No. 16-___

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMENT; ROBERT H. LINSEY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"), this Court held that disputes over the interpretation of collective bargaining agreements governed by the Railway Labor Act must be arbitrated so long as the party seeking arbitration can meet the "relatively light" burden of showing that its interpretation is "arguably justified," rather than "frivolous" or "obviously insubstantial." *Id.* at 306-07. And this Court further held that the determination of whether a party's interpretation is arguable is not "governed by the same old common-law concepts which control … private contracts," because "[a] collective bargaining agreement" is a unique labor-law agreement whose "express" terms must be construed in light of the "play in the joints" necessary when "responding to changed conditions" as well as "implied" terms grounded in the parties' past "practice." *Id.* at 311-12.

The question presented here is: Whether the Sixth Circuit's decisions below conflict with this Court's *Conrail* decision and an otherwise-uniform body of appellate precedent following *Conrail*, given that the court refused to order arbitration of the parties' dispute simply because it concluded that Respondents had "the better argument" under the "express" terms of the agreement, without regard to the exigent circumstances and implied terms that Petitioner plausibly invoked to support its contrary interpretation. Pet. App. 34a.

PARTIES TO THE PROCEEDING

Petitioner is the Wheeling & Lake Erie Railway Company("W&LE"). Defendants-Respondents are the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), a labor organization, and Robert H. Linsey, an official of BLET with the title of General Chairman. General Chairman Linsey was named in his official capacity.

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RULE 29.6 STATEMENT

The parent company of the W&LE is The Wheeling Corporation, which is privately held. No publicly traded company holds 10 percent or more of the stock of the W&LE or The Wheeling Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Wheeling & Lake Erie Railway Company respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals that is under review is an unpublished order, *Wheeling & Lake Erie Ry. Co. v. Bhd. of Locomotive Engineers and Trainmen*, No. 16-3016 (6th Cir. July 13, 2016) ("*W&LE II*") (Pet. App. 1a). Also relevant to this petition is the Sixth Circuit's earlier decision in *Wheeling & Lake Erie Ry. Co. v. Bhd. of Locomotive Engineers and Trainmen*, 789 F.3d 681 (6th Cir. 2015) ("*W&LE I*") (Pet. App. 13a), whose rulings were the law of the case followed without change in *W&LE II*. The order of the district court from which the appeal in *W&LE II* was taken by W&LE is unreported (Pet. App. 7a), as corrected (Pet. App. 11a). The order of the district court from which the appeal in *W&LE I* was taken by the union is reported at 2013 U.S. Dist. LEXIS 154389 (N.D. Ohio Oct. 22, 2013) (Pet. App. 47a).

JURISDICTION

The court of appeals issued its judgment on July 13, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act, 45 U.S.C. § 151, et. seq., are reprinted in Appendix H to this petition.

STATEMENT OF THE CASE

A. Background.

Labor relations in the railroad and airline industries are governed by the RLA. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963). Because of the importance of these industries to the nation's commerce, a primary purpose of the RLA is to "avoid any interruption to commerce or the operation of any carrier engaged therein." 45 U.S.C. § 151a(1). *See, e.g., Union Pacific R.R. Co. v. Bhd. of Locomotive Engineers and Trainmen,* 558 U.S. 67, 72 (2009) ("Concerned that labor disputes would lead to strikes bringing railroads to a halt, Congress enacted the [RLA]."); *Slocum v. Delaware, L. & W. R.R. Co.,* 339 U.S. 239, 242 (1950) ("The "first declared purpose of the [RLA]."). To that end, the RLA specifies mandatory procedures for resolving disputes concerning collective bargaining agreements. The RLA provides distinct procedures for two different types of disputes, which this Court has described as "major" and "minor" disputes. *Conrail*, 491 U.S. at 302-04.

The term "major" dispute refers to the Act's collective bargaining procedures to form or amend collective bargaining agreements, to "create contractual rights." *Id*. at 302. The statutory bases for major disputes are 45 U.S.C. §§ 152, Seventh and 156. The major dispute procedures are initiated by the service of written proposals for changes to collective bargaining agreements. Until the parties exhaust bargaining and mediation under the supervision of the National Mediation Board, they are not free to engage in self-help. During these procedures, both sides must observe the status quo.

Once these procedures have been exhausted and, if no new agreement reached, the union is free to strike and the carrier to implement its proposed changes in agreements. *See*, *e.g.*, *Conrail*, 491 U.S. at 302-03.

By contrast, minor disputes are "disagreements arising out of the interpretation or application of agreements," 45 U.S.C. § 153, First (i), and involve enforcement of rights under existing agreements. *Conrail*, 491 U.S. at 302. The statutory bases for minor disputes are 45 U.S.C. §§ 152, Sixth and 153. *Id.* at 303. Minor disputes are first to be addressed in the "usual manner." 45 U.S.C. §153, First(i). The "usual manner" typically is the grievance procedure specified in the collective bargaining agreement. *See, e.g., Union Pacific R.R.Co.,* 558 U.S. at 73-74 (must first "exhaust the grievance procedures specified in the collective bargaining agreement . . . ."). If not resolved in the on-property handling, then the dispute must be submitted to binding arbitration before arbitration boards established pursuant to Section 3 of the RLA, 45 U.S.C. § 153. These include the National Railroad Adjustment Board ("NRAB"), a permanent arbitration tribunal, and adjustment boards established by the parties to hear disputes in lieu of the NRAB. *See, e.g., Conrail,* 491 U.S. at 303-04. Strikes over minor disputes are illegal and to be enjoined. *Id.*

Labor and management do not always agree on the proper characterization of a dispute. The carrier will often classify it as a minor dispute over the interpretation of an existing agreement to ensure it is resolved peacefully. The union will classify it as a major dispute essentially involving the creation of a new agreement so it can use or threaten its strike

weapon. Under the RLA, the issue of arbitrability is for the courts. 491 U.S. at 306. In *Conrail*, this Court set out uniform standards for lower courts to follow when the parties disagree on the proper classification of a labor dispute.

Where a carrier claims its position is allowed under, or not prohibited by, the existing agreement, the dispute is minor so long as its interpretation is "arguably justified" by the terms of the agreement. 491 U.S. at 307, 310. A dispute can be characterized as major only where the party's interpretation is so "frivolous or obviously insubstantial" that the party is essentially seeking to create a new agreement term rather than applying the existing one. *Id.* at 307. The carrier's burden is "relatively light" and the analysis favors a finding of arbitrability, because federal labor policy as expressed in the RLA favors peaceful resolution of disputes through arbitration rather than strikes. *Id.* at 307. In addition, the court is not to weigh the parties' contentions, because ultimate resolution of the contract interpretation dispute is within the exclusive jurisdiction of a specialized labor arbitration board established under the RLA. *Id.* at 318-19.

In developing standards for arbitrability, the Court recognized that "a collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts . . . it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . ." *id.* at 311-12 (quoting from *Transportation Communications Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 161 (1966), which was

quoting from *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960)). Because the express agreements terms do not address every contingency that may arise in the workplace, the Court recognized that express terms were susceptible to interpretations that "leaves some play in the joints, permitting management some range of flexibility in responding to changed conditions." 491 U.S. at 309 n.7. Similarly, the Court recognized that, "[c]ollective bargaining agreements often incorporate express or implied terms . . . ," *Conrail*, 491 U.S. at 308, including "implied contractual terms, as interpreted in light of past practice." *Id.* at 311.

B. Facts and Procedural History.

The W&LE is a regional railroad that operates in the States of Ohio, Pennsylvania, West Virginia, and Maryland. Pet. App. 14a. Under the RLA, union representation of employees is by class or craft. Two crafts of employees operate W&LE's freight trains, the craft of locomotive engineers and the craft of trainmen, which includes conductors. Pet. App. 68a. The BLET is the collective bargaining representative for both crafts of employees. Pet. App. 15a. W&LE and BLET are party to a collective bargaining agreement that governs the rates of pay, work rules and working conditions of engineers (the Engineer Agreement) and a collective bargaining agreement that governs the rates of pay, work rules and working conditions of conductors (the Trainmen Agreement). Pet. App. 68a.

Railroad employees are subject to the federal Hours of Service Act. Pet. App. 70a. This Act limits the maximum number of hours that a train crew employee can work as the crew of a train. The facts giving rise to this case were two occasions in September 2013 when the train crew comprised of an engineer and conductor reached their maximum hours of service. Pet. App. 20a. Because no rested union engineers and union conductors were available to relieve the train crew members who had reached their maximum hours, and there was an operational need to move these trains, W&LE temporarily used managers who were certified as engineers and conductors as the engineer and conductor members of the crew of these two trains. Pet. App. 71a. The BLET subsequently wrote a letter to W&LE dated September 13, 2013 complaining that such use of a manager as the engineer and conductor violated the parties' collective bargaining agreements. Pet. App. 20a. According to BLET, only a locomotive engineer covered by the Engineer Agreement and a conductor covered by the Trainmen Agreement could serve as the crew of a train. BLET further contended that W&LE operated these trains without a conductor in violation of the crew consist provision in the Trainmen Agreement, which specifies that a conductor will be in the crew of every train. Pet. App. 73a.

The "usual manner" on the W&LE for resolving claims that it violated the collective bargaining agreement is for it to respond to the union's claim, and, if the union still believes a violation occurred, for the union to file a grievance under the grievance procedures in the Engineer or Trainman Agreement.

However, before W&LE could respond to the union's letter, let alone schedule a conference to address the union's concerns, the union engaged in a surprise strike on September 20, 2013, which substantially curtailed W&LE's rail operations. BLET never filed a grievance over W&LE's use of managers as an engineer or conductor. Pet. App. 72a. Instead, BLET contended that W&LE was trying unilaterally to change the parties' labor agreements by eliminating the conductor position altogether and operate trains with only an engineer. Pet. App. 73a. The parties were then in collective bargaining and W&LE had proposed changes to the Trainmen Agreement that would allow the operation of some trains with only an engineer, without a conductor. Pet. App. 15a-16a, 74a. However, as W&LE explained, the dispute whether the existing Trainmen Agreement allowed W&LE to use a supervisor temporarily to fill the conductor position in exigent circumstances was unrelated to the bargaining to eliminate the conductor positions altogether. Pet. App. 74a.

Relying on this Court's precedents that district courts have jurisdiction to enjoin strikes that violate the RLA's minor dispute resolution procedures, [1] W&LE immediately sought and obtained a restraining order and then a preliminary injunction from the district court that the strike violated the RLA. Pet. App. 47a. In its court pleadings and communications to the BLET, W&LE explained that the Engineer Agreement contained an express

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[1] *See*, *e.g.*, *Conrail*, 491 U.S. at 304 ("Courts may enjoin strikes arising out of minor disputes.").

provision that allowed it to use a supervisor as the engineer in certain circumstances. W&LE further explained that its temporary use of a manager as the engineer on the two trains in question satisfied the requirements of the Engineer Agreement. Pet. App. 74a.

Unlike the Engineer Agreement, the Trainmen Agreement does not expressly speak to the situation when a rested union conductor is not immediately available and there is an operational need to move a train. Pet. App. 70a. Although the crew consist provision in the scope rule of the Trainmen Agreement, Rule 1(h)(i) and (ii) (Pet. App. 15a), provides that a "conductor" shall be part of the crew of "all assignments (regular or extra) . . . .," it does not expressly prohibit the use of a supervisor as the "conductor" even in these exigent circumstances. Moreover, W&LE submitted evidence of a long past practice under the Trainmen Agreement of using supervisors as the conductor when a rested conductor was not available in such circumstances. Pet. App. 24a-25a, 72a, 76a-87a. After reviewing the parties' competing agreement interpretations and past practice evidence under the *Conrail* standards, the district court concluded that the disputes over W&LE's use of a supervisor as an engineer (the "Engineer Dispute") and as a conductor (the "Conductor Dispute") were minor disputes within the meaning of the RLA, because W&LE's interpretation of the existing agreements was at least "arguable," rather than "frivolous." Pet. App. 47a.

BLET took an interlocutory appeal from the grant of a preliminary injunction as it related to the Conductor Dispute pursuant to 28 U.S.C. §

1292(a)(1). The Sixth Circuit in *W&LE I* found that W&LE's interpretation of the crew consist provision was frivolous simply because the union "has the better argument" under the Trainmen Agreement's express terms. Pet. App. 34a. Therefore, the Sixth Circuit reclassified the Conductor Dispute as major. In so doing, the court refused to interpret the express terms to allow any "play in the joints" for exigent circumstances allowed under *Conrail*. 491 U.S. at 309 n. 7. Likewise, the court refused to consider any possibility of an implied term based on past practice. Moreover, the court rejected W&LE's evidence of past practice because it found that such evidence not support a finding of unilateral management control over filling the conductor position when no rested union conductor was available. Pet. App. 36a. Therefore, the court of appeals reversed the district court's preliminary injunction that the Conductor Dispute was a minor dispute and remanded the matter to the district court for further proceedings consistent with the appellate court's major dispute finding.

