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

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In Miguel de Cervantes' classic novel *The Ingenious Gentleman Sir Quixote of La Mancha*, the eponymous hero earns his fame as a patron saint of lost causes. With his trusty squire Sancho Panzo by his side, the would-be knight-errant – having read too many chivalric romances – sets off to tilt at windmills. He remains undaunted by both his repeated failures and his inability to comprehend the world around him. Don Quixote never prevails, but there is a sad nobility to his idealistic persistence.

The Unions in this case – BLET and SMART-TD – are on their own quixotic quest. It has been almost 33 years since the Supreme Court's decision in *Consolidated Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 303-04, 312 (1989) ("*Conrail*"). During that span, the railroad unions (including BLET and SMART-TD) have challenged BNSF Railway ("BNSF") and its predecessors in literally dozens of cases over the classification of disputes as "major" or "minor" under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* They have ***never*** prevailed, yet they continue to tilt at this windmill time and time again.

In this regard, BLET and SMART-TD are much like the union defendant in *Burlington N. & S.F. Ry. v. BMWE*, 143 F. Supp. 2d 672 (N.D. Tex. 2000) (McBryde, J.), *aff'd*, 286 F.3d 803 (5th Cir. 2002), which repeatedly tried to strike over "minor" disputes based on the mistaken belief that those disputes were properly viewed as "major." *Id.* at 679 (recounting 18 instances of minor disputes that union incorrectly claimed were major). BLET and SMART-TD have not – in most cases – displayed the same tendency to strike without warning, but they do exhibit a similar stubborn inability to distinguish major from minor. The result has been decades of wasteful and repetitive litigation that inevitably serves as a pointless prologue to arbitration of the merits of the parties' disputes.

The present dispute is a classic example of this pattern. As discussed in BNSF's previous briefs (ECF No. 7 and ECF No. 40), disagreements over changes in carrier attendance or discipline policies have been litigated on multiple occasions, and in every case, the dispute was classified as "minor" and thus subject to arbitration under Section 3 of the RLA. *See, e.g.*, *BLET GCA UP v. Union Pac. R.R. Co.*, 988 F.3d 409, 413 (7th Cir. 2021); *Burlington N. & S.F. Ry.*, No. 4:99-cv-0675-Y (Sept. 8, 1999) (ECF No. 8). This dispute is likewise properly deemed minor because, as BNSF has already shown, it has at least an "arguable" basis for claiming that it has a contractual right to establish, modify, and maintain employee attendance standards. *Conrail*, 491 U.S. at 307; *see also* ECF No. 7 at 13-15 (outlining BNSF's past practice evidence).

The Unions' Motions for Preliminary Injunction are, of course, predicated on the opposite contention, *i.e.*, that the dispute over Hi Viz is major, not minor. Dueling motions for preliminary injunction are common in this kind of case, and which side is entitled to relief inevitably boils down to whether the dispute is major or minor. *See, e.g.*, *Chicago & North Western Transp. Co. v. Railway Labor Executives Ass'n*, 855 F.2d 1277, 1280 (7th Cir. 1988) (granting railroad's motion and denying union's cross-motion); *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990, 993-94 (2d Cir. 1990) (same). As explained in more detail below – and as previously addressed in connection with BNSF's own pending motion for injunctive relief – the Unions in this case have no plausible argument that BNSF's position is "frivolous" or that the Hi Viz dispute is major (and also cannot satisfy the other requirements for injunctive relief). Accordingly, for essentially the same reasons that the Court should grant BNSF's Motion for a Preliminary Injunction, ECF. No. 39, the Unions' Motions for a Preliminary Injunction should be denied.

ARGUMENT

The Unions' Motions for Preliminary Injunction repeat – almost word for word – their contentions opposing BNSF's motion for a restraining order. Because BNSF has already addressed most if not all of those arguments, we will, for the most part, simply summarize our previous responses, with a few embellishments where necessary to address any new assertions by the Unions. In Part I, below, we rebut (again) the Unions' claims that the Hi Viz dispute is "major" because the parties are discussing related issues at the bargaining table and/or because Hi Viz supposedly conflicts with particular collective bargaining agreement ("CBA") provisions. In Part II, we address the Unions' attempt to reframe this dispute as a "statutory" question of anti-union animus. In Part III, we respond to their reliance on the Family and Medical Leave Act ("FMLA"). Finally, in Part IV, we explain why the Unions are not entitled to an *M-K-T* "status quo" injunction pending arbitration.

