's more, even if Ventra Sandusky could avoid liability by showing that equivalent leave statuses

[5] The 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); and from "discriminating or retaliating against an employee… for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). To prevail on an FMLA interference claim, a plaintiff must establish that (1) he was an eligible employee as defined under the FMLA; (2) his employer was a covered employer as defined under the FMLA; (3) he was entitled to leave under the FMLA; (4) he gave the employer notice of his intention to take FMLA leave; and (5) his employer denied FMLA benefits to which he was entitled. *Burris v. Brazell*, 351 Fed.Appx. 961, 963 (5th Cir. 2009); *see also Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 427 (6th Cir. 2014).

> similarly reset the 30-day clock, there is a dispute of material fact regarding whether it treats unpaid forms of military leave and union leave the same.

*Id.* at 478. As noted above, BNSF's policy dictates that employees will begin with 30 points, which are then deducted in amounts ranging from two points to 25 points depending upon the reason for the absence and day of the week, culminating in discipline when those points reach a certain threshold. (Ferguson Decl., Ex. C). BNSF will then add back four points for any 14-day period in which the employee has not been absent for any reason other than training, working light duty, company business, or on military leave. (*Id.*). Particularly for employees in "unassigned" service who are required to be on-call 24/7 and have no scheduled rest days, and who have approved FMLA, this policy is particularly devasting. For those employees, this is not a theoretical exercise, but one with harsh real-life consequences. Employees have flooded the GC offices with examples of such. BNSF, however, is unmoved by the troubling wake of its policy. (LaPresta Decl. ¶ 10). As mentioned above, one such employee, also formerly a LC, is a single parent with two disabled children whose care requires traveling to appointments eight hours away. (LaPresta Decl. ¶ 14). The employee would often need to lay off multiple days in advance in order to attend appointments with specialist in various cities, scheduling for which occurs months in advance. (*Id.*). One such appointment which took years to obtain required the employee to lay off 96 hours FMLA due to the associated five-hour travel and two-day appointment. (*Id.*). After repeatedly checking to see when they would be going to work, the employee was eventually informed that they would need to report the night they returned home from the hospital and traveling all day. (*Id.*). Because they would not be sufficiently rested and therefore unsafe, the employee attempted to lay off personal business, but was denied. The employee then had to lay off sick. (*Id.*).

Another employee must accompany their spouse with serious medical conditions to their out-of-state appointments, and requires time off to care for their spouse as needed. (LaPresta Decl. ¶ 12). This employee is similarly harmed by the Hi Viz. Other situations entail custody situations, like the employee who has court ordered visitation with their child every other weekend and that is the only opportunity they get to spend time with their child. (LaPresta Decl. ¶ 13). Prior to Hi Viz, marking off to see their children was not an issue. (*Id.*). Now, however, it demands a choice between earning an income or seeing family.

These are just several of countless examples of the real-world repercussions of the Hi Viz policy. (LaPresta Decl. ¶¶ 11-15). These are not planned events. Employees cannot plan when their spouse or child is going to get sick and require their care, particularly during a pandemic. Even for those appointments which are "planned," the Hi Viz policy does not allow employees with adequate time to lay off of work to attend such. Moreover, there is an incredible amount of stress and fatigue placed on the employee who is also serving as the caregiver. *See, e.g.*, Caregiver Burnout, Cleveland Clinic, *available at* https://my.clevelandclinic.org/health/diseases/9225-caregiver-burnout. The physical demand of rail jobs is exacting without adding more unnecessary emotional and mental stress. (last visited Feb. 2, 2022).

Fatigue in the rail industry leads to disastrous consequences. Under the Hi Viz policy, these employees will have to choose between their job or their health/family/union obligations. They will be required to choose between working fatigued and placing themselves at risk or not working and setting themselves up for discipline. Others will be forced to choose between fulfilling their legal duty to represent their members and taking care of their family, or not working and setting themselves up for discipline. By punishing employees who use FMLA

leave, and further by treating employees off FMLA differently than those on military leave, BNSF's policy has likely violated the FMLA. *Dyer*, 934 F.3d at 478.

**B. No Showing of Irreparable Injury is Necessary to Issue a Status Quo Injunction.**

Courts have long held that no showing of irreparable harm is required to issue a status quo preliminary injunction. *See, e.g., Flight Options, LLC v. Int'l Bhd. of Teamsters 1108*, 863 F.3d 529, 545 (6th Cir. 2017) (noting "[t]he second factor is inapplicable in the context of an RLA dispute, because courts may enjoin a violation of the status quo pending completion of the required [Section 6] procedures, without the customary showing of irreparable injury.'") (quoting *Conrail*, 491 U.S. at 303; *see also S. Ry. Co. v. Bhd. of Locomotive Firemen & Enginemen*, 337 F.2d 127, 133-34 (D.C. Cir. 1964) (holding irreparable injury showing unnecessary for preliminary injunction under RLA status quo provision); *W&LE*, 789 F.3d at 691 ("[T]he party moving for injunctive relief in federal court is not required to make the usual showing of irreparable injury."). Nevertheless, the Union would be irreparably harmed by the Railroad's violation of the status quo, in contravention of the statutory mandate.