W&LE filed a petition for rehearing en banc pointing out that *W&LE I* was contrary to *Conrail* and in conflict with the post-*Conrail* precedent from every Circuit, where the dispute turned on the meaning of terms in existing agreements. The Court nonetheless denied W&LE's petition. [2]

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[2] In response to W&LE's petition for rehearing en banc, the court of appeals did, however, amend its opinion to limit its holding to the Conductor Dispute. In its original opinion, the Sixth Circuit also reversed the district court's finding that the Engineer Dispute was a minor dispute, even though the union

On remand, W&LE voluntarily dismissed its claim over the Engineer Dispute, given that BLET had accepted the district court's ruling on that issue. The district court entered final judgment against W&LE on its claim that BLET was required to arbitrate the Conductor Dispute, finding that *W&LE I* had established as law of the case that the Conductor Dispute was a major dispute. Pet. App. 7a-10a.[3] In order to obtain an appellate decision from a final judgment, W&LE appealed the district court's decision to the Sixth Circuit. In *W&LE II*, a different panel affirmed the district court decision in that the Conductor Dispute was a major dispute, agreeing that *W&LE I* was the law of the case and finding that W&LE had not shown any basis to depart from it. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with this Court's *Conrail* decision and an otherwise-uniform body of appellate precedent applying *Conrail* over the past 27 years. As explained, *Conrail*'s approach to classifying disputes as major or minor recognizes that a collective bargaining agreement is not an ordinary contract for goods and services and traditional common law rules are not to be used in

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had not appealed the district court decision on this point. The Amended Opinion is Pet. App. 13a. Although the court amended its opinion, it did not eliminate its discussion of the Engineer Dispute.

[3] The district court subsequently issued a corrected order. Pet. App. 11a-12a.

determining whether a disagreement growing out of an existing agreement must be classified as minor and therefore subject to arbitration. Although the Sixth Circuit referenced *Conrail*, it did not follow *Conrail* and its progeny. In direct conflict with *Conrail*, the court instead applied traditional common law rules to determine that the Conductor Dispute was a major dispute rather than a minor dispute. First , *Conrail* instructed that a carrier had only a "relatively light" burden to show that its collective bargaining agreement interpretation was "arguably justified" rather than "frivolous" or "obviously insubstantial." Rather than apply this rule, the Sixth Circuit instead asked who had the "better argument" and what the record "support[ed]" – i.e., essentially applying the common-law preponderance of the evidence burden. Pet. App. 34a, 36a. Second, under *Conrail* a collective bargaining agreement's express terms can be construed to have "play in joints" to account for "changed conditions." The Sixth Circuit refused to allow for such a possibility, again essentially treating the Trainmen Agreement like an ordinary contract. Third, *Conrail* held that "implied" terms based on "past practice" must be considered along with express terms in determining whether a carrier's interpretation was arguably justified. Yet, the Sixth Circuit refused to consider whether an implied agreement was even arguable because of the court's interpretation of express terms, in effect applying the common-law parol evidence rule. *Conrail* and its consistent application by post-*Conrail* appellate decisions have helped maintain labor stability in the important railroad and airline industries by ensuring

that disagreements growing out of existing agreements are resolved peacefully, without strikes, through grievance handling and arbitration. The Sixth Circuit's novel approach in this case threatens this labor stability by opening the door to the resolution of labor disputes through strikes and court litigation, as happened here, outcomes that are totally in conflict with the language and purpose of the RLA and this Court's RLA jurisprudence.

Given how out of step the Sixth Circuit's approach is with *Conrail* and its progeny, the Court may wish to consider summary reversal.

I. THE SIXTH CIRCUIT'S APPROACH FOR DETERMINING ARBITRABILITY CONFLICTS WITH *CONRAIL*.

The Sixth Circuit's approach in *W&LE II*, which adopts in total the reasoning of *W&LE I*, failed to follow the "relatively light burden" approach in *Conrail*. While the court of appeals recited the *Conrail* standards, Pet. App. 31a-33a, it did not actually apply them. In their place, the court of appeals applied the traditional common law rules used by courts in adjudicating disputes involving ordinary contracts for goods and services, thereby impermissibly deciding the merits of the underlying contract interpret interpretation dispute when its role was limited to determining whether the dispute was required to be arbitrated.

As discussed *supra*, because federal labor policy as expressed in the RLA is to avoid interruptions to carrier operations from labor disputes, the standards developed by this Court for distinguishing between major and minor disputes are designed strongly to

favor a minor dispute finding. The inquiry is whether the carrier's interpretation is "arguably justified" by the terms of the agreement, 491 U.S. at 310, and whether the dispute can "be conclusively resolved by interpreting the existing agreement," 491 U.S. at 305. At this stage, the carrier does not have to prove that its contract interpretation is correct or likely to succeed, only that it is not "frivolous" or "obviously insubstantial." *Id.* at 306. The carrier's burden to satisfy these standards is "relatively light" because of the strong presumption in favor of arbitration. *Id.* at 307. For similar reasons, courts are to resolve any doubt in favor of a minor dispute finding. *Id.* at 310 ("Full utilization of the Board's [arbitration] procedures . . . will diminish the risk of interruptions in commerce.").

In applying the *Conrail* standards, the role of courts is narrow; the court can neither interpret the contract nor decide which party's interpretation is correct. "[U]nder the RLA, it is not the role of the courts to decide the merits of the parties' dispute." *Id.* at 318. The court's role is deliberately narrow, because the RLA places exclusive jurisdiction to resolve the contract interpretation dispute in arbitration boards, which have special expertise in interpreting labor agreements. *Id.* at 310-11. This Court has found that such arbitration boards are better equipped than courts to resolve disputes over the interpretation of collective bargaining agreements, because they are expert in the industry and familiar with its jargon and the "law of the shop." *See, e.g., Gunther v. San Diego & E.Ry. Co.,* 382 U.S. 257, 261 (1965).

Under these standards, the parties' dispute whether W&LE's use of a supervisor temporarily to fill the conductor position in a train crew violated the crew consist provision in the Trainmen Agreement's scope rule was a classic minor dispute. The union was seeking to enforce a term in an existing agreement, Rule 1(h)(i) (Pet. App. 15a), which it interpreted to prohibit use of a non-union manager as a "conductor" member of a train crew in any circumstances. Conversely, W&LE argued that the crew consist provision did not address the circumstances when no rested union conductors are available and there is an immediate need to move the train. Contrary to the union's interpretation, nothing in the crew consist provision expressly prohibited the use of a supervisor in such exigent circumstances. Given this silence,W&LE also relied on an implied agreement, based in past practice, that it could use a manager as a conductor in such circumstances just as it admittedly could use a manager as the locomotive engineer member of the crew in exigent circumstances. The dispute was a minor dispute because it could be "conclusively resolved" by interpreting both express and implied contract provisions.

Nonetheless, based on the reasoning of *W&LE I*, the court of appeals found in *W&LE II* that W&LE's interpretation of the written agreement was frivolous, and the Conductor Dispute was therefore a major dispute. The Sixth Circuit's classification of the

Conductor Dispute as a major dispute was legal error and contrary to *Conrail* in three ways.[4]

First, the Sixth Circuit focused on which party had the "better argument" under the express terms of the collective bargaining agreement and on what the "record support[ed]" regarding evidence on past practices under the express terms. In essence, the court applied the common law preponderance of the evidence standard rather than limiting its inquiry to the RLA arguably justified standard of whether W&LE's interpretation was "frivolous" or "obviously insubstantial."

The Sixth Circuit found that the union had the "better argument" because it agreed with the union's

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[4] The panel in *W&LE I* also at times conflated the minor dispute whether the crew consist provision in the existing Trainmen Agreement ever permitted the use of a manager as a conductor with the parties' then on-going major dispute over their proposed changes to the Trainmen Agreement, including W&LE's proposal that the conductor position be eliminated altogether from some crews. Pet. App. 34a, 37a-38a. As the district court recognized, they were two completely different disputes. By temporarily using a manager as the conductor crew member, W&LE was asserting rights under an existing agreement, not eliminating the conductor position to operate engineer only. It is well settled that the service of bargaining proposals does not convert every dispute that may arise in the course of bargaining into a major dispute. *See*, *e.g.*, *Bhd. Ry. Carmen v. Missouri P. R.R. Co.*, 944 F.2d 1422, 1427 (8th Cir. 1991) ("[T]he service of a section 6 notice by the union does not transform a minor dispute into a major one."). The panel's resulting reliance on *Detroit & T.S.L.R.R. Co. v. Transp. Union*, 396 U.S. 142 (1969) (Pet. App. 39a-41a) was another legal error, because *Shore Line* does not apply in a minor dispute. *Conrail*, 491 U.S. at 304.

interpretation that the "express language of the Trainmen Agreement's scope rule . . ." "mandates that the Railroad must assign at least one *union* conductor to each train." *W&LE I,* Pet. App. 34a (emphasis added). The court also found the union's evidence of past practice under the express terms more persuasive than that of W&LE. W&LE provided declarations from supervisors detailing specific circumstances over a 15-year period where they had filled the role of conductor in exigent circumstances when no rested union conductor was available. BLET did not deny W&LE's evidence, but pointed to an incident in 2011 where W&LE agreed with BLET that the movement of one train using only a supervisor as the engineer and no one acting as conductor violated the Trainman Agreement. As with its consideration of the parties' differing interpretation of express agreement language, the Sixth Circuit weighed the parties' past practice evidence and found the union's evidence more persuasive, finding that "the record in this case does not support a finding that the Railroad exercised unilateral control over its conductor assignment in the past. The evidence confirms that the Railroad did not have the unilateral control and that BLET did not acquiesce in the Railroad's attempts to use management employees in place of union conductors." Pet. App. 36a.

The Sixth Circuit's treatment of the parties' differing interpretations of express language and past practice evidence clearly shows that it weighed their relative merits and decided that the union's was more persuasive. This is the classic preponderance of the evidence paradigm where the

trier of fact is charged with deciding the merits of the dispute. *See, e.g.*, *Microsoft Corp. v. 14i Limited Partnership*, 564 U.S. 91, 100 n. 4 (2011) (burden of persuasion means "which party loses if the evidence is balanced"); Black's Law Dictionary (9th ed. 2009) (under preponderance of evidence standard, "jury is instructed to find for the party that, on the whole, has the stronger evidence"). But, *Conrail* specifically eschewed this as the proper approach for deciding arbitrability. 491 U.S. at 319-20 ("not the role of the courts to decide the merits of the parties' dispute"). Under the RLA, an arbitration board, not a court, is the fact finder and has exclusive jurisdiction to decide the merits of the contract interpretation dispute. 491 U.S. at 310.

Had the court applied *Conrail's* "arguably justified" standard rather than the preponderance of the evidence standard, the Conductor Dispute was clearly a minor dispute. Contrary to the union's interpretation, the language of the Trainmen Agreement's scope rule does not expressly mandate that a "conductor" must *always* be a "union" conductor. Although Rule 1(h)(i)(1) states that "[t]he crew of all assignments . . . shall consist of not less than one (1) conductor . . . ." (Pet. App. 15a), it is silent with respect to the circumstances when no rested union conductor is available, as the Sixth Circuit itself acknowledged. Pet. App. 33a. Nothing in the express language prohibits W&LE from temporarily using a manager as a conductor in the limited circumstances when no rested union conductors are available and there is an operational need to move a train. An example of an express term that could prohibit such use is the following

language from an agreement on another railroad applying to conductors: "*No company supervisor*, official, nor craft employee, other than those working under the UTU agreement, *will be used to supplant or perform work exclusively reserved to UTU-represented employees,*" quoted in *United Transportation Union v. Soo Line*, NRAB 1st Div. Award No. 25061 (Nov. 8, 1999) (Peterson, Arb.) (emphasis added) (Pet. App. 88a, 89a). No such prohibitive language appears in the Trainmen Agreement. A carrier's contract interpretation cannot be considered frivolous under *Conrail* in "the absence of a term prohibiting the carrier's action." *Bhd. of Maintenance of Way Employes Div. v. Burlington Northern Santa Fe Ry. Co.*, 596 F.3d 1217, 1223 (10th Cir. 2010).

Under *Conrail's* arguably justified standard, it also was not the court's role to decide who had the "better argument" regarding the inferences to be drawn from conflicting past practice evidence. The court's role was limited to ascertaining whether there was relevant evidence of past practice, not whether the union had "acquiesce[d]" in the carrier's version. This Court long ago recognized that resolution of disputes over past practice is for an arbitration board, stating in *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 665 n. 5 (1946) (quoting *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 567 (1946)), "[s]ince all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to

deal with it has been created by Congress." [5] *Conrail* similarly observed that resolution of disputed past practice evidence and the inferences to be drawn therefrom are within the exclusive jurisdiction of an arbitration board and not for courts. 491 U.S. at 312 n. 9 ("This is not to say that the legal significance of these practices is undisputed . . . .The District Court made no factual findings that Conrail's specific practices had themselves become implied terms of the contract, and we do not suggest otherwise in the discussion that follows.").