I. THIS IS A MINOR DISPUTE, NOT A MAJOR DISPUTE.

Both SMART-TD and BLET offer various theories as to why the disagreement over the Hi Viz Attendance Program should be characterized as a major dispute. As BNSF has already shown, they are wrong. *See* ECF No. 7 at 13-17, 19-20, ECF No. 40 at 5-12, 17-18.

A. The Major-Minor Inquiry Does Not Turn on Whether the Dispute Overlaps With Issues in Ongoing Bargaining.

Because they know they cannot win under the *Conrail* standard, SMART-TD – and to a lesser extent BLET – contend that if the subject of a dispute is the same or similar to topics being discussed in bargaining, then the dispute is *per se* major. ECF No. 46 at 11-12; ECF No. 44-1 at 11-12. They argue that because "availability and work schedules" are the subject of pending Section 6 notices (seeking to change agreements), BNSF is prohibited from altering the "status quo" as to any related matters. *Id.*

There is still no legal support for that theory. In short, the *Conrail* test concerns whether the carrier's proffered interpretation is "arguable," not whether the subject of the parties' dispute is "similar" to anything being discussed at the bargaining table. 491 U.S. at 307. *See also* ECF No. 7 at 19-20; ECF No. 40 at 17-18 (collecting cases). That is because a railroad's effort to acquire future rights does not, by itself, reveal what the railroad's existing rights might be. *Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. BNSF Ry. Co.*, No. C15-1270RSL, 2015 WL 5159201 (W.D. Wash. Aug. 24, 2015) (proposal by BNSF in bargaining on what SMART-TD claimed was the "same" subject is not dispositive as to major/minor inquiry).

No court has ever – to our knowledge – adopted a contrary view. The only post-*Conrail* decision that SMART-TD cites on this point is *Wheeling & Lake Erie Ry. v. Bhd. of Loco. Eng'rs & Trainmen*, 789 F.3d 681 (6th Cir. 2015) ("*W&LE*"). The Union claims that *W&LE* found that a dispute over crew size was "major" because "the parties were engaged in negotiations over the very topic the carrier wanted to change." ECF No. 46 at 11. But that is not what *W&LE* actually holds. The reason the Sixth Circuit held that dispute was major was because the "[carrier's] claim that the [CBA] allows it to man trains without union conductors is frivolous or obviously insubstantial in light of the express language of the [CBA]." 789 F.3d at 690. In other words, *W&LE* applied the usual test under *Conrail*, and simply found the railroad's interpretation to be too implausible.

SMART-TD also relies on *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969) ("*Shore Line*"). But the Union continues to ignore BNSF's counter-argument that, under *Conrail*, the *Shore Line* "status quo" concept "has no direct application to a minor dispute." 491 U.S. at 305 n.5. The Unions' invocation of the "status quo" – absent a determination that BNSF's position is "frivolous" – remains "analytically backward." *CSX Transp., Inc. v. UTU*, 879 F.2d 990, 999 (2d Cir. 1989).

B. Hi Viz Is Arguably Consistent With the Parties' Existing Agreements.

BLET, unlike SMART-TD, at least acknowledges the *Conrail* test and makes a passing effort to try to show that BNSF's position is "frivolous" under the parties' existing agreements. ECF No. 44-1 at 4. BLET references various categories of CBA provisions, all of which it discussed in its opposition to BNSF's motion for a TRO. *Compare* ECF No. 44-1 at 4-10 (BLET's Motion for Preliminary Injunction) *with* ECF No. 20 at 2-6 (BLET's Opposition).

However, BNSF has (again) already explained why it is at least "arguable" that none of CBA terms cited by BLET bar the railroad from implementing Hi Viz. ECF No. 40 at 7-12. There is nothing new or responsive in BLET's submission, and so BNSF stands by its previous arguments, which, briefly summarized, are as follows:

- *Union Business Mark-Offs*: BLET insists that Hi Viz conflicts with agreements stating that an absence for union business "will not be considered as laying off or missing a call for purposes of Rule 23 and 24." ECF No. 21 at 21. It is arguable that these provisions do not bar Hi Viz because (1) the Program does not assess any points for an absence for union business, and (2) the cited provisions at least arguably do not require BNSF to treat union business as equivalent to regular service, and thus do not obligate the railroad to reward union business mark-offs for purposes of calculating the Good Attendance Credit. *See* ECF No. 40 at 7-8.

