IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179

Plaintiff,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN/UNION PACIFIC CENTRAL REGION GENERAL COMMITTEE OF ADJUSTMENT
320 Brookes Drive - Suite 115
Hazelwood, MO 63042

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN/UNION PACIFIC EASTERN DISTRICT GENERAL COMMITTEE OF ADJUSTMENT
2024 S. Xenon Court
Lakewood, CO 80228

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
GENERAL COMMITTEE OF ADJUSTMENT
UNION PACIFIC WESTERN LINES AND PACIFIC HARBOR LINES
1902 Orange Tree Lane, STE 110
Redlands, CA 92374

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN/UNION PACIFIC SOUTHERN REGION GENERAL COMMITTEE OF ADJUSTMENT
607 W. Harwood Road
Hurst, TX 76054

CASE NO.:

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN/UNION PACIFIC WESTERN REGION GENERAL COMMITTEE OF ADJUSTMENT
7331 West Charleston Blvd. Suite 120
Las Vegas, Nevada 89117

Defendants

COMPLAINT FOR DECLARATORY JUDGMENT

1. For the second time in just over a decade, subordinate bodies of the Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Union") have asserted that Union Pacific Railroad Company ("Union Pacific") cannot make changes to its attendance policy without obtaining the Union's consent, and have refused to submit a dispute over such changes to binding arbitration as required by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). The Union's position concerning arbitration was rejected by this Court in Civil Action No. 1:07-CV-00160, and its challenge to the previous attendance policy was rejected on the merits in binding arbitration. *BLET v. Union Pacific* Arb. Case No. 09/073 (Goldstein) (2011).

2. Union Pacific recently announced a change to its attendance policy. Ignoring the rulings of this Court and the arbitrator, the Defendants in response now claim that Union Pacific's most recent change to its attendance policy constitutes a "Major Dispute" which would allow BLET to call a strike. However, under the RLA, disputes concerning the interpretation or application of a collective bargaining agreement ("CBA") are known as "minor disputes." Minor disputes are subject to mandatory arbitration, and strikes over such disputes are prohibited. A dispute is "minor" so long as the railroad's position with respect to the merits of the dispute is not "frivolous or obviously insubstantial." *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n.*, 491 U.S. 299, 303-05 (1989) ("*Conrail*").

3. Union Pacific's position that it has the right to change its attendance policy without the Union's concurrence is not "frivolous or obviously insubstantial." On the contrary, Union Pacific has already prevailed on the merits of a virtually identical dispute with the same

Union. Because the Union refuses to recognize the outcome of its previous efforts to prevent Union Pacific from making changes to its attendance policy, Union Pacific is forced to bring this action once again seeking a declaratory judgment that the parties' dispute over the attendance policy constitutes a "minor dispute" under the RLA, and that such dispute must be submitted to arbitration under the RLA.

PARTIES

4. Union Pacific is a Class I railroad that provides freight transportation services in 23 States in the western half of the United States. Union Pacific's headquarters building and principal place of business is 1400 Douglas Street, Omaha, Nebraska 68179. Union Pacific is a Carrier within the meaning of the RLA, 45 U.S.C. § 151, First.

5. BLET is an unincorporated labor organizations in which employees participate and that exists for the purpose of, among other things, dealing with carriers pursuant to the RLA concerning rates of pay, rules and working conditions, including negotiation and administration of CBAs. BLET is a "representative" within the meaning of Section 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth. On Union Pacific, BLET represents employees in the craft or class of "locomotive engineer."

6. BLET operates through subordinate bodies known as "General Committees of Adjustment." The General Committees of Adjustment exist for the purpose of, among other things, dealing with carriers pursuant to the RLA concerning rates of pay, rules and working conditions, including negotiation and administration of CBAs, and are also "representatives" within the meaning of Section 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth.

7. Five of the six General Committees of Adjustment representing Union Pacific employees are named as defendants in this action, including (a) the BLET/UP Central Region General Committee of Adjustment, (b) the BLET/UP Southern Region General Committee of Adjustment, (c) the BLET/UP Western Region General Committee of Adjustment, (d) the

BLET/UP Eastern District General Committee of Adjustment, and (e) the BLET Union Pacific Western Lines and Pacific Harbor Lines General Committee of Adjustment. The defendants are collectively referred to herein as the "General Committees."