Second, the court of appeals failed to follow *Conrail* because it limited its analysis to the literal terms of the collective bargaining agreement and refused to allow that "the general framework of a collective bargaining agreement leaves some play in the joints, permitting management some range of flexibility in responding to changed conditions." *Id.* at 309 n. 7. Under *Conrail*, the court of appeals should have allowed for the possibility that the express language of the scope rule allowed some "play in the joints" and could be interpreted to allow the temporary use of supervisors as conductors in exigent circumstances.

Third, the Sixth Circuit compounded its error by refusing to look at sources allowed by *Conrail* other than express agreement terms to determine whether the carrier's contract justification was arguably justified. *W&LE I* reasoned that "[b]ecause the language of the scope rule is express, we need not

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[5] Here, the court was referring to the NRAB established under Section 3 of the RLA. 326 U.S. at 565-66.

consider any implied terms." Pet. App. 36a. This is a classic formulation of the parol evidence rule. Under that rule, extrinsic evidence of other agreements may not be used to vary, contradict, or even supplement an integrated written agreement. *See*, *e.g.*, Restatement of Contracts 2d § 213(1)("A binding agreement discharges prior agreements to the extent that it is inconsistent with them ."). As explained in Corbin on Contracts, the parol evidence rule comes into play when a "there is an attempt to add a term to a written contract . . . ." 5-24 Corbin on Contracts § 24.12 (2016). However, like the preponderance of the evidence burden, the common law parol evidence rule has no place under *Conrail* for at least two reasons.

First, this Court expressly held that a collective bargaining agreement can include express and implied terms and *both* must be considered in determining whether a dispute is a RLA minor dispute. *Conrail*, 491 U.S. at 308 ("Collective bargaining agreements often incorporate express or implied terms that are designed to give management . . .a degree of freedom of action within a specified area of activity."). *See also id.* at 311. Second, as discussed, this Court has repeatedly held that a collective bargaining agreement "is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts . . . ." *Conrail*, 491 U.S. at 311. A court must consider unwritten past practices as well as express agreement terms. *Id.* at 311 ("[I]t is well established that the parties' 'practice, usage and custom' is of significance in interpreting their

agreement."). In explaining similar standards for arbitrability of labor contract interpretation disputes under the Labor Management Relations Act ("LMRA"), this Court stated in *United Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. at 579, "there are too many people, too many problems, too many unforeseen contingencies to make the words of the contract the exclusive source of rights and duties." [6]

Again, it was certainly plausible that implied terms allowed W&LE "a degree of freedom of action" to use a manager to fill a conductor position in exigent circumstances.

This Court warned in *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568-69 (1960), another LMRA precedent, that "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." Yet, this is exactly what the Sixth Circuit did in this case by applying common law rules of proof rather than *Conrail's* "relatively light" burden to show that a contract interpretation was "arguably justified."

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[6] Parallels between the RLA and LMRA can be drawn when appropriate. *Trans World Airlines v. Inpdt. Fed. of Flight Attendants*, 489 U.S. 426, 432-33 (1989). Federal labor policy under both the RLA and LMRA favor arbitration of disputes arising under collective bargaining agreements. While an agreement to submit such disputes to arbitration under the LMRA is purely contractual, as discussed, under the RLA arbitration is mandatory as a matter of statute.

II. THE SIXTH CIRCUIT'S APPROACH CONFLICTS WITH DECISIONS OF OTHER CIRCUITS APPLYING *CONRAIL*.

The only decision cited by the Sixth Circuit in support of its holding that a dispute over the application of a scope rule was a major dispute was the Tenth Circuit's pre-*Conrail* decision *St. Louis Sw. Ry. Co. v. Bhd. of R.R. Signalmen*, 665 F.2d 987, 992 (10th Cir. 1981). It is understandable that the Sixth Circuit had to reach back to a pre-*Conrail* era decision for support, because the Sixth Circuit's approach in this case, relying as it does on common law rules, conflicts with every appellate decision in the 27 years since *Conrail*, including from the Tenth Circuit. All have found that disagreements over the interpretation of an existing agreement, including a scope rule, were minor disputes; none found a dispute major because the union had "the better argument." [7] Indeed, prior to this case, Sixth Circuit precedents followed *Conrail*.[8]

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[7] Post-*Conrail* decisions finding that disputes over the interpretation of scope rules are minor disputes include: *Air Line Pilots Ass'n, Int'l v. Guilford Transp. Indus.*, 399 F.3d 89, 99 (1st Cir. 2005); *Int'l Ass'n of Machinists & Aero. Workers v. US Airways, Inc.*, 358 F.3d 255, 262-63 (3d Cir. 2004); *Bhd. of Maint. of Way Employes v. Union Pac. R.R. Co.*, No. 00-1105, 2000 WL 1867967, at *2 (10th Cir. 2000); *Bhd. Ry. Carmen v. Missouri Pac. R.R. Co.*, 944 F.2d 1422, 1425 (8th Cir. 1991); *Sheet Metal Workers' Int'l Ass'n v. Burlington N. R.R. Co.*, 893 F.2d 199, 20405 (8th Cir. 1990).

Other post-*Conrail* decisions finding that a disagreement over the meaning of existing terms is a minor dispute include: *Bhd. of Maintenance of Way Employes Div. v. Burlington Northern Santa Fe Ry. Co.,* 596 F.3d 1217 (10th Cir. 2010); *United*

Other Circuits recognize that under *Conrail*, a dispute is minor even if the union has "the better argument," indeed even if the court believes that the carrier's interpretation is wrong, as long as the carrier's interpretation is "arguable" rather than "frivolous" under the agreement's express and/or implied terms. None applied the preponderance of the evidence burden used by the Sixth Circuit in this case. *See, e.g.*, *Air Line Pilots Ass'n v. Guilford Transp. Industries, Inc.,* 399 F.3d 89, 98-99 ("Even if ALPA's construct is objectively reasonable (a matter on which we take no view), it is not so irresistible that it overwhelms the defendants' contrary and otherwise plausible interpretation of the existing CBA.") and 99 n. 6 ("Of course, we cannot—and do not—decide whether the CBA actually permitted the defendants to engage in the challenged conduct. As

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(continued…)

Transp. Union v. CSX R.R., 893 F.2d 584, 592 (3d Cir. 1990); *CSX Transp., Inc. v. Bhd. of Maint. of Way Employes*, 327 F.3d 1309, 1321 (11th Cir. 2003); *United Transp. Union v. Kansas City S. Ry. Co.*, 172 F.3d 582, 585-86 (8th Cir. 1999); *Bhd. of Maint. of Way Employes v. Atchison, Topeka.& Santa Fe Ry. Co.*, 138 F.3d 635, 639-41 (7th Cir. 1998); *United Transp. Union v. S.C. Pub. Ry. Comm'n Auth.*, 130 F.3d 627, 628 (4th Cir. 1997); *Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R.*, 85 F.3d 35, 38 (2d Cir. 1996); *Ass'n of Flight Attendants v. United Airlines, Inc.*, 976 F.2d 102, 105 (2d Cir. 1992); *Ry. Labor Executives' Ass'n v. Chesapeake W. Ry.*, 915 F.2d 116, 119 (4th Cir. 1990); *Allied Pilots Ass'n v. Am. Airlines, Inc.*, 898 F.2d 462, 464-65 (5th Cir. 1990); *Air Line Pilots Ass'n v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1396-97 (9th Cir. 1990).

[8] *See, e.g., Airline Profs. Ass'n v. ABX Air, Inc.,* 400 F.3d 411 (6th Cir. 2005).

in any minor dispute under the RLA, that judgment is for the arbitrator.") (1st Cir. 2005); *CSX Transp., Inc. v. Bhd. of Maintenance of Way Employees*, 327 F.3d 1309, 1322 (11th Cir. 2003) ("We will not discuss whether CSXT's interpretation is a correct one; it is not within the scope of our review to decide the merits of the dispute before us, but merely to classify it as major or minor" citing *Conrail*); *Bhd. of Locomotive Engineers v. Long Island Rail Road Co.*, 85 F.3d 35, 39 (2d Cir. 1996) ("BLE may ultimately prevail on the merits of its claims in arbitration," but "[w]e must, however, abide by the directive of *Conrail* to turn disputes such as the one presented here over to arbitrators who, as 'experts in 'the common law of the particular industry,' are in a better position to interpret the provisions of the CBA than we are."); *Bhd. of Railway Carmen v. Missouri Pacific R.R. Co.,* 944 F.2d 1422, 1429 (8th Cir. 1991) (" Our holding does not reach whether the Carmen are entitled to ultimately prevail before the Adjustment Board, nor does it address the persuasive force of their arguments. . . .We hold only that the merits of this dispute are for the Adjustment Board and not this court to determine."); *Southeastern Penn. Transp. Auth. v. Bhd. of R.R. Signalmen,* 882 F.2d 778, 786 (3d Cir. 1989) ("In the end, the unions' arguments might carry the day in arbitration. Based on all the evidence, however, we think that SEPTA's position is not so frivolous or obviously as to lack arguable justification."); *Int'l Bhd. of Teamsters v. Southwest Airlines Co,*, 875 F.2d 1129, 1135 (5th Cir. 1989) (en banc) ("Although [the union's interpretation] my ultimately be the correct interpretation of the clause," the dispute was

minor because "outcome turns on a choice between two arguable constructions . . . .").

The Sixth Circuit also conflicts with other Circuits by weighing the parties' past practice evidence and requiring the carrier to prove that the union had "acquiesce[d]" in past practices asserted by the carrier. Other Circuits recognize that, under the *Conrail* arguably justified burden, disputes over the nature, extent, and inferences to be drawn from past practice involve contract interpretation issues and are for the arbitrator to resolve, not the court. For example, the Ninth Circuit explained as follows in *Ass'n of Flight Attendants. Mesa Airlines, Inc.*, 567 F.3d 1043, 1050 (9th Cir. 2009), "[p]ast practices under the CBAs may or may not have created an implied term, and there is evidence to support contentions of both sides. The existence of an implied term is therefore arguable and must be decided in arbitration." *See also, e.g., Bhd. of Ry. Carmen v. Missouri Pac. R.R. Co.,* 944 F.2d at 1429 (arguments over past practice for arbitration board); *Sheet Metal Workers Int'l Ass'n v. Burlington Northern R.R. Co.*, 893 F.2d at 204 ("The Association's argument may ultimately prove to be well taken, but our task is not to determine whether BN's position regarding the practices is correct, but rather whether it is arguable. Likewise, it is not our role to speculate as to the practical effect of the past practices.").

The Sixth Circuit's refusal even to consider whether there was an implied agreement that W&LE could use supervisors as conductors, because the court interpreted express agreement terms to prohibit such use, is again in conflict with post-

Conrail precedent from other circuits. *See*, *e.g.*, *Bhd. of Maintenance of Way Employes Div. v. Burlington Northern Santa Fe Ry. Co.,* 596 F.3d 1217, 1223 (10th Cir. 2010) ("We look first and primarily, of course, to both express and implied provisions of the collective bargaining agreement," citing *Conrail*); *United Transp. Union v. Kansas City Sou. Ry. Co.*, 172 F.3d 582, 588 (8th Cir. 1999) ("Thus we conclude that the district court legally erred when it failed to fully consider all the potential existing agreements that might govern the present dispute."); *Southeastern Penn. Transp. Auth. v. Bhd. of R. Signalmen,* 882 F.2d at 786 ("It is generally appropriate for the court to look beyond the face of the collective bargaining agreement," citing *Conrail*); *United Transp. Union v. South Carolina Public Ry. Comm'n*, 130 F.3d 627, 635 (4th Cir. 1997) ("However, the district court failed to consider the other evidence of past practice mentioned above . . . it is ultimately the arbitrator's role to decide that question."). Even if the scope rule expressly barred the use of supervisors as conductors, which, as W&LE has shown, it does not, the Sixth Circuit's refusal to consider whether an implied agreement allowed such use in exigent circumstances is still in conflict with post-*Conrail* decisions from other circuits that allow such consideration. *See*, *e.g.*, *Bhd. of Maintenance of Way Employees v. Atchison, T.& S. F. Ry. Co.*, 1998 U.S. App. LEXIS 7841 (7th Cir. 1998) ("The dissent presents thoughtful policy arguments against considering any extrinsic evidence when the plain meaning of an agreement seems clear. But the Rubicon has been crossed by the Third Circuit in *SEPTA*. *See generally SEPTA*, 882 F.2d 778 at 783-

86. We would find it very difficult to maintain that the suggestion to consult extrinsic evidence, supported by Third Circuit precedent, is 'frivolous or obviously insubstantial,'" citing this Court's *Conrail* decision.