- *Union Representation*: BLET's theory that Hi Viz interferes with contractual rights to union representation in disciplinary proceedings is flawed for a number of reasons, including (1) the absence of evidence that previous attendance standards affected the ability of local officers to perform those duties; (2) the ability of local officers to switch off and cover for one another; (3) the flexibility in scheduling of disciplinary proceedings; and (4) record evidence showing that even the heaviest users of union business would not be at risk of discipline. *See* ECF No. 40 at 8-9; ECF No. 8 at 168, 189.

- *Reasonable Layoff Privileges*: BLET has previously argued that BNSF's attendance standards deprive employees of contractual rights to "reasonable layoff privileges," but it lost in arbitration. ECF No. 41 at 35. Given the lack of any evidence that BNSF has failed to maintain a sufficient number of employees to permit "reasonable" layoffs under Hi Viz – as well as the inherently fact-based question of what is "reasonable" – it is hardly "frivolous" for BNSF to maintain that the same reasoning justifies its adoption of Hi Viz. *Id.*

- *Displacement Rights*: BLET also claims that Hi Viz conflicts with the right of employees to take 24 hours to select a new position if "bumped." ECF No. 44-1 at 9-10. Again, the unions have repeatedly lost this point in arbitration – displacement rights do not immunize an employee from application of attendance rules if he or she delays in exercising those rights. ECF No. 41 at 37-47. Again, in light of that authority, it is hardly frivolous for BNSF to contend that the same rule would apply in this case. ECF No. 40 at 11.

- *Paid Leave Rights*: Finally, BLET argues that Hi Viz conflicts with paid leave rights because an employee in unassigned service could be called to work just prior to a scheduled leave period. ECF No. 44-1 at 10. But the issue that BLET identifies is not new; vacations and other paid leaves were subject to change under the previous attendance system as well as this one. ECF No. 40 at 12. As a result, it cannot be frivolous for BNSF to contend that continuing to apply these rules under Hi Viz is permissible. *Id.*

It is also worth emphasizing that neither BLET nor SMART-TD has any answer to BNSF's 40+ year history of establishing and modifying attendance and employee availability policies. *See* ECF No. 7 at 13-17 (discussing examples of unilateral adoption or implementation of attendance rules or practices), ECF No. 40 at 5-6; *see also Burlington N.& S.F. v. BLET*, No. 4:99-cv-675-Y (N.D. Tex. 1999) (ECF No. 8) ("BNSF and its predecessors have a history of implementing policies regarding availability for work, attendance, and absenteeism . . . for at least twenty years."). As this Court noted just a month ago in a similar dispute between some of these same parties, "implied contractual terms, *as interpreted through established past practice*, will serve to classify a dispute as minor." *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transportation Workers - Transportation Div.*, No. 4:21-CV-0432-P, 2022 WL 138518, at *7 (N.D. Tex. Jan. 14, 2022) (emphasis added) (quotation marks omitted). Given BNSF's past practice of changing attendance rules, any debate over whether particular details of any specific attendance rules conflict with existing contract provisions on other subjects is exactly the kind of matter that can and should be decided by "railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in the field." *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257, 262 (1965).

C. The Unions' New Factual Assertions Do Not Change the Analysis.

While most of the Unions' briefing on the major-minor inquiry is identical to their previous arguments, they do add a few additional details on certain points. Most prominently, SMART-TD adds a new declaration from one of its General Chairpersons, Joseph Michal LaPresta. ECF No. 46-1. Mr. LaPresta asserts, among other things, that BNSF is overworking its employees, such that "many employees go to work fatigued because they cannot get time off without being penalized." *Id.* at 3 ¶ 5. He also contends that the Hi Viz Program is not reasonable in various respects, arguing that it is "harsh and severe." *Id.* at 4 ¶ 8. And he offers various examples of what he claims will be problematic applications of the Program for employees using FMLA or union business rights. *Id.* at 4-7 ¶¶ 10-14.