**C. The Balance of Harms Favors a Status Quo Injunction.**

In addition to not requiring a showing of irreparable harm, courts routinely grant status quo injunctions under the RLA without weighing the traditional balancing of equities. *See, e.g., Bhd. of Maint. of Way Empl., Lodge 16 v. Burlington N. R.R. Co.*, 802 F.2d 1016, 1021 (8th Cir. 1986) ("If the dispute is major [under the RLA], the courts have broad powers to enjoin unilateral action by either side in order to preserve the status quo while settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities.") (emphasis added). Even if such was required, however, the balance of harms weighs in the Union's favor and supports the issuance of the requested injunctive relief. Indeed, as recognized

in *Flight Options*, the Carrier is "unlikely to suffer substantial harm from being required to preserve the status quo," in part where they are "obliged by statute to do so." 863 F.3d at 545. Here, no harm will befall the Railroads in granting an injunction that maintains the status quo, while the Union and employees will be harmed by the failure of the Railroads to abide by the existing agreements and bypassing the Union before instituting changes to the mandatory terms and conditions of employment. By its very nature, bypassing the Union undermines the Union's status and power as the collective bargaining representative and risks diminishing the Union in its members' eyes. *See Small v. Avanti Health Sys.*, 661 F.23d 1180, 1191-92 (9th Cir. 2011).

**D. Public Interest Favors the Issuance of SMART-TD's Requested Injunction.**

Consistent with the primary purpose of the RLA to make and maintain agreements, and in furtherance of parties abiding by the law and agreements they make, public interest strongly favors preserving the status quo required by the RLA. *See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1308 (11th Cir.), *cert. denied*, 532 U.S. 1019 (2001) ("We note that in RLA cases a [party] need not show irreparable injury, a usual prerequisite for obtaining an injunction, to enjoin a violation of the *status quo* because of the strong public interest in enforcing the RLA."); *see also Union Pac. R.R. Co. v. Bhd. of Maint. of Way Employes Div. of Int'l Bhd. of Teamsters*, 509 F. Supp. 3d 1117, 1132 (D. Neb. 2020) (noting "public interest favors maintaining the status quo and avoiding major disruption to the nation's rail lines"); *Atlas Air, Inc. v. Intern. Broth. Of Teamsters*, 280 F. Supp. 3d 59, 105-06 (D.D.C. 2017). The public interest does not favor an employer unilaterally imposing draconian requirements regarding terms and conditions of employment, especially where well-settled statutes provide that such issues be resolved in negotiations. Furthermore, public interest is not served by allowing a policy which on its face violates federal law to stand.

## VII. CONCLUSION

For the foregoing reasons, SMART-TD respectfully requests that the Court grant its Motion for Preliminary Injunction, restore the parties to the status quo that existed prior to February 1, 2022, and order BNSF to bargain with the Union prior to implementing any changes to the terms and conditions of employment for represented employees.

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Respectfully Submitted:

*/s/ Sanford R. Denison*

SANFORD R. DENISON
Tex. Bar No. 05655560
Baab & Denison, LLP
6301 Gaston Ave., Suite 550
Dallas, TX 75214
Tel.: (214) 637-0750
Fax.: (214) 637-0730
Email: denison@baabdenison.com

KEVIN C. BRODAR
General Counsel
Ohio Bar No. 52854
ERIKA A. DIEHL-GIBBONS*
Associate General Counsel
Ohio Bar No. 86424
SMART-TD
24950 Country Club Blvd., Ste. 340
North Olmsted, OH 44070
Tel: (216) 228-9400
Fax: (216) 228-0937
Email: kbrodar@smart-union.org
Email: ediehl@smart-union.org

*Counsel for Defendant International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division ("SMART-TD")*

* Admitted
*Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I certify that on this 2nd day of February, 2022, a true and correct copy of the foregoing document was served on counsel for all parties of record listed below by a means permitted by Rule 5(b)(2) of the Federal Rules of Civil Procedure ("F.R.C.P.").

David M. Pryor
BNSF Railway Co.
2500 Lou Menk Dr.
AOB-3
Fort Worth, TX 76131-2828
Tele: 817-352-2286
Fax: 817-352-2399
Email: david.pryor@bnsf.com

Donald J. Munro
Jones Day
51 Louisiana Ave NW
Washington, DC 20001-2113
Tele: 202-879-3939
Fax: 202-626-1700
Email: dmunro@jonesday.com

Russell D. Cawyer
Taylor J. Winn
Kelly Hart & Hallman LLP
201 Main Street, Suite 2500
Fort Worth, TX 76102-3194
Tele: 817-332-2500
Fax: 817-878-9280
Email: russell.cawyer@kellyhart.com
Email: taylor.win@kellyhart.com

Rod Tanner
Tanner and Associates, PC
6300 Ridglea Place, Suite 407
Fort Worth, Texas 76116-5706
Tele: 817-377-8833
Fax: 817-377-1136
Email: rtanner@rodtannerlaw.com

*/s/ Sanford R. Denison*
SANFORD R. DENISON