The conflicts between the Sixth Circuit's approach, based on common law concepts, and the approach of other Circuits applying *Conrail*, provide a compelling reason for granting the petition. As explained next, consistent application of the *Conrail* standards across the country is vital to labor stability in the railroad and airline industries.

III. THE SIXTH CIRCUIT'S DECISION THREATENS TO DISRUPT TWO DECADES OF LABOR STABILITY FOSTERED BY *CONRAIL*.

The issues raised in this case have recurring significance for the stability of labor relations in the railroad and airline industries. While most of the private sector is not unionized, the majority of railroad and airline employees are. Numerous disputes arise on a daily basis under collective bargaining agreements at railroads and airlines, both large and small carriers, across the country. Both industries are vital to the nation's economy. Labor disputes in these industries can have ripple effects across the economy, which is why Congress mandated in the RLA that such disputes growing out of the interpretation of collective bargaining agreements be resolved peacefully, without interruptions to interstate commerce. In addition, a labor dispute at any RLA carrier can quickly spread to other carriers or regions of the country. This is

because, unlike under the National Labor Relations Act, this Court held that the RLA does not regulate secondary picketing or prevent a striking RLA union from targeting neutral employers. *Burlington Northern R.R. Co. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 419 (1987). In that case a labor dispute on a small regional carrier threatened to become a nationwide railroad shutdown.

This case presents a compelling case for Supreme Court review, because the Sixth Circuit did not simply misapply the *Conrail* standards. The Sixth Circuit followed a completely different approach, one where the court used common law concepts to weigh the merits of the parties' arguments, exclude implied agreements from any consideration, and adjudicate the underlying contract interpretation dispute. The Sixth Circuit's approach is contrary to this Court's RLA precedents that, in deciding arbitrability, courts are not to employ common law rules, weigh the parties' arguments, or decide the merits of the underlying dispute. This Court long ago held that Congress intended in the RLA that disputes over the meaning of collective bargaining agreements are not to be resolved through work stoppages or by courts, but are committed by law to the exclusive jurisdiction of arbitration boards. *See, e.g., Union Pacific R.R. Co. v. Bhd. of Locomotive Engineers and Trainmen,* 558 U.S. at 74 ("In creating the scheme of mandatory arbitration superintended by the NRAB, the 1934 amendments largely 'forclose[d] lititgation' over minor disputes," quoting *Union Pacific R.R. Co. v. Price*, 360 U.S. 601, 616 (1959)). *See also Andrews v. Louisville & N.R.R. Co.*, 406 U.S. 320, 322-23 (1972) (minor disputes must be resolved by RLA

arbitration boards, not courts); *Bhd. of Locomotive Engineers v. Louisville & N.R.R. Co.*, 373 U.S. 33, (1963) (dispute over meaning of arbitration award could not be resolved through strike); *Bhd. of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30 (1957) (union cannot strike over minor dispute).

Conrail makes repeated reference to *Warrior & Gulf Navigation Co.* 491 U.S. at 308, 310-11, 312. In *Warrior & Gulf Navigation*, as well as the companion case of *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960), this Court set out similar standards for courts to use in determining when disputes over the meaning of collective bargaining agreements covered by the LMRA, which applies to private sector labor relations other than railroads and airlines, had to be submitted to arbitration. As with the RLA, federal labor policy under the LMRA favors arbitration of disputes. In *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986) ("*AT&T*"), this Court observed that 25 years of labor peace flowed from its standards for arbitrability set out in *Warrior Gulf & Navigation*. 475 U.S. at 648 ("These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement."). The uniform application of the *Conrail* standards by the circuit courts of appeal over the last 27 years has similarly helped assure labor stability in the rail and airline industries. Carriers and unions are well aware that, given the "relatively low burden" to show that a contract interpretation is "arguably justified," and the strong presumption in

favor of arbitrability, the vast majority of disagreements growing out of collective bargaining agreements will be found to be a minor dispute. This awareness helps assure that unions do not threaten to strike or, as in this case, actually strike, over such disagreements. Carriers and unions conduct their labor relations against this backdrop of judicial precedents. The *W&LE* decisions may lead to more strikes and more judicial intervention in disputes over the meaning of collective bargaining agreements, because they would make it more difficult than *Conrail*'s arguably justified standard to show that a dispute should be submitted to arbitration.

Finally, both major and regional rail and air carriers are headquartered and/or operate in the area covered by the Sixth Circuit. Major RLA unions, including the BLET, are headquartered or do business in the Sixth Circuit. Unions may now seek to litigate RLA cases in the Sixth Circuit to try and take advantage of *W&LE I* and *II*, given that they are outliers in RLA jurisprudence. Review by this Court will help assure uniform application of *Conrail* in all Circuits.

SUMMARY REVERSAL

As an alternative to granting W&LE's petition, the Court could summarily reverse the Sixth Circuit's decision in *W&LE II* and remand with instructions that, under a proper application of *Conrail*, the Conductor Dispute is a minor dispute within the meaning of the RLA.

This Court has granted summary reversal of lower court decisions when they are clearly erroneous and

contrary to controlling Supreme Court precedent. Stern & Gressman, Supreme Court Practice 345 (10th ed. 2013) (citing *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012)). For example, the Court has summarily reversed state supreme court decisions that failed to follow its precedents under the Federal Arbitration Act. *See Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) ("State courts rather than federal courts are most frequently called upon to apply the [FAA]. . . . It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation."). *See also*, e.g., *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*).

As explained in this petition, the Sixth Circuit failed to give effect to this Court's decision in *Conrail* regarding the proper classification of RLA labor disputes as major or minor. By applying common law rules of burdens of persuasion and evidence, the Sixth Circuit adjudicated the merits of the underlying contract interpretation contrary to this Court's longstanding RLA jurisprudence that courts are not to resolve disputes over the meaning of collective bargaining agreements; such disputes are to be resolved peacefully by expert arbitrators, not by

courts or through strikes. The Sixth Circuit's failure in this case to follow this Court's precedents is as serious as the failure of state courts to follow its FAA jurisprudence given the primary purpose of the RLA to protect the public from disruptions to rail and air carrier operations resulting from strikes and the federal labor policy favoring arbitration of labor disputes. The Sixth Circuit's decision is out of line not only with this Court's RLA jurisprudence but with the body of post-*Conrail* appellate precedents.

CONCLUSION

The petition for writ of certiorari should be granted. And this Court may wish to consider summary reversal.

Respectfully submitted,

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OCTOBER 11, 2016

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-3016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 13, 2016
DEBORAH S. HUNT, Clerk

WHEELING & LAKE ERIE RAILWAY COMPANY, Plaintiff-Appellant, v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN; ROBERT H. LINSEY, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: GUY and McKEAGUE, Circuit Judges; BERTELSMAN, District Judge.*

Wheeling and Lake Erie Railway Company ("WLE") appeals the district court's judgment dismissing its lawsuit against the Brotherhood of Locomotive Engineers and Trainmen ("BLET") and BLET General Chairman Robert H. Linsey, which alleged violations of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In September 2013, WLE filed a complaint against BLET and Linsey, alleging that BLET was engaged in an unlawful strike over a "minor dispute," as that term is defined by the RLA. The dispute involved WLE's occasional use of supervisors rather than engineers and "trainmen," specifically, conductors, to operate its trains. WLE alleged that it entered into two collective bargaining agreements ("CBAs") with BLET: (1) an "Engineer Agreement," which applies to engineers who operate locomotives; and (2) a "Trainmen Agreement," which applies to "trainmen," including conductors. WLE explained that, although it generally uses employees covered by the CBAs to operate its trains, it sometimes uses supervisors to operate trains if an engineer or trainman is not rested or is otherwise unavailable. According to WLE, the Engineer Agreement expressly recognized

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*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

its right to use supervisors if a rested engineer was not available, and the Trainmen Agreement did not prohibit such conduct. WLE contended that, if BLET believed that it used supervisors when engineers or trainmen were available, the appropriate remedy under the CBAs would be to file a grievance and submit to binding arbitration. Instead, "BLET engaged in a surprise strike against WLE" on the morning of September 20, 2013.

The complaint set forth two counts. In Count One, WLE alleged that BLET violated the RLA by striking over a minor dispute instead of handling the dispute through conferences and binding arbitration. In Count Two, WLE alleged that BLET violated the RLA by failing to follow the Act's minor dispute resolution requirements and failing to provide WLE with reasonable advance notice of its strike. WLE sought a declaratory judgment and injunctive relief. It also moved for a temporary restraining order and a preliminary injunction preventing BLET from engaging in "a work stoppage or any other form of self-help."

The district court immediately granted WLE a temporary restraining order. After holding oral argument, it granted WLE's motion for a preliminary injunction, finding in relevant part that the labor dispute at issue is a minor dispute. BLET and Linsey filed an interlocutory appeal challenging the district court's determination that the labor dispute involving the use of supervisors in place of conductors ("Conductor Dispute") is a minor dispute for purposes of the RLA.

We reversed the district court's decision to the extent that it had concluded that the Conductor

Dispute is a minor dispute. *Wheeling & Lake Erie Ry. v. Bhd. of Locomotive Eng'rs & Trainmen,* 789 F.3d 681, 684, 697 (6th Cir. 2015). We concluded that "[t]he dispute is a major one because WLE's claim that the Trainmen Agreement allows it to man trains without union conductors is frivolous or obviously insubstantial in light of the express language of the Trainmen Agreement's scope rule." *Id.* at 693. We further held that WLE violated the "status quo requirements of the RLA" when it "prematurely and unilaterally resorted to self-help" by running trains with management personnel instead of contract conductors. *Id.* at 697. Thus, we vacated the portion of the preliminary judgment that granted injunctive relief to WLE with respect to the Conductor Dispute and remanded the case for further proceedings. *Id.* at 684, 697.

On remand, the district court issued an order stating that, because the Conductor Dispute is a major dispute under the RLA, "it appears undisputed that the proceedings were filed without exhausting all of the administrative steps required to attempt resolution of major disputes." The district court ordered the parties to "file position statements regarding whether or how this matter should proceed further."

The parties submitted a joint position statement noting that, although our opinion resolved the Conductor Dispute, it did not address the dispute over the use of supervisors as engineers ("Engineer Dispute"). The parties recommended concluding further proceedings by: (1) stipulating to the dismissal without prejudice of all of WLE's claims except its claim that the Conductor Dispute is a

minor dispute; and (2) "the issuance of a final judgment based on the holding and remand instructions from the Court of Appeals finding that the dispute over the use of supervisors as conductors was a major dispute."

The district court dismissed Count Two without prejudice pursuant to the parties' stipulation and noted that our opinion dissolved the preliminary injunction as it pertained to the Conductor Dispute. The court then dismissed the remaining portion of Count One, concluding that our decision compelled the conclusion that the Engineer Dispute was a major dispute as well. It determined "that the administrative steps necessary to resolve a major dispute have not been exhausted."

On appeal, WLE seeks to challenge only the determination that the Conductor Dispute constitutes a major dispute. WLE acknowledges, however, "that under the 'law of the case' doctrine, the instant appeal is controlled by the panel's decision in *W&LE I* that the Conductor Dispute is a major dispute," but it argues that our prior decision is erroneous.

The law-of-the-case doctrine "precludes a court from reconsideration of issues 'decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.'" *Westside Mothers v. Olszewski,* 454 F.3d 532, 538 (6th Cir. 2006) (quoting *Hanover Ins. Co. v. Am. Eng'g Co.,* 105 F.3d 306, 312 (6th Cir. 1997)). Admittedly, applying the law-of-the-case doctrine to "a prior panel's ruling on a preliminary injunction . . . is tricky." *Howe v. City of Akron,* 801 F.3d 718, 740 (6th Cir. 2015). However, "when a court reviewing the propriety of a

preliminary injunction issues a fully considered ruling on an issue of law with the benefit of a fully developed record, then the conclusions with respect to the likelihood of success on the merits are the law of the case in any subsequent appeal." *Id.* In such cases, we generally will not revisit a prior holding "unless there is '(l) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Id.* at 741 (quoting *Entm't Prods., Inc. v. Shelby Cty.,* 721 F.3d 729, 742 (6th Cir. 2013)).

As WLE admits, our prior holding that the Conductor Dispute is a "major" dispute, *see Wheeling & Lake Erie Ry.,* 789 F.3d at 693-95, is the law of the case. This holding was made in light of a fully developed record, including consideration of the relevant provisions of the CBA. *See id.* at 684-85, 692-95. The issue was fully briefed, and oral argument on the issue was held both in the district court and on appeal. WLE has not identified an intervening change of controlling law or newly available evidence. Instead, it relies upon the same arguments and case law that it presented in its prior appeal; in fact, WLE's brief in the current appeal in many ways mirrors its petition for rehearing en banc of our prior order, which we denied. Under these circumstances, WLE has not shown a need to correct a clear error or prevent manifest injustice.