For several reasons, Mr. LaPresta's assertions do not suffice to show that this is a "major" dispute. *First*, "wading through the competing declarations to determine the actual authority the Railroad had to modify its . . . policies, based on past practices, is a job for the arbitrator." *Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm, of Adjustment, Ctr. Region) v. Union Pac. R.R. Co.*, 879 F.3d 754, 759 (7th Cir. 2017) ("*UP*"); *cf. also BNSF*, 2022 WL 138518, at *7 (Pittman, J.) (noting that "dueling affidavits" regarding past practice indicate that dispute is minor). So while BNSF disagrees with essentially every one of Mr. LaPresta's claims, arbitration is the forum to resolve those factual questions. *See* Supp. App. 1 - 5 ¶¶ 3-12 (Second Supplemental Declaration of Salvatore Macedonio).

Second, the Unions' assertions concerning whether the Hi Viz rules are reasonable are especially inappropriate in this forum because that is exactly the issue for arbitration. An arbitrator can and should decide whether Hi Viz is "reasonable." *See, e.g.*, ECF No. 8 at 58 (Kasher Award) (noting that issue to be decided is whether the BNSF attendance rules are "reasonable"); ECF No. 41 at 32-33 (Kohn Award) (same).

Third, if the Court were inclined to "wade through" the competing declarations on these issues, it would find that the Unions have exaggerated or mischaracterized virtually every point. For example:

- There is no support for Mr. LaPresta's claim that employees are unable to get any time off and so are "exhausted." ECF No. 46-1 at 4 ¶ 8. As Mr. Macedonio has explained, employees have both contractual time off as well as statutorily-mandated rest between shifts. Supp. App. at 1-2 ¶ 3; ECF No. 41 at 3-5 ¶¶ 9-10. Moreover, Mr. LaPresta's depiction of the current situation ignores the fact that the Unions have rebuffed BNSF's efforts to expand predictive work schedules and other fatigue management tools.[1] Supp. App. at 2 ¶ 5.
- Employees are not, as Mr. LaPresta suggests, trapped in unassigned service and unable to get time off for FMLA needs or union business. An employee whose lifestyle or other commitments are inconsistent with unassigned service can bid to any one of various other positions that have more regular hours. Supp. App. at 2-3 ¶ 6.
- The stories of individual hardship that Mr. LaPresta provides are, as best BNSF can determine, not accurate. For example, Mr. LaPresta claims that one local union officer would have exhausted his points and been subject to discipline in just the first month of Hi Viz, had it been implemented in January, implying that this shows how the Program will chill use of union business markoffs. But as Mr. Macedonio explains, even in the Union's own example, the individual's use of union business layoffs would have had no impact whatsoever on his point total. Supp. App. at 4 ¶ 10.

[1] There is a clear distinction between subjects that have historically been negotiated – such as pool assignments and work schedules for employees in unassigned pools – and those that the railroad has a long-standing past practice of managing in its unilateral discretion, including attendance and availability. *See* ECF No. 41 at 3-4 ¶ 9; 6 ¶ 14.

II. THIS IS NOT A STATUTORY DISPUTE UNDER SECTION 2 THIRD AND 2 FOURTH OF THE RAILWAY LABOR ACT.

The issue of union business also comes up in connection with the Unions' attempt to reframe this case as a "statutory" dispute under Section 2 Third and Section 2 Fourth of the RLA. They argue that Hi Viz is a "fundamental attack" on union representation rights because the Program "penalizes" laying-off for union business. ECF No. 44-1 at 12-16; ECF No. 46 at 12-16 (quoting *Dempsey v. Atchison, T. & S.F. Ry.*, 16 F.3d 832, 841 (7th Cir. 1994)).

Once again, BNSF has already addressed these arguments, both its memorandum in support of a TRO and its memorandum in support of a preliminary injunction. *See* ECF No. 7 at 17-20, ECF No. 40 at 9. To restate those points, there are three related reasons why the Unions are wrong.

A. Assertion of a "Statutory" Claim Cannot Circumvent *Conrail*.

Because they almost never win under *Conrail*, unions often try to portray a dispute as implicating some other part of the RLA. *See* ECF No. 7 at 17. But a union's attempt to recharacterize a dispute as "statutory" – based on any alleged impact on union representation – cannot evade the *Conrail* test. The threshold question remains whether the carrier's action is "arguably" permitted by the parties' agreements. 491 U.S. at 307.

