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

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

DEFENDANT SMART-TD'S RESPONSE AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Dated: February 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

Defendant the International Association of Sheet Metal, Air, Rail, and Transportation Workers – Transportation Division ("SMART-TD" or the "Union") submits the following as its Response and Brief in Support of its opposition to Plaintiff Burlington Northern Santa Fe Railway Company's ("BNSF" or "the Carrier") Motion for Preliminary Injunction. As demonstrated below and as set forth in the Union's Brief in Support of its Motion for Preliminary Injunction, BNSF is unable to succeed on the merits that imposing a draconian Hi Viz availability policy is a minor dispute under the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 151-88. It is therefore unable to meet the standard for the extraordinary remedy of injunctive relief, and its request for a Preliminary and Permanent Injunction should be denied.

BNSF begins its lament that disputes in the industry "are distressingly common and vitriolic." They assert that the parties cannot agree on anything and are once again here in court. This bemoaning the situation is disingenuous, however, as it is one of their own making. BNSF, as is its wont, only wants to issue decree after decree. It does not wish to talk or discuss with SMART-TD regarding "rules and working conditions," not only as required by the RLA, but as this Court has suggested in its TRO ruling in this case and in a prior case. Indeed, it eschews the very thought of that process. If BNSF would abide by the requirements of the Act, and the directive of this Court, to sit down and bargain with the Union, the parties would not be here before this Court yet again. It should additionally be noted that it is not the Union bringing suit. BNSF once again is rushing to the courthouse after refusing to even attempt to resolve matters, clogging this Court's docket with litigation that could easily be avoided if BNSF so chose. *See, e.g., BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers – Transp. Div.*, 4:21-CV-00432-P, 2021 WL 2695141 (N.D. Tex. Mar. 19, 2021) (denying TRO/preliminary

injunction);[1] *see also* *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 2016 WL 1242627 (N.D. Tex. Mar. 30, 2016). The Union would rather not be in court and is more than willing to meet and discuss issues regarding "rules and working conditions" as the Act prescribes. BNSF would rather litigate.

BNSF further laments that the unions have called the Hi Viz policy "the worst and most egregious attendance policy ever adopted by any rail carrier." The unions will not apologize for that stance. Employees have been working through a pandemic, often coming to work fatigued or even sick, putting their lives on the line day after day. BNSF's thanks for all this hard work, a new and overreaching attendance policy that is a slap in its employees' faces. Work more is BNSF's mantra.

This new policy punishes employees who have legitimate reasons to mark off. Unfortunately, BNSF is of two different and distinct minds on this topic. According to Vice President Macedonio, this is just a tweak, a clarification of what they already have. (*See* D.E. 8, Macedonio Decl. ¶ 8) ("Hi Viz is not so much a change to current attendance standards as it is a codification and restatement of our existing standards. Employees are not being asked to work more (or conversely, take less time off) than in the past. Rather, we are simply making the various attendance rules more transparent and easy to apply."). BNSF then goes on to contradict itself, asserting that this is a needed major change to compete with other railroads. (D.E. 40 at 19 (citing D.E. 41, Garland Decl. ¶ 3)). Which statement is the lie? Both cannot be true.

The unfounded assertions continue that no one will be affected, and employees have plenty of time off to use. These statements are issued by upper management who only work five

[1] In Case No. 21-00432, this Court did ultimately find the underlying dispute minor. *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 4:21-CV-0432-P, 2022 WL 138518 (N.D. Tex. Jan. 14, 2022).

days a week and get their weekends off. They have very little knowledge of how this draconian policy affects the employees who actually move the trains. The Union has provided, and continues to provide real, concrete examples of employees who will or have been directly impacted. BNSF's response is something that would have come out of the mouth of Scrooge before his late-night conversion. Given the poor working conditions that BNSF imposes on its employees, is it any wonder that they are angry?

II. RESPONSE TO FACTUAL BACKGROUND

SMART-TD hereby adopts and incorporates the facts set forth in its Brief in Support of its Motion for Preliminary Injunction herein by reference. (D.E. 46 at 1-7).

In sum, the status quo that existed with regard to BNSF's attendance policy prior to Hi Viz availability policy allowed for employees working in "unassigned service"[2] to take off on average five weekdays and two weekend days off per month without penalty. As this Court is well aware, the parties have been engaged in negotiations on a national and local level for over two years on various matters, including employee availability for work and sick leave. (D.E. 22-1, Ferguson Decl. ¶ 5, Exhibits ("Ex.") A, B).[3] Those negotiations are ongoing with the parties now moving to the next phase – mediation under Section 5 of the Act. (Sec. Ferguson Decl. ¶ 2, Ex. J) (docketing NCCC and SMART-TDs negotiations over "rates of pay, rules and working

[2] Unassigned service employees have no scheduled or regular off days. Rather, they are required to be "available" 24/7/365.