Accordingly, the district court's judgment is **AFFIRMED.**

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Wheeling & Lake Erie Company, Plaintiff. v. Brotherhood of Locomotive Engineers and Trianmen, et al., Defendants	CASE NO. 5:13CV2105 JUDGE JOHN R. ADAMS **ORDER**

On September 30, 2015, the parties filed their position statements on how or whether this matter should proceed further. Attached to their posit ion statement was the parties' proposed joint stipulation. The stipulation provides:

> Plaintiff Wheeling & Lake Erie Railway Company ("W&LE") and Defendants Brotherhood of Locomotive Engineers and Trainmen ("BLET") and BLET General Chairman Robert H. Linsey file this joint stipulation of dismissal of a portion of W&LE's Complaint, pursuant to Fed. Rule of Civil Procedure 41(a)(l)(ii). The dismissal is without prejudice.

> W&LE filed its Complaint on September 20, 2013. Doc 1. The Complaint contains two counts. Count I claimed that Defendants' strike over W&LE's use of supervisors as engineers (the ·'Engineer Dispute") and as conductors (the "Conductor Dispute") violated the Railway Labor Act ("RLA"), because the disputes were allegedly minor disputes within the meaning of the RLA. Count II claimed that Defendants' failure to provide any advance notice of their strike to W&LE separately violated Section 2, First of the RLA, 45 U.S.C. § 152, First. Defendants filed a Corrected Answer on October 15, 20 13 denying W&LE's claims. Doc. 23.
>
> That portion of Count I that relates to the Engineer Dispute is hereby dismissed.
>
> Count II is dismissed in its entirety.
>
> The preliminary injunction (Doc. 24) as it relates to the Conductor Dispute was previously vacated by the Sixth Circuit's Amended Opinion and Judgment. Wheeling & Lake Erie Railway Co. v. Brotherhood of Locomotive Engineers and Trainmen, No. 13-4356 (June 26, 2015). The parties shall request that the Court dissolve the preliminary injunction as it relates to the Engineer Dispute.
>
> This Joint Stipulation does not cover that portion of Count I that relates to the Conductor Dispute.

Doc. 43-1 at 1-2.

The parties' proposed stipulation is hereby approved. Count II is hereby dismissed without prejudice pursuant to the stipulation. Moreover, the preliminary injunction issued regarding the Engineer

Dispute is hereby dissolved, consistent with the instructions of the Sixth Circuit.

Accordingly, all that remains before this Court is the Conduct Dispute contained in Count I. As the parties recognize, the Sixth Circuit's analysis of the Engineer Dispute compels the same conclusion with regard to the Conductor Dispute. More specifically, the Sixth Circuit's analysis compels a conclusion that the Engineer Dispute is a major dispute and therefore not properly before this Court. As such, this Court hereby dismissed the remaining portion of Count I, finding that the claim involves a major dispute and that the administrative steps necessary to resolve a major dispute have not been exhausted.

This Court's order coupled with the adoption of the parties' stipulation hereby resolves all the remaining claims in the complaint. This matter is hereby closed.

IT IS SO ORDERED.

October 2, 2015	s/ *John R. Adams*
Dated	JUDGE JOHN R. A DAMS
	United States District Judge

APPENDIX C

ADAMS, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Wheeling & Lake Erie Railway Company,	)	CASE NO. 5:13CV2105
Plaintiff,	)	
	)	
v.	)	JUDGE JOHN R. ADAMS
	)	
Brotherhood of Locomotive Engineers and Trainmen, et al.,	)	**JUDGMENT ENTRY**
	)	
Defendants.	)	

Consistent with the Order docketed contemporaneously with this entry, the parties' stipulation is approved. Moreover, the remaining portion of Count One is hereby dismissed. There are no claims remaining and this matter is hereby CLOSED.

IT IS SO ORDERED.

October 2, 2015
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Wheeling & Lake Erie Railway Company,	)	CASE NO. 5:13CV2105
Plaintiff,	)	
	)	
v.	)	JUDGE JOHN R. ADAMS
	)	
Brotherhood of Locomotive Engineers and Trainmen, et al.,	)	**ORDER**
	)	
Defendants.	)	

Pending before the Court is the parties' joint motion (Doc. 46) to correct a clerical error made by the Court. The motion is GRANTED.

The Court's order (Doc. 44) of October 2, 2015 is hereby AMENDED as follows. The penultimate paragraph on page 2 of the Court's order shall now read:

> Accordingly, all that remains before this Court is the Conductor Dispute contained in Count I. As the parties recognize, the Sixth Circuit's analysis of the Conductor Dispute compels a conclusion that the Conductor Dispute is a

major dispute and therefore not properly before this Court. As such, this Court hereby dismissed the remaining portion of Count I, finding that the claim involves a major dispute and that the administrative steps necessary to resolve a major dispute have not been exhausted.

IT IS SO ORDERED.

October 13, 2015	*/s/ John R. Adams*
Dated	JUDGE JOHN R. ADAMS United States District Judge

APPENDIX E

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0131p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WHEELING & LAKE ERIE RAILWAY COMPANY, *Plaintiff-Appellee,* *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN; ROBERT H. LINSEY, *Defendants-Appellants.*	No. 13-4356

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 5:13-cv-02105—John R. Adams, District Judge.

Argued: October 7, 2014

Decided and Filed: June 26, 2015

Before: KEITH, MOORE, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Margo Pave, ZWERDLING, PAUL, KAHN & WOLLY, P.C., Washington, D.C., for

Appellants. Ronald M. Johnson, JONES DAY, Washington, D.C., for Appellee. **ON BRIEF:** Margo Pave, Michael S. Wolly, ZWERDLING, PAUL, KAHN & WOLLY, P.C., Washington, D.C., for Appellants. Ronald M. Johnson, JONES DAY, Washington, D.C., for Appellee.

AMENDED OPINION

STRANCH, Circuit Judge. We are asked to decide whether the Wheeling & Lake Erie Railway Company (the Railroad) and the Brotherhood of Locomotive Engineers and Trainmen (BLET) are engaged in a major or a minor dispute under the Railway Labor Act (RLA). The district court entered a preliminary injunction barring BLET from taking any economic action against the Railroad, finding that the parties were engaged in a minor dispute. Because we determine the parties' dispute over the Railroad's use of supervisors as conductors is major, not minor, we REVERSE the district court's holding that the dispute is minor. We further VACATE the portion of the preliminary injunction granting relief to the Railroad on the parties' dispute over using supervisors as conductors, and we REMAND the case to the district court for further proceedings consistent with this opinion.

I. FACTS

The Railroad is a regional common carrier within the meaning of the RLA. 45 U.S.C. § 151, First. It maintains its principal offices in Brewster, Ohio, and operates 840 miles of track in the states of Ohio, Pennsylvania, West Virginia, and Maryland. BLET

is an unincorporated association and labor union within the meaning of the RLA, 45 U.S.C. § 151, Sixth, and it represents locomotive engineers and trainmen, including conductors and brakemen, who work for the railroad. BLET has represented the Railroad's engineers since 1992 and its trainmen since 2004. Prior to 2004, the trainmen were represented by the United Transportation Union (UTU). After BLET replaced UTU, the union negotiator was Cole Davis, BLET's General Chairman of the BLET General Committee of Adjustment NS Northern Lines/W&LE (BLET GCA).

Central to our analysis is the "crew consist" provision found in Article I, Scope, of the Trainmen Agreement, which provides:

> (h): i. The crew consist of all assignments (regular or extra) shall consist of not less than one (1) conductor and one (1) brakeman, except as otherwise provided for under paragraph (ii) hereof. (Exceptions: No conductor or brakeman shall be called for light engines or engine changers.)
>
> ii. The Carrier may operate conductor only assignments at its own discretion. In the event a conductor works without a brakeman[,] he shall receive a special allowance of ten dollars for each complete tour of duty.
>
> iii. The Carrier is not prohibited from operating crews with a greater number of trainmen if it so desires.

R. 19 Page ID 282.

On October 9, 2003, the Railroad served a notice on UTU, pursuant to Section 6 of the RLA, 45 U.S.C.

§ 156, seeking to eliminate the "crew consist" provision of the Trainmen Agreement. Negotiations concerning this notice continued for several years.

During the negotiations, the Railroad insisted that the "crew consist" provision must be deleted from the Trainmen agreement so that the Railroad would not have to assign a union conductor to each train. BLET refused this proposed change. In March 2007, the Railroad finally agreed to a new Trainmen Agreement that maintained the "crew consist" provision, and that agreement, with some changes not relevant here, was ratified by the BLET membership in June 2008. The 2008 agreement presently governs the relationship of the parties, although the parties have continued to negotiate changes to the agreement since 2012.

On July 11, 2008, Joseph C. Burley, the Railroad's Director of Human Resources, sent a letter to Cole Davis of BLET stating in part:

> During this most recent round of bargaining, we were unable to reach an agreement on the operation of trains with a single person crew in limited situations despite our good faith efforts. At the request of [BLET, the Railroad] agreed to remove this topic from the bargaining table for this round with the understanding that the parties will continue to bargain over this matter in the next round of negotiations.

R. 19-1 Page ID 320. Davis promptly responded in writing that BLET was "committed ... to the principle that railway operations cannot be conducted safely with any less than two Train/Engine Service employees on each movement and are prepared to

maintain that stance throughout the course of any future rounds" of bargaining. R. 19-1 Page ID 322. Davis also corrected Burley's notion that BLET had agreed to continue bargaining over the elimination of the "crew consist" rule in future rounds of contract negotiations:

> The tentative agreement that failed ratification in 2007 was reached in March of that year after the Carrier unconditionally withdrew the issue of single person crews. When the Agreements that were ratified were being negotiated locally the Carrier attempted, unsuccessfully, to attach a side letter containing an *in futuro* commitment to bargain over single person crews during the next round of negotiations. It was only after intercession by the [National Mediation Board] and the attendance of [BLET's] National President and First Vice President at our last negotiation session in Cleveland that the Carrier withdrew its demand for the offending side letter and initialed the tentative Agreements that were ultimately ratified and are completely silent with respect to the issue of single person crews or the nature and scope of the next round of negotiations. While verbally acknowledging our statutory duty to bargain in good faith, [BLET] did not consent to any understanding in connection with, or in exchange for, the Carrier's withdrawal of its demand for the side letter concerning future negotiations over the single person crew issue.

R. 19-1 Page ID 322–23.

On January 1, 2011, Robert H. Linsey succeeded Cole Davis as General Chairman of BLET. On

March 25, 2011, Linsey sent a letter to Joseph Burley stating that he had just learned that, on March 3 and 14, the Railroad had operated trains from Brewster, Ohio without a union conductor assigned to the trains. Linsey advised Burley that BLET viewed these acts as major violations of the Trainmen Agreement. His letter stated that "[n]o less than one Conductor must be assigned to all trains without exception [and] [w]e must insist, therefore, that you take immediate[ ] action to preclude any repetition of such egregious violations." R. 20-2 Page ID 472. Burley and other officials of the Railroad met with Linsey and assured him that they would cease such operations.

Approximately two months later, in May 2011, Linsey learned that the Railroad had run another train without an engineer or a conductor and had instead allowed a Railroad management official and a shop employee to run the train. Linsey wrote a letter to James I. Northcraft, Vice President of Transportation for the Railroad, objecting to the action and demanding that the Railroad cease and desist its operation of trains without the required union crew. Burley responded that there were no rested engineers or conductors available to run the train. Linsey disagreed, pointing out that a rested engineer and a rested conductor were available to run the train and the Railroad acted deliberately in failing to call them. Again, Linsey demanded that the Railroad cease and desist its conduct. After further investigation into the incident, Burley admitted that the rested engineer and conductor should have moved the train because a freight car

was attached to the locomotives. He suggested that the affected union employees submit time claims.

On July 25, 2011, Linsey sent a letter to Burley stating:

> We appreciate your acknowledgement that there is no contractual basis for your actions and that you will undertake every effort to assure that it does not happen again. As you know, [BLET] considers the operation of any locomotive without a full crew to raise a major dispute and while we understand that sometimes mistakes are made inadvertently, future instances like this will be regarded as violations of the Carrier's status quo obligation under the RLA and addressed accordingly.

R. 20-2 Page ID 481; R. 20 Page ID 327–28.

The following January, BLET served a Section 6 notice on the Railroad to amend the Trainmen Agreement. In March 2012, the Railroad served a Section 6 notice on BLET, seeking once again to remove the "crew consist" provision from the Scope Rule of the Trainmen Agreement.