This exact point was addressed just a few days ago by Judge Friedrich in *Ass'n of Flight Attendants v. United Airlines, Inc.*, No. 21-CV-01674, 2022 WL 252030 (D.D.C. Jan. 27, 2022). In that case, the employer had initiated disciplinary investigations of two local union officers. The union sued, seeking an injunction based on the theory that the airline's investigations violated Sections 2 Third and Fourth of the RLA. *Id.* at *2. The court rejected that claim, concluding that the airline's actions were arguably permitted by the CBA. *Id.* at *5. It explained as follows:

> The union contends that the RLA's withdrawal of jurisdiction over minor disputes is inapplicable here because the union raises statutory claims under the RLA, not claims under the CBA. But the *Conrail* test does not turn on a whether a statutory claim exists. Nor does it matter which section of the RLA applies. What matters is whether the contested action relates to, or "'is arguably justified by the terms of the parties' [CBA].'" All disputes that are go to arbitration. Here, there is no colorable argument that the actions United took in its investigation of [two employees and union representatives] are not related to or "arguably justified" by . . . the CBA, which provides for employee discipline. "[F]ederal courts should be particularly wary of finding jurisdiction when the carrier plausibly understands a CBA to permit its conduct."

Ass'n of Flight Attendants v. United Airlines, Inc., No. 21-CV-01674, 2022 WL 252030, at *5 (D.D.C. Jan. 27, 2022) (citations omitted). *See also Ass'n of Prof'l Flight Attendants v. American Airlines, Inc*., 843 F.2d 209, 211-12 (5th Cir. 1988) ("*APFA*") ("exceptions to the limits on federal judicial power in minor disputes arise only when the administrative mechanism that Congress confected breaks down. If the administrative process is available, minor disputes must be routed through it").

The same is true here. Because the elements of Hi Viz are arguably permitted by the parties' agreements, the Unions' assertion that the Program is not reasonable as applied to local officers must be addressed to an arbitrator.

B. A "Chilling Effect" is Not a "Fundamental Attack" on a Union.

Even if this were the right forum to address the Unions' claim, as a matter of law, what they allege does not rise to the level of a violation of Sections 2 Third and Fourth. As the Fifth Circuit has emphasized, any cause of action under Sections 2 Third and Fourth in the post-certification context is extraordinarily "narrow." *APFA*, 843 F.2d at 211. The Unions would need to show that the "extrajudicial dispute-resolution framework of the RLA is either ineffective . . . or unavailable," or that the carrier's actions were "for the purpose of weakening or destroying" the Unions. *Bhd. of Ry. Carmen (Div. of TCU) v. Atchison, Topeka & Santa Fe Ry. Co.*, 894 F.2d 1463, 1468 n.10 (5th Cir. 1990).

Nothing that the Unions have alleged would constitute that sort of "exceptional circumstance." *Id.* They do not and cannot allege that any local union officer has been prevented from performing his duties. Nor can they show that Hi Viz directly penalizes union business markoffs. *See* ECF No. 8 at 167 (Macedonio Declaration ¶ 15). At most, they allege that there *could be* a chilling effect if officers were worried about not being able to earn Good Attendance Credits. But even if that were proven – and as discussed below it is not remotely plausible – that is hardly a situation "where the essential framework for bargaining between management and the union has broken down." *APFA*, 843 F.2d at 211. That is especially so given that, if the Unions were right, a Section 3 arbitrator could provide a remedy.

The same is true of the Unions' secondary claims. For example, they assert that Hi Viz discriminates against union business leave because the Program "exempts unpaid military leave from any penalty for being unavailable, but punishes use of similar unpaid Union leave." ECF No. 44-1 at 16. That is not correct. For one, neither form of leave is "punished" – this is, again, just a question of whether employees can earn a Good Attendance Credit. But more importantly, unpaid military leave is *not* treated better than union business leave in this regard. Supp. App. at 3-4 ¶ 9. To be sure, *paid* military leave does not disqualify an employee from earning a Credit, but paid leave is not comparable, and even if it were, it is perfectly reasonable for BNSF to incentivize military service. *Id.*

Likewise, there is no merit to SMART-TD's claim that BNSF struck a "fundamental blow" against the Union by "talking directly" with local officers about Hi Viz. As Mr. Macedonio explains, BNSF did not circumvent the general chairpersons, *id.* at 5 ¶ 11, but even if did, talking to the supposedly wrong category of union officer about a new program is not an effort to "destroy" the union. *See UP*, 879 F.3d at 760 (direct dealing with rank-and-file employees is not a violation of the RLA).

