

**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.

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Civil Action No.
4:22-CV-00052-P

**PLAINTIFF BNSF RAILWAY COMPANY’S APPENDIX IN SUPPORT OF
ITS RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTIONS FOR
PRELIMINARY INJUNCTION**

NOW COMES, Plaintiff BNSF Railway Company and files this Appendix in Support of
Its Response in Opposition to Defendants’ Motions for Preliminary Injunction.

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
A	Second Supplemental Declaration of Salvatore Macedonio ISO BNSF’s Response to Defendants’ Motion for Preliminary Injunction	App. 1-6

Respectfully submitted,

/s/ Russell D. Cawyer

Russell D. Cawyer

State Bar No. 00793482

Russell.cawyer@kellyhart.com

Taylor J. Winn

State Bar No. 24115960

Taylor.winn@kellyhart.com

KELLY HART & HALLMAN LLP

201 Main Street, Suite 2500

Fort Worth, Texas 76102

Telephone: (817) 332-2500

Facsimile: (817) 878-9280

**ATTORNEYS FOR PLAINTIFF
BNSF RAILWAY COMPANY**

CERTIFICATE OF SERVICE

On February 8, 2022, I electronically submitted the foregoing document with the clerk of the 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

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SECOND SUPPLEMENTAL DECLARATION OF SALVATORE MACEDONIO

1. My name is Salvatore (Sam) Macedonio. The following facts are true and correct and within my personal knowledge. I am of legal age and otherwise competent to make this declaration.

2. This is my third Declaration in the above-captioned matter. I have reviewed the materials submitted by BLET and SMART-TD in connection with their Motions for Preliminary Injunction, including the Declaration of Joseph Michael LaPresta. The purpose of this Declaration is to respond to some of the factual assertions in those Union materials.

3. As an initial matter, Mr. LaPresta and the Unions imply that BNSF employees are chronically overworked. He notes that railroad operations are 24/7, 365 days a year “without rest.” ECF No. 46 at 5. While it is true that the *railroad* operates around the clock and around the year, any implication that railroad *employees* are required to do so is simply not true. As explained in my last Declaration, employees in train and engine service are entitled to substantial time off as both a contractual and regulatory matter. ECF No. 41 at 4. From an empirical standpoint, there is no evidence that BNSF employees – even those in unassigned service – are unable to get sufficient

rest or take days off for personal matters. *Id.* at 5. There are, of course, a relatively small number of employees who choose to work as much as possible to maximize their earnings, but they do so voluntarily.

4. The Unions also exaggerate the scope of this issue. BNSF currently has roughly 15,000 employees in train and engine service (the employees who are represented by BLET and SMART-TD). About 40 percent of those individuals work in unassigned service. And of those employees, almost half – about 45 percent – are in “pools” with some form of negotiated fatigue management protocols in place (predictive work schedules, work/rest cycles, assigned rest days, or the like). So only a minority of BNSF employees work in pure unassigned service, with the availability obligations that entails, and a percentage of them have a home cycle time (time at their home terminal) in excess of 24 hours between round trips.

5. BNSF has repeatedly tried to address the Unions’ complaints about employee fatigue by offering to apply fatigue mitigation tools to more unassigned service pools. (For example, of the 145 engineer pools, there are 65 that have the sort of fatigue management protocols referenced above.) The Unions have failed to agree to expand any of these additional pools, presumably because they want to preserve the higher earnings potential for employees who work unpredictable schedules while preserving the flexibility to take time off that fits their schedule.

6. There is no doubt that unassigned service is a demanding job, but that is why those positions are among the highest paid in the industry. An employee who elects to work in unassigned service can easily make \$150,000 a year or more (averaging approximately \$115,000 a year). But if an individual’s circumstances change or they want a different lifestyle, they can exercise their seniority and bid to a job with more regular hours, such as yard service, a road switcher, or a local. Employees in unassigned service also have access to “smart rest” fatigue

management tools that allow employees to extend their statutory rest period with no penalty under HiViz (which allows an employee to have at least 24 hours off-duty following a trip).

7. Moreover, the Unions reference several employees with circumstances that make it difficult for them to work unassigned service. However, they have the power to address many of the alleged challenges they cite by agreeing to be more flexible in their approach to seniority. BNSF has repeatedly offered solutions for individuals and categories of employees in these circumstances, only to be told no. For example, nursing mothers would often benefit from being allowed to take yard service jobs or other positions with more regular schedules. The Unions have refused to allow for any exception to seniority to allow them to do so.

8. The Unions continue to mischaracterize how the Hi Viz Program works, including with respect to FMLA. I have reviewed the various “examples” provided by Mr. LaPresta of how the Program could be applied harshly. While these examples are all anonymous and thus impossible to verify, every hypothetical could easily be addressed. The dual employee couple discussed in paragraph 11 of Mr. LaPresta’s declaration could, for example, trade off using FMLA and other mark-offs. Because use of FMLA is not penalized, they would likely never trigger discipline under Hi Viz. Moreover, in response to employee input, BNSF has added another layer of review to the process to ensure that no employee is disciplined unfairly. Even if the hypothetical that Mr. LaPresta proposes happened, BNSF retains discretion to excuse those kind of presumably legitimate absences. And if the railroad failed to do so, the affected employee could make his or her case to an arbitrator.