[3] 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).

conditions" for mediation). Despite such, on February 1, 2022, BNSF implemented its new Hi Viz availability policy without engaging in the required bargaining under the Act.

BNSF has now set forth six "additional facts," none of which are relevant to the legal issues at hand, and some of which twist the present situation. Indeed, SMART-TD does not dispute that train service employees, including their respective availability, are critical to train operations. But any issues regarding availability are a crisis of BNSF's own making. As reported to the Surface Transportation Board ("STB") in January 2015, BNSF had 21,157 Train and Engine Service employees. *See* Swiatek Decl. Ex. L, *BNSF Employment Data January 2015,* STB, *available at* https://www.stb.gov/reports-data/economic-data/employment-data/.[4] But just six years later, in December 2021, BNSF had reduced its Train and Engine Service down to 14,637. Swiatek Decl. Ex. M, *BNSF Employment Data January 2015,* STB, *available at* https://www.stb.gov/reports-data/economic-data/employment-data/.[5] BNSF has eliminated roughly 7,000 employees and now institutes a policy that makes the remaining employees work even longer and harder. They cannot furlough thousands of employees and wonder why no one is available to run trains.

Contrary to BNSF's assertions, train service employees do NOT enjoy substantial time off, but are required to be available 24/7/365. Indeed, BNSF's supporting declaration is misleading at best, as Mr. Macedonio does not count hours worked per round trip, and that employees spend their time off in between trips waiting for the phone to ring again for their next assignment. (Miller Decl. ¶ 3; Swiatek Decl. ¶ 7). Further, by not allowing employees who lay

[4] For the Court's ready reference, a copy of the January 2015 report, which is also accessible on the STB site, is attached to Swiatek's Declaration as Ex. L.
[5] For the Court's ready reference, a copy of the December 2021 report is to Swiatek's Declaration attached as Ex. M.

off for union business to "earn" credits, the policy does in fact punish them. In addition to not placing these employees in a similar position as all others, these union officers are assessed additional points if they lay off the day before or after a union business day.

BNSF tries to assert that the Union has 1,300 officers on BNSF. BNSF provides absolutely no basis for this number, and it is grossly misleading. Indeed, of the 1,184 members who have seniority on BNSF who additionally hold an officer position at some level with SMART-TD, 220 of are Local Chairpersons ("LC"). (Sec. Ferguson Decl. ¶ 3). Of those 220, they are spread out throughout the BNSF's system in the western United States. (*Id.*). Moreover, such misrepresentation is a red herring. The officer positions and their respective duties are set forth in the governing Union Constitution. Each have a separate and distinct function. Of importance here is the LC who provides the basic representative function to the membership and is responsible for the initial enforcement of the appropriate agreement. Each LC is attached to a local and locals are located throughout the western half of the United States. Their jurisdiction is limited to a geographical territory and a specific CBA. Each LC represents the members of that specific local under that controlling agreement. The notion that they can simply cover for each other is disingenuous, overly simplistic, and speculative at best. Indeed, it is akin to saying that since BNSF has over 1,200 executives, officials and staff assistants (Swiatek Decl., Ex. M, BNSF Employment Data Dec. 2021, *available at* https://www.stb.gov/reports-data/economic-data/employment-data/), that staff assistants can cover for executives.

Finally, despite BNSF's claims to the contrary, BNSF would not be seriously harmed by the delay or interruption in the implementation of Hi Viz. Other than to make this statement, they provide no evidence that it is true. BNSF made profits in the Billions of dollars last year using the prior attendance policy. *See* BNSF's Third Quarter 2021 Financial Performance, *available at*

https://www.bnsf.com/about-bnsf/financial-information/pdf/performance-update-3q-2021.pdf. Any claim that they will lose money unless they run their employees into the ground under the Hi Viz policy is simply absurd. This rush to implement the Hi Viz has little to do with competition and more to do with Wall Street.

Again, it is BNSF who has stripped its employee levels to the bare bone—furloughing employees, refusing to call them back, failing to hire in sufficient numbers to avoid that crisis that they now claim that they find themselves. BNSF's poor planning has now become an emergency that it asks the Court to remedy.