BLET and the Railroad engaged in direct bargaining over both parties' Section 6 notices on numerous occasions without success. In August 2012, BLET asked the National Mediation Board (NMB) to appoint a mediator to assist the parties in their negotiations. The NMB assigned a mediator shortly thereafter, and the parties mediated their disputes. In March 2013, BLET asked the NMB to try to induce the parties to submit their unresolved bargaining disputes to binding arbitration. The NMB

asked the Railroad for comments on BLET's proposal for arbitration.

Burley rejected the request for arbitration as premature. He acknowledged that the primary issue was the Railroad's proposal to eliminate the crew consist rule, which required the railroad to assign a union conductor to all freight trains. Because the parties' collective bargaining agreement covering locomotive engineers—the Engineer Agreement—had allowed the Railroad to operate a train manned with only an engineer since 1993, the Railroad wished to revise the Trainmen Agreement to remove the requirement that a conductor must be assigned to the trains. Burley suggested that BLET, not the Railroad, was "being intractable."

On Friday, September 13, 2013, Linsey learned that the Railroad had again operated two trains without the required complement of union employees. He called Burley that day and followed up with a letter stating that, on September 12, Lorne Dodds, Road Foreman of Engines, and Andrew Lengyal, a Trainmaster, performed a switching operation, and then Dodds alone operated another train for fifteen miles after the train's crew reached their maximum hours of service. Although Burley asserted that there were no union engineers or conductors available for these jobs, Linsey reminded him that the scope rule of the Trainmen Agreement did not allow the Railroad to operate a train without assigning a union conductor. Noting that BLET had previously advised the Railroad in March and May of 2011 that BLET considered the Railroad's acts to constitute major violations of the Trainmen Agreement, Linsey demanded that the Railroad cease such violations.

He emphasized that at least one union conductor must be assigned to all trains without exception under the scope rule of the Trainmen Agreement.

Linsey further pointed out to Burley that, on September 13, 2013, Road Foreman Dodds relieved the crew of a train and operated the train himself for a distance of twenty-three miles while Trainmaster Lengyal served "as a taxi service." At the time of the operation, four union employees were rested and available for service, but they were not called to work. Linsey concluded:

> In addition to the serious nature of these violations which, in application of the Railway Labor Act, we consider to be major violations as that term is applied, we must remind you that the matter of manning was a subject of your notices served on March 15, 2012, under Section Six of this law. Having yet to reach agreement on this issue, the mediation process has been invoked … which requires the parties (BLET and [the railroad]) to maintain a status quo in regards to conditions that existed prior to your service of the aforementioned notices. *We consider the actions cited above to be a violation of that status quo.*
>
> If you take exception to any of the facts set forth in [this letter], please contact me immediately.

R. 20-2 Page ID 483. Burley did not respond immediately. On Friday, September 20, BLET members engaged in a strike of the Railroad.

The Railroad filed suit the same day in federal court to obtain injunctive relief to end the strike. The district court granted a temporary restraining order

enjoining the strike, but conditioned relief on the Railroad's agreement not to use supervisors or other management employees in place of engineers or conductors in the operation of its trains.

On October 3, Linsey received a letter from Burley explaining what took place on September 12 and 13. On those days, he explained, the train crews had reached their maximum hours of service and there were no other available engineers or trainmen. Burley quoted three provisions of the *Engineer Agreement*. The first, from the Scope Rule, stated in part that "'BLET is agreeable to Carrier officials and management providing service, without restriction, when the Carrier deems that reasonable attempts, as described in Articles 10(f) and 11(b) are complied with, to acquire manpower are exhausted and the service is related to an emergency or is incidental or performed to expedite service.'" R. 20-2 Page ID 486 (quoting Article 1, *Scope*, paragraph (i) of the Engineer Agreement) (italics omitted). The second provision stated: "'If vacancies cannot be filled after all reasonable attempts, including utilizing all extra boards, furloughed boards, or other assignments, then qualified carrier officers may provide service to the customers['] freight which will be affected, without penalty.'" *Id.* at 486–87 (quoting Article 10, *Marking off and Reporting*, paragraph (f)) (italics omitted). The third provision stated: "'Regularly assigned locomotive engineers who are used in an emergency situation after having already performed compensation service on the day involved, will be paid for the actual time worked at time and one half rate with a minimum of two hours.'" *Id.* at 487 (quoting Article 11, *Calls*, paragraph (b)) (italics

omitted). Management employees were used to move the trains on September 12 and 13, Burley explained, because the tracks were blocked and service to customers was delayed. He relied on the quoted sections of the Engineer Agreement to justify the Railroad's use of management employees to serve as engineers to move the trains. He also noted that "[t]he Trainmen Agreement is silent on this issue," and contended that, absent specific language, the Railroad retained management authority to run trains without union employees. Burley further explained that, while there were no union employees available for service on September 12, there were four union employees available for service on September 13, but they were not called because they were needed for trains scheduled later that day. If BLET objected to the use of management personnel to move the trains, Burley thought the appropriate remedy was for those employees who believed they should have been called to work to submit a time claim to the Railroad. Burley also explained that Lengyel was assigned as the conductor on the train and performed conductor work while operating a motor vehicle shadowing the train, a practice Burley said is common in the industry. In conclusion, he characterized the issue as a minor, not a major, dispute and conveyed the Railroad's position that allowing management employees to perform the work was not a violation of the status quo.

In documents filed with the district court, Linsey disputed Burley's position that the four employees available for service on September 13 could be "saved" for use on later trains on the basis that the collective bargaining agreements provide that a determination

of employee availability must be made at the time a train is to depart. According to Linsey, the Railroad admitted that there were employees available, but the Railroad chose to ignore the agreements and run trains without the employees as required by the Trainmen's crew consist rule and the Engineer's availability rule.

To support its motion for a preliminary injunction, the Railroad filed the declaration of James S. Hill, Division Superintendent, who is responsible for the movement of trains. Hill was aware "of occasional circumstances" when the Railroad used supervisors to man trains when contract engineers or conductors were unavailable or already assigned to other jobs, and he gave several examples of this practice. For instance, on October 20, 2011, Hill served as an engineer and Trainmaster Hank Allender served as a conductor on a train from Hartland Yard in Collins, Ohio to provide service to a customer in Parkertown, Ohio. After completing that job, they took a taxi to Huron, Ohio to finish loading an ore train and moved that train from the dock to Shinrock, Ohio. On October 13, 2011, Allender worked as a conductor alongside a contract locomotive engineer because the contract conductor was sick and there were no other conductors available. Hill concluded that, over the last several years, management employees Lengyel, Dodds, Darren Ohler, Edward Steiner, and Jason Cowart, all of whom report to Hill, had worked as conductors and engineers on occasion as needed. Hill attached to his declaration certain documents known as "Train Sheets" to demonstrate that management personnel were used in place of contract employees when necessary.

Dodds provided a declaration stating that, on October 27, 2010, he worked as an engineer and Lengyel worked as the conductor on a train, and that he (Dodds) served as an engineer or conductor on four other occasions in 2010. Dodds also served as a conductor alongside a contract engineer on June 10, 2013, and on June 11 he worked as an engineer alongside a contract conductor. He also worked on the September 12 and 13 trains that Linsey disputed just before BLET called a strike. Similarly, Lengyel stated in his declaration that he worked as a conductor on October 27, 2010, again during the summer of 2013, and on September 12 and 13, 2013.

Linsey and Cole Davis both attested that they were unaware until the filing of the declarations of Hill, Dodds, and Lengyel that the Railroad used management personnel to move trains on all of the dates mentioned in the declarations. Because Linsey and Davis were unaware of most of the events, they did not act on BLET's behalf to protest the actions. Due to their lack of knowledge, they also did not approve the Railroad's conduct.

Neither party presented live testimony at the preliminary injunction hearing. After hearing oral argument, the district court granted the Railroad's motion for a preliminary injunction, and later stayed the case pending this appeal. The district court found that the Railroad had met its "relatively light burden" to demonstrate a minor dispute because the Railroad's position was "arguably justified" by the lack of a restriction in the Trainmen Agreement. Because that Agreement is silent on the issue of whether the Railroad can utilize management personnel when no conductor is available, the court

reasoned that the Railroad retained discretion to make management decisions as necessary when union trainmen were unavailable.

BLET requests that we vacate the preliminary injunction on the grounds that the parties' disagreement is a major dispute under the RLA; that the Railroad's position is frivolous in light of the clear and mandatory language of the crew consist rule in the Trainmen Agreement that "all" trains "shall" include at least one conductor; and that the Railroad failed to maintain the status quo during the parties' bargaining process on this issue. Noting that the Trainmen Agreement expressly includes only one exception to the crew consist rule, which was inapplicable here, BLET contends the decision below was improper because it essentially re-wrote the crew consist rule to include another exception in the Railroad's favor—allowing use of management personnel in place of union conductors when necessary—an exception the parties did not bargain for and to which BLET did not agree. BLET also relies on the provisions of the Trainmen Agreement, specifying that it does not contain a clause like the one in the Engineer's Agreement that grants some discretion to the Railroad to use management personnel when contract engineers are not available. The Railroad argues that the district court acted appropriately in characterizing the dispute as minor, determining that BLET's strike was improper, and enjoining BLET from continuing the strike.

II. ANALYSIS

A. Standard of review

A district court's decision to grant a preliminary injunction under the RLA rests within that court's sound discretion. *Adams v. Fed. Express Corp.*, 547 F.2d 319, 322 (6th Cir. 1976) (citing *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937) and other cases). We do not disturb an order of injunctive relief unless we conclude that the district court abused its discretion in issuing the order, *id.*, and a court abuses its discretion if it relies on clearly erroneous factual findings or improperly applies the law. *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001). We review *de novo* the district court's legal determination of whether a labor dispute is "major" or "minor" under the RLA. *CSX Transp., Inc. v. United Transp. Union*, 395 F.3d 365, 368 (6th Cir. 2005).

B. Major and minor disputes under the RLA

Labor disputes in the railroad industry have traditionally fallen into two distinct categories: "disputes concerning the making of collective agreements," known as major disputes, and "disputes over grievances," known as minor disputes. *Elgin. J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 722 (1945). This marked categorization of disputes is established in the RLA. There, Congress created the jurisdictional authority and separate mechanisms through which efforts are to be made to resolve both types of disputes in an orderly fashion to prevent labor unrest and interruption of interstate commerce. *See* 45 U.S.C. § 151a; *Burley*, 325 U.S. at 722–23. Congress provided:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements

> concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, 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. The RLA encourages carriers and their employees to resolve disputes "in conference between representatives designated and authorized so to confer." 45 U.S.C. § 152, Second. The mechanism to resolve each type of dispute therefore begins with negotiation, but the procedural pathways to resolution then diverge into two separate systems depending upon whether the dispute is major or minor. *Burley*, 325 U.S. at 725. We begin with major disputes.

Major disputes rest on the authority of 45 U.S.C. § 152 Seventh and 45 U.S.C. § 156, *Consol. Rail Corp. v. Ry. Labor Exec. Ass'n*, 491 U.S. 299, 302 (1989), and relate to disagreements over the formation of collective bargaining agreements (CBAs) or efforts to procure them. *Burley*, 325 U.S. at 723. Such disputes arise where a CBA does not exist or where one of the parties seeks to change the terms of an existing CBA. *Id.* The issue in a major dispute "is not whether an existing agreement controls the controversy"; instead, the focus is on "the acquisition of rights for the future, not [the] assertion of rights claimed to have vested in the past." *Id.*

Because major disputes concern the larger "issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid[,]" *id.* at 723–24, Congress provided that

parties must engage in a lengthy process of bargaining and mediation to settle a major dispute. *Consol. Rail Corp.*, 491 U.S. at 302. The process begins when a party desiring to make a change affecting the "rates of pay, rules, or working conditions" gives thirty days' written notice to the other party of the intended change. 45 U.S.C. § 156. This written notice is known as a "Section 6 notice." Shortly after the Section 6 notice is received, the parties must designate the place and time to begin a conference between the representatives of the parties interested in the intended change. *Id.* If the parties' private negotiations are unsuccessful, then the dispute must be mediated by the parties under the auspices of the National Mediation Board (NMB). If mediation does not succeed, the parties must voluntarily accept or reject arbitration. If the major dispute continues after arbitration, the matter may finally make its way to the President's desk for possible intervention to secure a resolution of the dispute before a strike occurs that would impact the nation's transportation system. 45 U.S.C. § 160; *Burley*, 325 U.S. at 725; *Consol. Rail Corp.*, 491 U.S. at 303 n.3. Until the parties have exhausted the process Congress designed, they "are obligated to maintain the status quo, and the employer may not implement the contested change in rates of pay, rules, or working conditions." *Consol. Rail Corp.*, 491 U.S. at 302–03. A district court has subject matter jurisdiction to enjoin any violation of the status quo until the statutory mediation procedures are completed, but the party moving for injunctive relief in federal court is not required to make the usual showing of irreparable injury. *Id.* at 303. If no

agreement is reached at the completion of this process, "the parties may resort to the use of economic force." *Id.*

By contrast, minor disputes are predicated on 45 U.S.C. § 152 Sixth and 45 U.S.C. § 153 First. *Id.* A minor dispute "contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Burley*, 325 U.S. at 723. The parties' dispute concerns a grievance about either "the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Id.* If the dispute centers on an omitted case, "the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement." *Id.* Whether the parties' dispute relates to application of a particular CBA provision in a specific situation or to application of a CBA provision to an omitted case, "the claim is to rights accrued, not merely to have new ones created for the future." *Id.* Minor disputes "inevitably appear" in executing major agreements and policies or "arise incidentally in the course of an employment." *Id.* at 724. They relate to "specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so." *Id.*

The RLA directs parties to negotiate a minor dispute, but if negotiation is unsuccessful, the procedural pathway set out for minor disputes requires the parties to submit the dispute to compulsory and binding arbitration before the National Railroad Adjustment Board (NRAB) or,

alternatively, to an adjustment board established by the carrier and the employees. *Id*. at 724–28; *Union Pac. R.R. Co. v. Bhd. Of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 72 (2009); *Consol. Rail Corp.*, 491 U.S. at 303–04. Either type of adjustment board has exclusive jurisdiction to resolve a minor dispute. *Consol. Rail Corp*., 491 U.S. at 304. Judicial review of any arbitration decision is limited. *Id*. Federal courts may enjoin a strike arising from a minor dispute and may condition injunctive relief on the employer's maintenance of the status quo pending Board resolution of the dispute. *Id*. Where the dispute is minor, however, the Supreme Court has never recognized "a general statutory obligation on the part of an employer to maintain the status quo pending the Board's decision." *Id*.