9. The Unions are also wrong about how the Program treats union business. For example, BLET argues that the “Hi Viz policy exempts unpaid military leave from any penalty for being unavailable, but punishes use of the similar unpaid Union leave.” ECF No. 44-1 at 16. That

is not correct. For one thing, BNSF never “punishes” a legitimate mark-off for union business; as I have noted several times, no points are subtracted in that case. But to the extent the Unions are complaining about disparate treatment for purposes of earning a “Good Attendance Credit,” they are still wrong. BNSF does not treat *paid* military leave as an absence for purposes of the Good Attendance Credit. However, as I previously testified, “Good Attendance Credits are not earned for any *unpaid* leave of absence.” ECF No. 41 at 11 (emphasis added). Thus, if, for any reason, a military leave was unpaid, then it would be treated the same as an unpaid union business mark-off, an unpaid FMLA leave, or any other form of unpaid leave.

10. Mr. LaPresta also offers an example of how the treatment of union business lay-offs under Hi Viz will supposedly interfere with the functioning of union representation. ECF No. 46-1 at 7 & Ex. I. The example allegedly reflects mark-offs for a “Local Chairperson” in January of 2022, and purports to show that this individual would have reached zero points in just a month under Hi Viz. *Id.* Because the example is anonymous, there is no way for BNSF (or the Court) to verify the facts asserted, determine whether the employee was marking off for legitimate union business, and/or assess whether the alleged union business is something (like an investigation hearing) that could have been rescheduled. But leaving all of that aside, Mr. LaPresta’s own example still fails to show that the Program affects union business in any way. There are two union business mark-offs in the example, one on January 11, and one on January 27. The first such mark-off did not deprive the individual of a Good Attendance Credit because they were already at their full 30 points, and so were not eligible for a Credit. The second union business mark-off occurred during a two-week period when the employee had already had multiple other unexcused absences and so they would not have earned a Credit anyway. Thus, the individual’s point total did not change because of the use of union business lay-offs.

11. SMART-TD also complains that BNSF “went around” the authorized union officers – the general chairmen – and “deal directly with the Local Chairpersons in a January 6 meeting.” ECF No. 46 at 6. Again, that is not accurate. The Hi Viz Program was introduced by BNSF Labor Relations to the Unions’ general chairmen on the afternoon of January 5 – a presentation that included a video and a slide deck. Later that day, other BNSF managers told the local chairmen that the attendance policies would be changed, but there was no detail and no presentation like there was to the general chairmen. In any event, BNSF routinely “deals directly” and shares information with all levels of union officers, and there is nothing nefarious or improper about doing so.

12. The Unions assert that BNSF did not “attempt to negotiate the terms of the Hi Viz policy.” ECF No. 46-1 at 7. That is because BNSF retains discretion under its existing agreements to set and change reasonable attendance policies, and so we have never needed to negotiate before implementing this sort of rule. The fact that the railroad is not just giving away its contractual rights should come as no surprise, given that the Unions would likewise refuse to give up any contractual discretion that they have bargained for. To the extent that BNSF and other railroads are seeking more flexibility on assignments in the currently on-going bargaining with the Unions, those proposals concern matters such as self-supporting pools that are not the same thing as setting availability standards; we are obviously not seeking to bargain for the contract rights we already possess to manage attendance.

13. To the extent the Unions are suggesting that BNSF has made no effort to comply with the Court’s directive to try to resolve this matter, they are mischaracterizing the facts. After the Court issued its TRO, we approached the Unions to have a further discussion about their concerns with Hi Viz and see if we could reach a compromise. Labor Relations held a call on

Friday, January 28, 2022, and invited all of the general chairmen from both Unions. The BLET refused to attend; only the SMART-TD officers were on the call. We attempted to discuss some of the changes we were considering for Hi Viz to address concerns we had heard, and solicit the Unions' feedback. However, they refused to engage and would not discuss any of their concerns or explore options with us. Then, the day before Hi Viz was implemented, BNSF's senior executives met with the Presidents of both Unions to try again to reach a resolution. We again explained that we were willing to make some changes to address concerns, but the Unions refused to budge from their original position that the only acceptable outcome would be for BNSF to withdraw the Program entirely. Nevertheless, BNSF decided to move ahead with certain changes in Hi Viz to make it more employee-friendly, including a material increase in available personal leave and single day vacation opportunities, broadened standards for the good attendance credit to include paid death in family and paid jury duty in days that count towards earning a credit, and a shortening of the review period after the first infraction is assessed under Hi Viz to ensure that the Program is being applied in a flexible and fair manner.

14. Finally, the initial evidence is that Hi Viz is working to increase train crew availability and thereby improve BNSF's capacity to move freight. Employee unavailability on Saturdays in January averaged 6750, and on the first Saturday in February, the number was 4902, an improvement of 1858. Increased availability will make a material difference in BNSF's ability to help address the supply chain crisis in this country.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 8, 2022.



Salvatore Macedonio