III. ARGUMENT

Under the RLA, carriers have several obligations arising from their collective bargaining relationship with the union, including the obligation to bargain collectively and refrain from unilaterally altering the existing employment conditions or the terms of their CBA. 45 U.S.C. §§ 152 Seventh; 156. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union* ("*Shore Line*"), 396 U.S. 142, 148-54 (1969); *Wheeling & Lake Erie Ry. Co. v. Bhd. of Loco. Eng'rs & Trainmen*, 789 F.3d 681, 691 (6th Cir. 2015); *Florida East Coast Ry. v. Bhd. of Loco. Eng'rs* ("*FEC*"), 362 F.2d 482, 483 (5th Cir. 1966). Despite this well settled mandate, BNSF has chosen to blatantly ignore its obligation to exhaust the mandatory provisions of Section 6 and impose the Hi Viz availability policy. Such unilateral action violates the Act and should be enjoined.

A. BNSF Has Not Established a Likelihood of Success on the Merits.

1. The Parties Are Engaged in a Major Dispute.

As demonstrated in SMART-TD's Brief in Support of its Motion for Preliminary Injunction, the parties are engaged in a major dispute. Therefore, BNSF is unable establish a

likelihood of success on the merits that the dispute is minor. In response, BNSF raises several arguments, none of which carry the day.

The bulk of BNSF's arguments relate to BLET (D.E. 40 at 10-12), and not SMART-TD's arguments. Indeed, BNSF now seems to concede its prior argument on managerial prerogative, expressly noting that such was an alternate argument. (D.E. 40 at 6). Nevertheless, it does continue to maintain that it has a past practice of unilaterally altering attendance standards. (*Id.* at 5-6). Again, this another red herring that attempts to mischaracterize the current situation. The implementation of the Hi Viz policy does not consist of mere alterations to an existing policy. Rather, BNSF has implemented a new and distinct availability policy which changes the established "rules and working conditions" while the parties are actively engaged in bargaining over those exact "rules and working conditions."

As the Supreme Court noted in *Shore Line*,

> The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, **broadly conceived**, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

396 U.S. at 152-53 (emphasis added). For the status quo analysis, it must be stressed that the Supreme Court held that "rules and working conditions" are to be "broadly conceived" and not narrowly defined. *Id.*

Here, the status quo past practice is the attendance policy that existed prior to the implementation of the Hi Viz availability policy, which allowed 25% unavailability and permitted an employee to lay off on average five weekdays and two weekend days per month. This permitted employees in unassigned service to attend to both planned and unexpected life events, including doctor appointments, care for sick children or those on remote learning, day off

to attend child's soccer game, visit family, take their pets to the veterinarian, among other reasons. The prior policy further did not treat union representatives differently. That is the status quo. It is this lens through which the Hi Viz policy must be viewed.

Through the unilateral implementation of the Hi Viz availability policy, BNSF has effectively foreclosed employees' ability to do any of these things and have any quality of life, all the while these very same topics are being discussed at the bargaining table. BNSF cannot be permitted to short-circuit the Act's process.

2. Statutory Violation of the RLA.

As demonstrated in SMART-TD's Brief in Support of its Preliminary Injunction, BNSF's Hi Viz availability policy violates Sections 2 Third and Fourth of the Act by interfering with the collective bargaining process and interfering with the ability of the union to carry out its legal obligation to represent its membership. (D.E. 46 at 12-16).

BNSF admits that under the prior policy, union officers did not have to "earn" back any good attendance credits. Now, however, they are at a disadvantage merely for performing their duties that are required by law. BNSF additionally claims that union business deadlines are "flexible" and that any of what it claims are 1,300 other union officers can conduct these duties. (D.E. 40 at 8-9). As an initial matter, the RLA affords the Union with the right to choose its representative. Further, this ignores the separate and distinct function and services that different respective Union officer positions provide for the membership. Indeed, for example, monthly union meetings, etc. are not flexible. Moreover, for LCs, this ignores the practical reality that they are representing employees who are being subjected to investigations which could lead to discipline. BNSF has the sole control over who it charges and issues notices of investigation to. BNSF has sole control over the scheduling of these investigations and whether to grant or deny a

postponement request. Further, an officer cannot be expected to push a group of investigations together and still be able to perform his legal obligation of providing fair representation. An LC does not just show up on investigation day, they must prepare in advance for each investigation, and representation does not end with the hearing, additional follow-up work is required. And the idea that LCs could somehow cover for one another, even if that were possible, does not solve the problem as the covering LC would then be denied the ability to obtain good credits. It is not "rank speculation" that such will undermine the union (D.E. 40 at 9); it is common sense.