In *Consolidated Rail Corp.*, the Supreme Court sought to "articulate[ ] an explicit standard for differentiating between major and minor disputes." 491 U.S. at 302. The line drawn in *Burley* "looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action"; in other words, a dispute is minor if it may be "resolved by interpreting the existing agreement." *Id*. at 305. Differentiation between major and minor disputes thus becomes "a matter of pleading" by the party who initiates the dispute, but "there is danger in leaving the characterization of the dispute solely in the hands of one party." *Id*. If a party asserts a contractual basis for a claim without sincerity or on insubstantial grounds, "honoring that party's characterization would … undercut the prohibitions of § 2, Seventh, and § 6 of the Act against unilateral

imposition of new contractual terms." *Id.* at 306 (internal quotation marks omitted). In that situation, the proper function of the statutory process for settling disputes is protected only if the court "substitute[s] its characterization for that of the claimant." *Id.* Accordingly, "[w]here 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. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 307.

There is no such thing as a hybrid case with attributes of both major and minor disputes. *Id.* at 310. The Supreme Court rejected the union's request to recognize a hybrid case in *Consolidated Rail Corp.* because adding a third category would "aggravate the already difficult task of distinguishing between" major and minor disputes. *Id.* The Court held:

> [I]f an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (*i.e.*, the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Id.

Applying this standard, the Court ruled that a dispute arising from Conrail's decision to require drug testing as part of all periodic and return-from-

leave physical examinations was a minor dispute. *Id.* at 300, 311–12. Conrail had always required employees to submit to such physical examinations, a longstanding past practice of the parties based on implied contractual terms. *Id.* Because Conrail's claim was "neither frivolous nor obviously insubstantial," the dispute fell within the exclusive jurisdiction of the Board as a minor dispute. *Id.* at 312, 320. The Court went no further than to determine that Conrail "'met the light burden of persuading [the] Court that its drug-testing practice is arguably justified by the implied terms of its collective-bargaining agreement." *Id.* at 320. The Court did not reach the merits of the dispute. *Id.* at 318, 320.

With this explanation of the differences between major and minor disputes, the resolution of this appeal comes into focus.

C. BLET and the Railroad are engaged in a major dispute

The Scope Rule in Article I of the Trainmen Agreement states in mandatory language that the crew for "all assignments (regular or extra) *shall* consist of not less than one (1) conductor." R. 19 Page ID 282 (emphasis added). The rule stated in the Agreement includes only one exception, related to light engines or engine changers, and the parties agree that this exception has no relevance to this case. The parties further agree that the Trainmen Agreement is silent on whether the Railroad can assign only an engineer to a train when a rested contract conductor is not available, but they do not agree on what that silence means. BLET contends that contractual silence does not alter the

Agreement's express *requirement* that the Railroad assign at least one conductor to every train; this language can only refer to every train in every situation. The Railroad insists that, because the Agreement does not contain an express prohibition on using management employees if no rested conductors are available, the Railroad retains discretion to act, and particularly so if there is a past practice of similar conduct.

We conclude that BLET has the better argument. The scope rule of the Trainmen Agreement expressly requires the Railroad to assign a union conductor to every train. *See St. Louis Sw. Ry. Co. v. Bhd. of R.R. Signalmen*, 665 F.2d 987, 992 (10th Cir. 1981) ("The agreement purports to cover all of the work of the employees and apparently leaves no room for unilaterally contracting out some of the work."). To adopt the Railroad's position would undercut the clear language of the crew consist rule—which was expressly bargained by the parties years ago—without requiring the Railroad to complete the Section 6 negotiations through which the Railroad was seeking to remove the crew consist rule from the Trainmen Agreement. By serving a Section 6 notice on the union in 2003, the Railroad acknowledged the RLA requirement that it negotiate with the union if it wishes to revise or remove the crew consist provision from the Trainmen Agreement. Disputes about the making of collective bargaining agreements are major disputes. *Burley*, 325 U.S. at 722–24. BLET characterized the issue as a major dispute in all of its written communications with Railroad officials and, importantly, the Railroad and BLET addressed the issue by following the RLA's

procedures for negotiating a major dispute. *See* 45 U.S.C. § 156. When their private negotiations over the crew consist rule failed, they engaged in mediation with a NMB mediator. When that was not successful, BLET asked the NMB to encourage the Railroad to participate voluntarily in arbitration, but the Railroad refused.

The dispute is a major one because the Railroad's claim that the Trainmen Agreement allows it to man trains without union conductors is frivolous or obviously insubstantial in light of the express language of the Trainmen Agreement's scope rule. *See Consol. Rail Corp.*, 491 U.S. at 307. The arguments raised and cases cited by the Railroad are unavailing in the face of this express language.

The Railroad presents this as an issue of managerial discretion, noting that "the general framework of a collective-bargaining agreement leaves some play in the joints, permitting management some range of flexibility in responding to changed conditions." *Id.* at 309 n.7. Relying on cases in which this court has classified disputes as minor, it contends that it may decide unilaterally how to fill conductor positions when no rested conductors are available because the Trainmen Agreement is silent about that factual situation. The cited cases do not support the Railroad's position.

In *Airline Professionals Ass'n v. ABX Air, Inc.*, 274 F.3d 1023, 1029 (6th Cir. 2001) (*ABX I*), this court concluded that it was at least arguable that the implied terms of a CBA permitted ABX to unilaterally implement random employee searches. The conclusion rested on the proposition that management retains discretion except as limited by

the CBA and public law. *Id.* (citing *Appalachian Reg'l Healthcare v. United Steelworkers of Am.*, 245 F.3d 601, 604–05 (6th Cir, 2001)). Under that agreement and because "ABX had, in the past, exercised unilateral control over its employee searching policy," this court held that ABX's position was arguably justified by the implied terms of the CBA. *Id.*

By contrast, the crew consist provision of the Trainmen Agreement at issue here mandates that the Railroad must assign at least one union conductor to each train. Because the language of the scope rule is express, we need not consider any implied terms. *Cf. Airline Prof'ls Ass'n*, 274 F.3d at 1029. As a result of its promise in the Trainmen Agreement to assign a union conductor to each train, the Railroad must maintain an adequate workforce of contract conductors to fulfill the carrier's needs. Moreover, the record in this case does not support a finding that the Railroad exercised unilateral control over its conductor assignment policy in the past. The evidence confirms that the Railroad did not have unilateral control and that BLET did not acquiesce in the Railroad's attempts to assign management employees in place of union conductors. Thus, unlike ABX, the Railroad here is not arguably justified in its position due to the express language of the crew consist provision. *Cf. id.*

The later case of *Airline Professionals Ass'n v. ABX Air. Inc.*, 400 F.3d 411 (6th Cir. 2005) (*ABX II*), is more helpful to the Railroad, but that case still does not carry the day. There, the parties were engaged in contract negotiations for a successor agreement, having served Section 6 notices on each other. *Id.* at

413. During the negotiations, the union filed a grievance on behalf of a pilot who wished to return to work following disability leave without submitting to an independent medical examination (IME) requested by ABX. *Id.* Because the parties were negotiating a new contract, ABX conceded that the parties were involved in a major dispute. *Id.* at 415. This court addressed the question "whether every dispute arising under a CBA that is being renegotiated is a major dispute." *Id.* The court held that the parties' renegotiation of the CBA did not automatically require classification of the pilot's grievance as a major dispute. *Id.* Instead, the court had to determine whether the pilot's grievance was, on its facts, a major dispute. *Id.* Because the CBA contained "neither an express authorization for nor an explicit prohibition of" the IME requirement, ABX retained management prerogative to require an IME examination, and the court classified the dispute as minor. *Id.* at 416. Here, on the other hand, the crew consist provision expressly required the Railroad to assign a contract conductor to every train, and the Railroad sought to remove that very provision from the Trainmen Agreement through Section 6 negotiations. The facts before us are therefore distinguishable from those in *Airline Professionals Ass'n* (*ABX II*).

The Railroad contends that BLET should have resorted to the grievance procedure outlined in Article 30 of the Trainmen Agreement to pursue its dispute. But we cannot envision how a grievance procedure could have resolved this fundamental disagreement between the Railroad and the union about retaining the scope rule in the Trainmen

Agreement. BLET did not raise a claim or grievance on behalf of a particular employee, such as in the case of discipline; BLET challenged the Railroad's complete disregard of an express provision of the Trainmen Agreement while Section 6 negotiations were in progress on that precise issue.

The Railroad relies on *CSX Transportation, Inc. v. United Transportation Union*, 395 F.3d 365 (6th Cir. 2005), but that case is also distinguishable. There UTU's national leadership entered into a national collective bargaining agreement that included a moratorium barring either party from trying to change any part of the agreement, explicitly prohibited the filing of Section 6 notices prior to a certain date, and dismissed or settled all existing Section 6 notices issued before a certain date. *Id*. at 368. CSX and Conrail subsequently notified UTU that its Section 6 notice relating to a push car dispute was barred by the moratorium. *Id*. When UTU disagreed with that interpretation of the moratorium, CSX and Conrail filed suit in federal court, arguing the dispute was minor and should be submitted to arbitration before the NRAB. *Id*. The district court ruled the dispute was major, but we disagreed and reversed. *Id*. at 368, 370. Observing that the railroads' argument was not strong, we decided the railroads' position was arguably justified by the terms of the national agreement, and the case presented a minor dispute. *Id*. at 369. Neither the contract language nor the fact pattern presented here is similar.

Having determined that BLET and the Railroad are engaged in a major dispute, we turn now to

application of the RLA to the facts and issues presented.

D. RLA requirements for parties engaged in a major dispute

Until parties engaged in a major dispute exhaust each step of the major dispute process, they are obligated by law to maintain the status quo. *See Consol. Rail Corp.*, 491 U.S. at 302–03; *United Transp. Union v. Cuyahoga Valley Ry. Co.*, 979 F.2d 431, 435 (6th Cir. 1992). In *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 143 (1969), the Supreme Court agreed with the union "that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether those conditions are covered in an existing collective agreement."

In *Detroit & Toledo Shore Line*, the union and the railroad were embroiled in controversy over whether the railroad could assign employees to report for work at outlying locations some distance from where the employees had previously reported to work. *Id.* at 143–44. In the course of the controversy, the railroad notified the union that it was reviving its plan for outlying work assignments at Trenton, Michigan. *Id.* at 146. The union served a Section 6 notice on the railroad seeking to amend the agreement to forbid the railroad from making any outlying work assignments. *Id.* The parties' negotiations were fruitless and the union asked the NMB for mediation assistance but, while the mediation was pending, the railroad posted a bulletin definitely creating the disputed work assignments. *Id.* Faced with the railroad's unilateral change in

working conditions, the union threatened a strike, and the railroad filed suit in district court to prevent a strike. The union counterclaimed, seeking an injunction to enforce the status quo and prohibit the railroad from establishing the outlying work assignments. *Id.* at 146–47. The district court dismissed the railroad's complaint, granted the injunction sought by the union, and restrained the railroad from establishing the challenged work assignments. *Id.* at 147. The district court held that the status quo requirement of Section 6 prohibited the railroad from taking action on outlying work assignments "even though there was nothing in the parties' collective agreement which prohibited such assignments." *Id.* Both this court and the Supreme Court affirmed the grant of the injunction in favor of the union. *Id.* at 147, 159.