JURISDICTION AND VENUE

8. Jurisdiction exists pursuant to the RLA, 45 U.S.C. §§ 151-188 and 28 U.S.C. §§ 1331, 1337.

9. Venue over this action properly lies in this Judicial District under 28 U.S.C. § 1391(b)(1) and (2).

THE RLA REQUIRES ARBITRATION OF MINOR DISPUTES

10. Under the RLA, disputes concerning the interpretation or application of CBAs are known as "minor disputes," and are subject to mandatory arbitration. The characterization of a dispute as a "minor dispute" does not reflect the importance or value of the dispute. Rather, the term "minor dispute" means that the dispute is one over the interpretation or application of an existing agreement, rather than a dispute over the formation of, or change to the terms of, an agreement. Section 3 of the RLA requires minor disputes to be resolved exclusively through arbitration before the National Railroad Adjustment Board ("NRAB"), or before an arbitration panel of coordinate jurisdiction established by the parties pursuant to the RLA (known as a Public Law Board or a Special Board of Adjustment). 45 U.S.C. § 153.

11. A minor dispute "relates either to the meaning or proper application of a particular provision [in a CBA] with reference to a specific situation or to an omitted case." *Conrail*, 491 U.S. at 303 (*quoting Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945)). A CBA includes both express and implied terms. *Conrail*, 491 U.S. at 311; *Brotherhood of Loc. Eng'rs v. Union Pacific R.R. Co.*, 879 F.3d 754, 758 (7th Cir. 2017) ("the relevant terms of an agreement are not only those that are written down; they also include the parties' practice, usage, and custom as they carry out their agreement").

12. Under the RLA, a dispute is a "minor dispute" subject to mandatory arbitration so long as the rail carrier's position with respect to the merits of the dispute is not "frivolous or obviously insubstantial." *Conrail*, 491 U.S. at 303-305. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement." *Conrail*, 491 U.S. at 307. "[I]f there is any doubt as to whether a dispute is major or minor, a court will construe the dispute to be minor." *Railway Labor Execs.' Ass'n v. Norfolk & Western Ry. Co.*, 833 F.2d 700, 705 (7th Cir. 1987)

13. A union may not strike over a minor dispute. *Bhd. of R.R. Trainmen v. Chi. R. & I.R.R. Co.*, 353 U.S. 30, 39-42 (1957).

14. The dispute over Union Pacific's right to establish and implement a policy governing attendance is a "minor dispute" under the RLA. This Court has previously held that a dispute over Union Pacific's right to implement a previous version of its attendance policy was a minor dispute, and Union Pacific's position in that case was upheld in arbitration.

THE PARTIES' COLLECTIVE BARGAINING AGREEMENTS

15. Union Pacific and BLET are parties to multiple collective bargaining agreements. These agreements, together with terms implied therein through past practice, course of dealing and management prerogative, establish the rates of pay, rules and working conditions of employees represented by BLET. Some of the parties' collective bargaining agreements are system-wide in scope; they cover all of the employees represented by BLET who are employed by Union Pacific. Other agreements cover only those portions of the system that correspond to the properties of former railroads that have since been merged into Union Pacific.

16. Union Pacific's CBAs with BLET do not contain any provisions that prohibit or otherwise restrict Union Pacific's prerogative to establish rules governing attendance.

17. On multiple occasions, Union Pacific has exercised its reserved management prerogative to unilaterally establish and change its attendance policies. Specifically, in 2003

Union Pacific adopted an attendance policy for train, engine and yard service employees known as the Union Pacific TE&Y Attendance Policy, which became effective January 1, 2004. That policy was subsequently revised and reissued effective November 1, 2006. The 2003 attendance policy and the 2006 revision were unilaterally promulgated by Union Pacific.

18. BLET challenged the 2006 revised policy in this Court on a variety of grounds, including that its adoption violated an existing provision in a 1952 collective bargaining agreement between BLET's General Committee of Adjustment, Central Region and the Missouri Pacific Railroad Company, one of Union Pacific's predecessors, and therefore, constituted a "major dispute" under the RLA. That case was docketed as Civil Action No. 1:07-CV-00160. On June 12, 2007, this Court dismissed the count in BLET's complaint alleging that issuance of the new attendance policy constituted a major dispute, and held that the dispute about Union Pacific's implementation of the new attendance policy was a minor dispute that must be resolved in arbitration.

19. A Special Board of Adjustment (No. 09/073) was convened to address the contract interpretation dispute involved in Civil Action 1:07-CV-00160. The Special Board of Adjustment issued an award on March 15, 2011 that upheld Union Pacific's right to implement its attendance policy. In that award, the Special Board of Adjustment recognized the general principle that Union Pacific had the right "to implement policies to control excessive absenteeism, unless there is a negotiated contractual provision limiting that basic right in specific written terms." The Special Board of Adjustment concluded, "The Carrier has an inherent right to control the attendance of its employees, and that right was not clearly ceded in the 1952 Agreement."