3. Statutory Violation of the FMLA.

With regard to the FMLA, despite BNSF's best efforts to mischaracterize SMART-TD's argument, SMART-TD does not assert that a violation of the FMLA constitutes a major dispute. (D.E. 40 at 13-14). Rather, SMART-TD's argument is that an independent statutory violation is separate and distinct from the major/minor dispute dichotomy. The import is that BNSF cannot show a likelihood of success on the merits warranting its requested injunctive relief by relying on its "arguably justified" standard arguments, which are applicable in a major/minor dispute case. While a violation of FMLA does not constitute a major dispute and would not allow the Union to engage in self-help in isolation, it also would not entitle BNSF to engage in self-help.

BNSF then attempts to distinguish *Dyer v. Ventra Sandusky, LLC,* 934 F.3d 472 (6th Cir. 2019), noting that the policy in that case allegedly treated FMLA leave worse than comparable forms of leave. *Id*. at 474. However, despite BNSF's claims, that is exactly what is occurring in this case. BNSF is treating FMLA leave worse than other types of leave. Under the Hi Viz policy, employees begin with 30 points, which are then deducted for various unavailable events. If an employee lays off the day preceding or following a day in which s/he took FMLA leave, s/he gets assessed an <u>additional</u> two points for unassigned service and an additional three points

for assigned service. (D.E. 22-1, Ferguson Decl. ¶ 6, Ex. C) ("This is referred to a Conjunction Penalty). Further, while employees would otherwise be available for good attendance credits even where they are not actually available for service (*i.e* training, working light duty, company business, or on military leave); FMLA leave does not fit within this exception. (*Id.*).

Again, Hi Viz does not exist in a vacuum, but has real world consequences for employees. (D.E. 46-1, LaPresta Decl. ¶ 10; Miller Decl. ¶ 2). Since the filing of SMART-TD's Motion for Preliminary Injunction, hundreds of additional real-life examples of the draconian impact BNSF's implementation of its new Hi Viz attendance availability policy will visit upon its employees have been submitted to the Union. (D.E. 46-1, LaPresta Decl. ¶ 10; Miller Decl. ¶ 2). Some of these are provided in the Declarations. (Miller Decl. ¶ 2; *see also* D.E. 46-1, LaPresta Decl. ¶ 10). One such account was a heartbreaking story of a Conductor who exhausted all his FMLA, vacation, and personal leave days during his wife's ten-month battle against brain cancer. (Miller Decl. ¶ 2). If this Hi-Viz point system had been in effect while she was sick, he would have lost his job while his wife was fighting for her life. (*Id.*). Tragically, his wife died. (*Id.*). In addition to losing his job and his wife, he would have also lost his home due to lack of income. (*Id.*). He attempted to go to much needed counseling after losing his wife. (*Id.*). However, he has been unable to because he did not have enough worked hours to qualify for FMLA. (*Id.*). Under the Hi Viz policy now in effect, he will be further penalized. (D.E. 22-1, Ferguson Decl. ¶ 6, Ex. C). To make an incredibly difficult situation even worse, the employee's daughter is now battling thyroid cancer, and because of the Hi Viz policy, he is unable to assist her. (Miller Decl. ¶ 2).

The new policy demands an employee be available to work fourteen days straight to earn four points back. (D.E. 22-1, Ferguson Decl. ¶ 6, Ex. C). This design is impossible to achieve

with minimal life events, let alone those as catastrophic as the examples presented illustrate. (Miller Decl. ¶ 2; *see also* D.E. 46-1, LaPresta Decl. ¶¶ 10-14). The example above is just one employee of thousands. There are hundreds, if not thousands just like him. These are not hypothetical situations. These are people's lives being affected for the worse. To date, BNSF has not been able to change its workforce to non-feeling machines of circuits and wires. Its employees are human beings who need to be able to take time off to attend to the issues of life. The irony of it all is that unless and until BNSF starts treating them as such, these employees will find work elsewhere.

B. The Balance of Harms and the Public Interest Do Not Support BNSF's Request for Injunctive Relief.

BNSF must additionally establish that "the injury to [it]… outweigh[s] the threatened injury to the defendant" and that the injunctive relief is in the public interest. *Harris County, Texas v. Carmax Auto Superstores, Inc.*, 177 F.3d 306, 312 (5th Cir. 1999). BNSF argues, as in its TRO, that the balance of harms weighs in favor of granting an injunction and that such would further be in the public interest because the financial harm to BNSF through the loss of revenue including disruptions to the national rail network. (D.E. 40 at 19-20 (citing D.E. 7 at 20-21)).