C. There is No Plausible "Chilling Effect" on Union Business.

If the foregoing were not correct – even if a chilling effect could be a "fundamental attack" – the Unions have still not and cannot show any such negative impact on union representation of BNSF employees as a result of Hi Viz. All they have is speculation. And there are good reasons to believe that their speculation is mistaken.

First, there is no proof that union officers were unable to represent employees while subject to the old attendance rules. ECF No. 40 at 8.

Second, there are literally hundreds of employees (just in train and engine service) who are entitled to mark off for union business. They can and do cover for each other as necessary, and BNSF accommodates that practice. *Id*.

Third, "BNSF's labor relations officials routinely grant union business requests for deadline adjustments." ECF No. 41 at 13 ¶ 36. So if a local officer needs to reschedule in order to qualify for a Good Attendance Credit (and is unable or unwilling to swap with another officer), there is no reason to assume that the railroad would deny such a request.

Fourth, while "'all discipline decisions are tailored to the individual facts,' it is 'highly doubtful' that BNSF would 'hold an employee accountable under Hi Viz where the sole reason the employee stood for discipline was legitimate use of [union business] code layoffs and the employee had also made the attempts described above to work around [union business]/Good Attendance Credits conflicts.'" *Id*. In other words, the Program is flexible enough to allow for union business.

* * * *

For all of these reasons, there is no basis for an injunction against continued implementation of Hi Viz because of the Unions' allegations about potential for interference with union representation.

III. THE FMLA DOES NOT PROVIDE A BASIS FOR INJUNCTIVE RELIEF.

In their earlier briefs, the Unions argued that BNSF is not entitled to a strike injunction because Hi Viz violates the FMLA. *See* ECF No. 20 at 11-13, ECF No. 22 at 15-17. Now they argue that they are entitled to an injunction for the same reason. ECF No. 44-1 at 17-18, ECF No. 46 at 16-19. It is not entirely clear whether they are saying injunctive relief is proper because a violation of the FMLA makes this a major dispute – akin to what they asserted previously – or whether they are now suggesting that injunctive relief is appropriate under the FMLA directly. But either way, they are wrong for essentially the same reasons set forth in BNSF's previous filings. *See* ECF No. 24 at 1-3, ECF No. 40 at 13-17.

A. The Unions Cannot, as a Matter of Law, Assert Claims Under the FMLA.

First, to the extent that the Unions purport to seek relief under the FMLA itself, they cannot do so under the plain terms of the statute. Only an "employee" can bring a lawsuit. 29 U.S.C. § 2617(a)(2); *see also* 29 C.F.R. § 825.400; ECF No. 40 at 16-17 (collecting cases holding that unions cannot bring claims under the FMLA).

B. The FMLA is Not Relevant to the *Conrail* Inquiry.

Alternatively, if the Unions are saying that an alleged FMLA violation means that the Hi Viz dispute is "major," they continue to misunderstand the *Conrail* test. As BNSF has previously explained, the major versus minor assessment depends on whether the railroad's *contractual* interpretation is sufficient to justify referral to arbitration. ECF No. 40 at 13-14. Judge Friedrich's recent decision in the *AFA* case – discussed above – is consistent with BNSF's position on this point. As she noted, "the *Conrail* test does not turn on whether a statutory claim exists." 2022 WL 252030, at *5. That is true whether the union's statutory claim is brought under the RLA or any state or federal law; as SMART-TD admits, the determination of major or minor is "independent" of other laws. *See* ECF No. 22 at 16-17.

C. The Unions Are Misinterpreting What the FMLA Requires.

Even if they could bring a claim under the FMLA, the Unions' attack on the Program's Good Attendance Credit is wrong on the merits, for at least two reasons.

1. The Unions' interpretation is contrary to the plain language of Section 2614(a), which provides, in pertinent part, that taking FMLA leave "shall not result in the loss of any employment benefit *accrued prior to the date on which the leave commenced*." 29 U.S.C. § 2614(a)(2) (emphasis added). This language clearly distinguishes between "accrued" employment benefits and any benefits or rights that are still in the process of being earned as of the beginning of an FMLA leave period. Only the former are guaranteed.[2] Here, an employee who takes FMLA leave prior to completing a fourteen-day availability period has not "accrued" any benefit, and thus is not entitled – upon return from FMLA leave – to a good attendance credit (or any pro rata portion thereof). *See Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 751-52 (7th Cir. 2010) ("If removal of absenteeism points . . . is an employment benefit, it is one that accrues 12 months after an absence. Until then the employee has no right to have an absenteeism point removed."); *Bell v. CSX Transportation, Inc.*, No. JKB-18-0744, 2019 WL 2146917, at *7 (D. Md. May 16, 2019) (railroad attendance policy that includes "good attendance credit" does not violate § 2614(a) of FMLA because resetting the good attendance period upon return from leave "does not cause the forfeiture of any *previously accrued* employment benefit for one taking FMLA leave.") (emphasis added).