20. Numerous other arbitration awards likewise recognize Union Pacific's right to establish and enforce reasonable attendance requirements, and to take disciplinary action against employees who violate those requirements.

21. Union Pacific's right to establish and implement a policy governing attendance is supported by numerous railroad industry arbitration awards that hold that a carrier retains

discretion to adjust its employment policies unless specifically limited or restricted from doing so by an existing CBA. The National Railroad Adjustment Board ("NRAB") has clearly stated the rule as follows:

> We are well aware that enlightened railroad labor organizations recognize the principle that the schedule agreements do not deny to the carrier the right to manage and operate its properties economically and efficiently and that the carrier is also under legal obligation to do so. The carrier's fundamental management rights are restricted only to the extent that they are limited or surrendered in the schedule agreements.

BLE v. Southern Pacific Co., NRAB 1st Div., Award No. 16032 (Jan. 27, 1953). The NRAB has also clarified that "the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden is upon the complaining employees to show that the action taken violates some part of the Agreement." *Fetzer v. Ill. Central Gulf R.R. Co.*, NRAB 3d Div., Award No. 24998 (1984).

22. A carrier's inherent managerial right to institute new or additional attendance requirements also has been recognized by the courts. In addition to the previous ruling of this Court, in *Burlington Northern and Santa Fe Railway Co. v. Brotherhood of Locomotive Engineers*, No. 4:99-CV-0675 R (N.D. Tex. 1999), the Court held that a dispute over the carrier's adoption of an "Availability Policy," which required employees to be available for a certain percentage of time, was a minor dispute under the RLA. In doing so, the Court explained:

> BNSF and its predecessors have a history of implementing policies regarding availability for work, attendance, and absenteeism through implementing various policies, practices, and work rules for the last twenty years…BNSF's position that the Availability Policy does not conflict with the [parties' existing agreement] is at least arguable and is not obviously insubstantial…[b]ecause BNSF's contractual position is, at least, arguable and is not obviously insubstantial, any dispute over BNSF's 1999 Availability Policy is a "minor dispute" under the RLA and a

> strike, picketing, job action or other concerted work stoppage is prohibited over a minor dispute.

23. Other provisions of the CBAs governing BLET-represented employees on Union Pacific implicitly recognize Union Pacific's right to unilaterally establish rules and policies including an attendance policy. For example, the CBAs contain articles providing for vacations, personal leave days and other provisions allowing employees to be absent. But none of the CBAs limit Union Pacific's right to define what absences are "unexcused" or what level of absenteeism is excessive; that determination is left entirely to Union Pacific's discretion.

24. With respect to disciplinary action, the parties' System Discipline Agreement provides that locomotive engineers represented by BLET shall not be disciplined "without first being given a fair and impartial investigation." However, nothing in the disciplinary agreement, or any other provision of the CBA, limits Union Pacific's right to establish rules of conduct, including rules governing attendance, subject only to the requirement that Union Pacific follow the contractual investigation process if it seeks to take disciplinary action for a violation of one of those rules.

DESCRIPTION OF THE MINOR DISPUTE

25. On or about February 8, 2020, Union Pacific management officials began informing representatives of BLET that the Carrier intended to implement certain changes to its existing, unilaterally imposed, attendance policy effective March 1, 2020.

26. On February 9, 2020, counsel for the five named General Committees sent a letter to Union Pacific's Vice President for Labor Relations, Rodney Doerr, demanding that Union Pacific "cease and desist" from implementing changes to its attendance policy, and stating that BLET would view Union Pacific's action as a "Major Dispute" under the Railway Labor Act. A copy of that letter is attached as Exhibit A. By characterizing the disagreement as a "Major Dispute," BLET has taken the position that it has the right to call an immediate strike over Union Pacific's implementation of its attendance policy.

27. However, Union Pacific's right to establish and implement its attendance policy as planned is firmly established by the terms of the applicable agreement and many years of past practice and arbitration precedent.

28. The current dispute over the implementation of changes to Union Pacific's attendance policy constitutes a "minor dispute" as that term is used under the RLA. The dispute arises out of the interpretation or application of existing agreements, including terms implied in those agreements, concerning rates of pay, rules and working conditions. And, Union Pacific's position with respect to the merits of the dispute is not "frivolous or obviously insubstantial."