While the Court placed particular emphasis on the supply chain crisis in granting BNSF's request for a TRO, there would be no threatened interruption to interstate commerce, and as a result, no impact on the supply chain, if BNSF simply sat down and bargained in good faith over the availability policy, as the RLA requires. Indeed, such is consistent with the primary purpose of the RLA to make and maintain agreements, and in furtherance of parties abiding by that obligation, 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. Int'l Bhd. 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, as BNSF has done here, 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. The Union, and not the Carrier, would be irreparably harmed by the Railroad's violation of the status quo, in contravention of the statutory mandate. Because neither the balance of the harms nor the public interest factors weigh in favor of BNSF, its request for injunctive relief should be denied.

C. BNSF is Not Entitled to Injunctive Relief Due to the Norris-LaGuardia Act's Policy of Limiting Court Intervention in Labor Disputes.

Under the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101 *et. seq.*, federal courts are divested of jurisdiction to "issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of [the NLGA]." *Aircraft Service Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1073 (9th Cir. 2015) ("The Norris-LaGuardia Act was enacted to 'tak[e] the federal courts out of the labor injunction business.'") (quoting *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982)). Section 4 of the NLGA provides, in pertinent part, "in any case involving or growing out of any labor dispute," federal courts are prohibited from issuing an injunction to prohibit any person from "[c]easing or refusing to perform any work." 29 U.S.C. §

104(a). Further, Section 8 provides, in pertinent part, that "[n]o restraining order or injunctive relief shall be granted to any complainant ... who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108. It has long been held that a carrier must establish that it made every reasonable effort to settle the dispute before seeking an injunction. *Bhd. R.R. Trainmen v. Toledo, P. & W. R.R.*¸ 321 U.S. 50, 56-57 (1944) ("If a complainant has failed ... to make every reasonable effort to settle the dispute, he is forbidden relief.").

It is undisputed that this matter is a "labor dispute" within the meaning of the NLGA, and that BNSF has taken no meaningful action here to settle the dispute. It set out to dictate the terms of its policy, ignoring any attempt to bargain with the GCs on terms and conditions of employment. Indeed, it was only after the Court's request that BNSF Labor Relations begrudgingly attended a meeting with the GCs, and BNSF management met with the Presidents of both SMART-TD and the Brotherhood of Locomotive Engineers and Trainmen ("BLET"). However, during these meetings, BNSF simply went through the motions and made no attempt to actually resolve these issues. (D.E. 46-1, LaPresta Decl. ¶ 15). In fact, while BNSF mentioned that certain changes to the policy would be made, it did not even discuss what those changes would be, and the Union was forced to wait until the revision issued several days later before it knew what turned out to be "minor" adjustments were made. (D.E. 46-1, LaPresta Decl. ¶ 10). BNSF's sole action was sending a letter informing the Union of its position that the dispute was properly reserved for arbitration. (D.E. 40 at 7 (citing D.E. 8 at 161-62)). This late-in-the-day attempt to coerce SMART-TD to arbitration after refusing any attempts to discuss the attendance policy prior to implementation with the GCs is an afterthought with no meaning or substance. Further, BNSF has failed to establish that the present situation meets the NLGA's narrow

exception that injunctive relief is appropriate as the only remedy that can safeguard a right that the RLA grants. *See Burlington N. R.R., supra*. Rather, it only would encourage the type of court intervention that the NLGA was intended to limit; intervention sought by the Carrier from the courthouse, in lieu of sitting down with the Union, time and time again. Such actions undermine the RLA and NLGA. Furthermore, BNSF's continued antics undermining the Act and Court's instruction are no way to foster improved labor-management relations. Therefore, BNSF is not entitled to injunctive relief.

IV. CONCLUSION

As demonstrated herein and in SMART-TD's Brief in Support of its Motion for Preliminary Injunction, the dispute here is major. *Shore Line,* 396 U.S. at 148-54; *FEC*, 362 F.2d at 483. Accordingly, SMART-TD asks that the Court deny BNSF's motion injunctive relief, enjoin its implementation of the Hi Viz policy, and direct that it negotiate pursuant to the mandates of Section 6.

Dated: February 7, 2022

Respectfully Submitted:

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* Application for Admission *Pro Hac Vice* Forthcoming

CERTIFICATE OF SERVICE

I certify that on this 7th 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.").

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