[2] Had Congress wanted to require employers to treat FMLA leave as equivalent to work time for purposes of entitlement to benefits such as good attendance credits, it knew how to do so. A separate subsection of § 2614 provides that an employer must maintain health care coverage under the terms of a group health plan during a period of FMLA leave "under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of [FMLA] leave." 29 U.S.C. § 2614(c)(1). The lack of comparable language in § 2614(a)(2) shows that Congress did not intend to require employers to freeze progression of other benefit plans or programs while an employee is out on FMLA leave.

2. As discussed in BNSF's prior briefs, the law mandates that FMLA leave be treated only the same – not better – than comparable forms of leave for purposes of attendance credits or bonuses. ECF No. 24 at 1-3, ECF No. 40 at 15. Requiring an employer to pause a good attendance period during FMLA leave – but not during other forms of unpaid leave – would indisputably constitute better treatment. Consider the following example:

> (1) An employee lays off one day of unpaid leave after 13 days of availability. Assume that it is for personal sickness, but the leave does not qualify for FMLA coverage because it is not a "serious health condition" as defined by the Act. When the employee marks back up, he will now need to have ***fourteen*** days of availability before earning a credit.
>
> (2) After 13 days of availability, an employee takes the very same period of unpaid sick leave, but is qualified for and takes it as a day of FMLA. Under the Unions' view, when he returns to work, he would only need to be available for just ***one*** day before earning a credit.

As this example illustrates, the Unions' approach would result in a material advantage for any employees who take their unpaid leave as FMLA leave when it comes to earning an attendance bonus or credit.

Employers are not obligated to provide that sort of advantage for FMLA leave. This exact point was debated in a recent challenge to another freight railroad's attendance policy. In *Bell v. CSXT*, the railroad's policy had a good attendance credit similar, in many respects, to BNSF's. 2019 WL 2146917, at *5. In particular, CSXT's policy, like Hi Viz, did not allow for an attendance credit in any period in which an employee took FMLA leave (or any of a variety of other absences).[3] A putative class of employees argued (among other things) that "not being allowed to earn good attendance credits for months in which they take FMLA leave" effectively "punished" the use of FMLA leave. *Id.*

[3] The CSXT policy required employees to have no absences – including FMLA leave – for a month, as opposed the fourteen-day period established in the Hi Viz Program. *Id.* at *5.

The court rejected the employees' argument. As an initial matter, the court found that the CSXT policy did not, in fact, treat FMLA leave any worse that other comparable forms of unpaid leave. *Id.* at *6. So long as that is true, the court held, an employer is *not* required to re-start a good attendance period when an employee returns from FMLA leave:

> These circumstances establish the legitimacy of CSXT's attendance policy as a permitted policy under the FMLA. They also marry with the governing statutes and regulations and the Department of Labor's comments on those regulations. Section 2614(a)(2) of Title 29, United States Code, provides that the taking of FMLA leave "shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced." As noted above, the [CSXT] Policy does not cause the forfeiture of any previously accrued employment benefit for one taking FMLA leave.

Id. at *7. The *Bell* court further noted (*id.*) that this interpretation is supported by 29 C.F.R. § 825.215(c)(2), which expressly states that if a bonus or credit "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" so long as it is also denied to employees who use equivalent leave. That is because, as the Department of Labor has explained, "[p]enalizing an employee for taking FMLA leave under a 'no fault' attendance policy is distinct from disqualifying an employee from a bonus or award for attendance because the former faults an employee for taking leave itself whereas the latter denies a reward for achieving the job-related performance goal of perfect attendance." 2019 WL 2146917, at *7 (quoting 73 Fed. Reg. 67934-01, 67985 (Nov. 17, 2008)).

That reasoning applies here. BNSF's Hi Viz Program does not treat FMLA leave worse than comparable forms of leave for purposes of the Good Attendance Credit. ECF No. 41 at 10 ¶ 29; *see also supra* at 15. As such, the fact that employees cannot earn a Good Attendance Credit if they take FMLA leave is not a violation of law.