COUNT I -- MINOR DISPUTE

29. Union Pacific incorporates by reference as if fully set forth herein each and every allegation of the preceding Paragraphs.

30. This Cause of Action arises under Sections 2 First and 3 of the RLA, 45 U.S.C. §§152 First, 153.

31. There exists a current, live and ripe controversy that warrants declaratory relief from this Court.

32. Union Pacific has existing CBAs with BLET, which remain in full force and effect. These agreements, together with past practice and other established working conditions, set forth the terms and conditions of employment of Union Pacific's BLET-represented employees.

33. Union Pacific contends that its CBAs, as properly interpreted, do not prohibit Union Pacific from implementing or adopting new policies to regulate and monitor employees' attendance.

34. The General Committees dispute Union Pacific's interpretation of the applicable CBAs, and maintain that Union Pacific is prohibited from unilaterally modifying its attendance policy. The General Committees have expressly asserted that the dispute over the adoption and

implementation of a modified attendance policy is a "major dispute" under the RLA, which would entitle BLET to strike overt the dispute.

35. The dispute between the General Committees and Union Pacific over the implementation of new attendance policy is a minor dispute under the RLA, and thus subject to mandatory arbitration. The nature of the dispute is one that arises out of the interpretation or application of the parties' CBA, and Union Pacific's position with respect to the merits of the dispute is not frivolous or obviously insubstantial. Indeed, this Court has previously held that a dispute between Union Pacific and BLET over Union Pacific's right to implement changes to its attendance policy was a minor dispute, and Union Pacific's position was upheld in arbitration.

36. The General Committees' claim that the instant dispute is a "major dispute" constitutes a refusal to submit any dispute over changes to the attendance policy to arbitration, and therefore violates their duties under the RLA to pursue and exhaust the exclusive, administrative remedies for minor disputes which are set forth in Section 3 of that Act, including final and binding arbitration. The RLA precludes strikes, work stoppages, or other forms of self-help over minor disputes.

37. Union Pacific has at all times been willing to comply with the procedures of the RLA and has exercised and is continuing to exercise reasonable efforts to resolve this dispute with the General Committees.

COUNT II -- BREACH OF SECTION 2 FIRST

38. Union Pacific incorporates by reference as if fully set forth herein each and every allegation of the preceding Paragraphs.

39. This Cause of Action arises under Section 2 First of the RLA, 45 U.S.C. §152 First.

40. Section 2 First imposes an affirmative duty on the parties:

> 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, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. §152 First.

41. The General Committees have breached their duty under Section 2 First to maintain BLET's existing CBAs with Union Pacific by asserting that the parties' dispute over changes to Union Pacific's attendance policy constitute a major dispute.

42. Union Pacific has been willing at all times to comply with its duties under Section 2 First and has exercised and is continuing to exercise reasonable efforts to resolve this dispute with BLET.

PRAYER FOR RELIEF

WHEREFORE, Union Pacific respectfully requests that the Court grant the following relief:

1. Issue a Judgment declaring that the present dispute concerning Union Pacific's implementation of modifications to its attendance policy is a "minor dispute" under the RLA, and is subject to the compulsory and exclusive arbitration mechanisms set forth in section 3 of the RLA, 45 U.S.C. § 153;

2. Issue a Judgment declaring that the General Committees' threat to strike against Union Pacific violates the RLA by seeking to circumvent the mandatory and exclusive authority of the National Railroad Adjustment Board;

3. Issue a Judgment declaring that, by threatening to engage in a strike, the General Committees have breached their duty under Section 2 First of the RLA to make and maintain agreements;

4. Order the General Committees to pay the costs of these proceedings, including reasonable attorneys' fees; and

5. Grant Union Pacific such other and further relief as the Court may deem proper and just in the circumstances.

Respectfully submitted,

/s/ Jeremy Glenn

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Counsel for Plaintiff
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Date: February 14, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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7331 West Charleston Blvd. Suite 120
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Defendants

DISCLOSURE STATEMENT OF UNION PACIFIC RAILROAD COMPANY

In accordance with Fed. R. Civ. P. 7.1 and Illinois Local Rule 3.2, Plaintiff Union Pacific Railroad Company states that it is a non-governmental corporate party and a wholly-owned subsidiary of Union Pacific Corporation, a Utah corporation. Union Pacific Corporation is publicly traded on the New York Stock Exchange.

Respectfully submitted this 14th day of February, 2020

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Respectfully submitted,

/s/ *Jeremy J. Glenn*

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