IV. THE UNIONS ARE NOT ENTITLED TO A "STATUS QUO" INJUNCTION.

Finally, BLET argues that even if the Court concludes that the parties are engaged in a minor dispute, it should nevertheless issue an injunction to prohibit BNSF from proceeding with enforcement of Hi Viz pending arbitration. ECF No. 44-1 at 18-20. The Union asserts that such an injunction is necessary here because the BNSF policy threatens "irreparable injury" to the employees.[4] *Id*. at 20. In particular, the BLET asserts that Hi Viz "will effectively force COVID-19 positive engineers" to come to work, thereby spreading infection to others. *Id.* It says that there is no other "sure way" for engineers to be protected. *Id.*

The Union's argument is both legally and factually meritless. First, as BLET itself acknowledges, a court may condition a strike injunction arising from a minor dispute only in the exceedingly rare circumstance where failure to do so would result in "injury so irreparable that a decision of the Board in the union's favor would be but an empty victory." *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad*, 363 U.S. 528, 534 (1960) ("*M-K-T*"); *see also* ECF No. 44-1 at 19 (citing *IAM v. Frontier Airlines*, 664 F.2d 538 (5th Cir. 1981)). This is a narrow exception to the general rule that, in a minor dispute, a railroad is free to proceed with its interpretation pending arbitration. *Conrail*, 491 U.S. at 304. Thus, an *M-K-T* injunction is not warranted just because a union can assert some hypothetical parade of horribles, but only in circumstances where actual proven harm is so extreme that it would effectively deprive the arbitration panel of jurisdiction. *M-K-T*, 363 U.S. at 533-34. *See also, e.g.*, *Chicago & N.W. Transp. Co. v. Railway Labor Execs. Assoc*., 855 F.2d 1277, 1288 (7th Cir. 1988)

[4] More generally, the Unions' "balance of harms" argument is misguided for the same reasons set forth in BNSF's brief in support of its motion for preliminary injunction. ECF No. 40 at 19-20. In short, BNSF could never recover its losses if forced to suspend implementation of Hi Viz, whereas the employees will have a complete remedy in arbitration. *See Louisville & N.R.R. v. Brown*, 252 F.2d 149 (5th Cir. 1958) (carriers lack damages remedy against unions under RLA). The Unions' contrary argument assumes the parties' dispute is major.

(denying *M-K-T* injunction); *Maine C.R.R. v. United Transp. Union*, 787 F.2d 780, 781 (1st Cir. 1988) (same); *Frontier*, 664 F,2d at 542 (same).

There is no such harm here. The BLET's assertion about the potential consequences of implementation of Hi Viz for employees suffering from COVID-19 ignores the fact that Hi Viz specifically exempts COVID-19-related absences. Mr. Macedonio highlighted this point in his recent declaration:

> "While the Unions have argued that the Program punishes employees for taking sick leave during a pandemic, that is not true. *Hi Viz does not assess points when employees take leave in order to recover from COVID-19*."

ECF No. 41 at 8 ¶ 19 (emphasis added). Accordingly, the central premise of the Unions' argument – that employees will have to come to work when sick with COVID – is baseless. Moreover, and in any event, the Unions' sudden concern about the risks of COVID-19 rings rather hollow, given that they are currently contesting BNSF's employee vaccine policy – as well as the similar policies of various other railroads – in federal court. *See BNSF Ry. v. BRS et. al*, No. 1:21-cv-5965 (N.D. Ill.); *see also, e.g., International Association of Sheet Metal, Air, Rail and Transportation Workers - Transportation Division et al v. National Railroad Passenger Corp*., No. 1:21-cv-6282 (N.D. Ill.).

Looking past the BLET's false premise about the impact of COVID-19, it should be obvious that an arbitrator will have ample jurisdiction and opportunity to address the Unions' complaints about the specifics of Hi Viz. As the sample awards in the record show, challenges to the application of railroad attendance policies are routine grist for the arbitral mill. ECF No. 41 at 29-73. Indeed, challenges to employee discipline under attendance policies are among the most common cases in railroad arbitration. There is no basis to conclude, therefore, that a status quo injunction is necessary to preserve the ability of an arbitrator to resolve the merits of the parties' dispute.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 8, 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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