The railroad in *Detroit & Toledo Shore Line* argued in the Supreme Court, much like the Railroad does here, that the purpose of the status quo provision of the RLA "is to guarantee only that existing collective agreements continue to govern the parties' rights and duties during efforts to change those agreements," and that "working conditions as expressed in an agreement shall not be altered." *Id.* at 147–48. "And since nothing in the railroad's agreement with the union precluded the railroad from altering the location of work assignments, this working condition was not "expressed in an agreement"' and the railroad could make the desired assignments without violating the status quo. *Id.* at 148.

The Supreme Court rejected the railroad's position as inconsistent with the language of Section 6, which states that "working conditions shall not be altered

by the carrier until the controversy has been finally acted upon," 45 U.S.C. § 156, and which "speaks plainly of 'rates of pay, rules, or working conditions' without any limitation to those obligations already embodied in collective agreements." *Detroit & Toledo Shore Line R.R. Co.*, 396 U.S. at 148. The Court viewed the railroad's interpretation of Section 6 as "sharply at variance with the overall design and purpose of the Railway Labor Act." *Id.*

The RLA's status quo requirement is "central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strik." *Id.* at 150. Because one party may wish to change the status quo without undue delay, the power granted in the RLA to the other party "to preserve the status quo for a prolonged period" encourages the moving party to compromise and reach agreement without interrupting commerce. *Id.* Both parties bear an obligation "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." *Id.* at 153. The conditions need not be covered in the existing CBA. *Id.*

Under its interpretation of the status quo requirement of the RLA, the Supreme Court found it "quite apparent" that the railroad's argument had "little merit." *Id.* Importantly for this case, the Court stated:

> [T]he mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad

> from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of [Section] 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.

Id. at 153–54. When the union invoked the major dispute resolution procedures of the RLA, the railroad refused to maintain the status quo and instead implemented its planned work assignments. *Id.* at 154. The Supreme Court explained how that action was at odds with the RLA: "It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement. The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike." *Id.* The central goal of the RLA "came very close to being defeated" because "the railroad prematurely resorted to self-help." *Id.* "If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own

economic weapons, including the strike." *Id.* at 155. The remedies of the RLA operate effectively only if both sides are equally restrained. *Id.*

Application of the status quo requirement of the RLA here means the Railroad was not free to implement at will the very change it sought to accomplish when it served the Section 6 notice on BLET. It did so anyway. The record evidence in this case demonstrates that the Railroad prematurely resorted to self-help before the conclusion of the Section 6 major dispute process. In October of 2010, again in March, June and October of 2011, and again in June and September of 2013, the Railroad unilaterally ran trains without contract conductors and used management personnel instead.

BLET officials did not know until March 2011, while the major dispute negotiations were ongoing, that the Railroad was substituting management employees for contract conductors. When BLET officials learned this information, they immediately and repeatedly protested and did not acquiesce in the Railroad's conduct. Although the Railroad assured BLET officials that it would stop the offending conduct, the Railroad continued to utilize management personnel to fill conductor positions. Under *Detroit & Toledo Shore Line*, the Railroad could not act unilaterally in violation of the RLA's status quo provisions. *See Ill. Cent. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 422 F.2d 593, 596 (7th Cir. 1970) (observing that railroad could not "change existing conditions of work unilaterally and stake its status quo claim at the point gained by unilateral action"). The Railroad was obligated to maintain the working conditions the Trainmen Agreement

required—the assignment of at least one contract conductor to each train—until the parties concluded the RLA's major dispute process. Instead, the Railroad implemented the changes it sought and violated the status quo.

III. CONCLUSION

The Railroad failed to carry its burden to show that its position was arguably justified by the terms of the parties' collective-bargaining agreement. The Railroad's claim that the Trainmen Agreement allowed it to man trains without union conductors is frivolous or obviously insubstantial, and the dispute is major. *See Consol. Rail Corp.*, 491 U.S. at 307. The status quo requirements of the RLA were violated when the Railroad prematurely and unilaterally resorted to self-help. *See Detroit & Toledo Shore Line R.R. Co.*, 396 U.S. at 155.

Accordingly, we REVERSE the district court's holding that the dispute is minor, we VACATE the portion of the preliminary injunction granting relief to the Railroad on the parties' dispute over using supervisors as conductors, and we REMAND the case to the district court for further proceedings consistent with this opinion.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 13-4356

FILED

Jun 26, 2015

DEBORAH S. HUNT, Clerk

WHEELING & LAKE ERIE RAILWAY COMPANY,

Plaintiff - Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN; ROBERT H. LINSEY,

Defendants - Appellants.

Before: KEITH, MOORE, and STRANCH, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's holding that the dispute is minor is REVERSED, the portion of the preliminary injunction granting relief to Wheeling & Lake Erie Railway Company on the parties' dispute over using supervisors as conductors is VACATED,

and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Wheeling & Lake Erie Railway Company, Plaintiff, v. Brotherhood of Locomotive Engineers and Trainmen, et al., Defendants.	CASE NO. 5:13CV2105 JUDGE JOHN R. ADAMS **ORDER**

Pending before the Court is Plaintiff Wheeling & Lake Erie Railway Company's ("WLE") motion for a preliminary injunction. By agreement, there exists a temporary restraining order, enjoining any work-stoppage or any other form of self-help by Defendants over this dispute. The agreement is premised upon WLE's agreement to forego the use of any non-union employees as conductors or trainmen during the duration of the TRO.

On October 11, 2013, the Court held oral argument on WLE's request for a preliminary injunction. The Court hereby GRANTS the request for a preliminary injunction for the reasons that follow.

The United States Supreme Court has addressed the law surrounding this area as follows:

A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board, § 3, or before an adjustment board established by the employer and the unions representing the employees§ 3 Second. The Board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes. Judicial review of the arbitral decision is limited. Courts may enjoin strikes arising out of minor disputes. Although courts in some circumstances may condition the granting of a strike injunction on a requirement that the employer maintain the status quo pending Board resolution of the dispute, this Court never has recognized a general statutory obligation on the part of an employer to maintain the status quo pending the Board's decision

* * *

To an extent, then, the distinction between major and minor disputes is a matter of pleading. The party who initiates a dispute takes the first step toward categorizing the dispute when it chooses whether to assert an existing contractual right to take or to resist the action in question. But the Courts of Appeals early recognized that there is a danger in leaving the characterization of the dispute solely in the hands of one party. In a situation in which the party asserting a contractual basis for its claim is "insincere" in so doing, or its "position [is] founded upon ... insubstantial grounds," the result of honoring that party's characterization would be to undercut "the

> prohibitions of § 2, Seventh, and § 6 of the Act" against unilateral imposition of new contractual terms. In such circumstances, protection of the proper functioning of the statutory scheme requires the court to substitute its characterization for that of the claimant.
>
> To satisfy this need for some degree of judicial control, the Courts of Appeals uniformly have established some variant of the standard employed by the Third Circuit in this case:
>
> If the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial", the controversy is a minor dispute within the exclusive province of the National Railroad Adjustment Board.
>
> Verbal formulations of this standard have differed over time and among the Circuits: phrases such as "not arguably justified," "obviously insubstantial," "spurious," and "frivolous" have been employed. These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear in establishing exclusive arbitral jurisdiction under the RLA.

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 303-307 (1989) (citations, quotations, alterations, and footnotes omitted). In essence, the test can be boiled down to two sentences: "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. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 307.

Under the test set forth above, at this stage of the proceeding, the Court finds that WLE has met its "relatively light burden" of demonstrating that this is a minor dispute. WLE has shown through the verified complaint that the core of the dispute centers upon whether it may utilize supervisors to operate trains when engineers and trainmen covered by their respective collective bargaining agreements are unavailable due to statutory restrictions. Based upon the information currently before the Court, it finds that WLE's position is "arguably justified" by the respective CBAs and therefore a minor dispute. Accordingly, enjoining the work stoppage is appropriate.

In order to review whether relief is appropriate, the Court must examine the language of two distinct collective bargaining agreements. The engineer agreement contains the following relevant provision:

> (i) The BLET recognizes the unique concept in regional railroading of being able to provide immediate service to their customers on short notice. In recognition of this concept, the BLET is agreeable to Carrier officials and management providing service, without restriction, when the Carrier deems that reasonable attempts, as described in Articles 10 (f) and 11 (b) are complied with, to acquire manpower are exhausted and the service is related to an emergency or is incidental or

> performed to expedite service. (Carried over from the 1993 Agreement.)

Doc. 1-1 at 4. The Court finds that the above provision clearly provides some level of discretion to WLE to use supervisors and management as engineers. Moreover, the Court finds that under the facts presented there is room for reasonable debate over whether WLE in fact properly utilized that discretion when it chose to use management and supervisors. Accordingly, WLE's position is arguably justified by the language in the engineer agreement.

The conductor/trainmen agreement, however, contains no similar provision. Instead, the conductor agreement contains solely the following:

> (h) i. The crew consist of all assignments (regular or extra) shall consist of not less than one (1) conductor and one (1) brakeman, except as otherwise provided for under paragraph (ii) hereof.
>
> (Exceptions: No conductor or brakeman shall be called for light engines or engine changers.)
>
> ii. The Carrier may operate conductor only assignments at its own discretion. In the event a conductor works without a brakeman he shall receive a special allowance of ten dollars for each complete tour of duty.
>
> iii. The Carrier is not prohibited from operating crews with a greater number of trainmen if it so desires.

Doc. 1-2 at 3-4. From the above, BLET contends that the language of the crew-consist provision is straightforward and unambiguous: every crew **shall** consist of a conductor. In contrast, WLE contends

that the conductor agreement does not speak at all to the occasion when no conductor is available, thereby leaving WLE its previously-held discretion to make management decisions as necessary.

Upon review of the authorities relied upon by the parties and the argument presented by counsel, the Court finds that WLE has shown an arguable basis within the conductor agreement for its position. Moreover, in reaching this decision the Court has been mindful of the underlying purpose of the Railway Labor Act. Enacted in 1926, the Railway Labor Act was designed to "avoid any interruption to commerce or to the operation of any [railroad] engaged therein" caused by labor-management disputes. 45 U.S.C. § 151a(1); see also H.R. Rep. No. 328, at 1 (1926) (noting that the Act would ensure "continuity and efficiency of interstate transportation service, and [ ] protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies").

Herein, BLET has been unable to explain what *should* occur to avoid interruption of service in the event that a conductor is not available. The sole response appears to be that this situation should simply be avoided by hiring/maintaining a proper number of union conductors. While WLE has presented evidence that is in fact hiring more employees to reduce the chances of these shortages occurring, the Court cannot conclude that BLET's proposed solution is the sole solution contemplated by the conductor agreement. Instead, taking into account the fact that business needs are bound to

fluctuate and that hour restrictions have only grown over time, it is simply not feasible to conclude that WLE has *no discretion* when no conductor is available. Instead, the Court finds that WLE has demonstrated that the **lack of a restriction** in the conductor agreement arguably justifies its position that it may use non-union individuals as conductors under certain circumstances.

Based upon the above, the Court finds that the issuance of a preliminary injunction is warranted. The prior restrictions imposed on BLET by the Court's TRO shall remain in place by virtue of a preliminary injunction.

IT IS SO ORDERED.

October 22, 2013	*/s/ John R. Adams*
Dated	JUDGE JOHN R. ADAMS United States District Judge

APPENDIX H

45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

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

* * *

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

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

* * *

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided--

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under

which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as

per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board,

which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or

corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases

which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of

disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible[1] by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an

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[1] So in original. Probably should be "enforceable".

intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX I

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

WHEELING & LAKE ERIE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No. 5:13-cv-02105
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN ("BLET"), *et al.*,	)	
Defendants.	)	

DECLARATION OF JOSEPH C. BURLEY

I, Joseph C. Burley, declare and state as follows:

1. I have personal knowledge of the facts contained in this declaration, and if called as a witness, could and would testify as to their accuracy.

2. I am over the age of 21 and am legally competent to make this declaration. I am employed

by the Wheeling & Lake Erie Railway Company ("WLE") as Vice President of Human Resources. I have worked for WLE since May 17, 1990. My responsibilities include conducting bargaining for WLE with the unions that represent its employees and administering its collective bargaining agreements. I am familiar with the collective bargaining agreements between WLE and the Brotherhood of Locomotive Engineers and Trainmen ("BLET") having participated in their negotiation for the WLE and overseeing their administration.

3. In the railroad industry, employees are organized into crafts or classes for purposes of union representation. The craft or class of locomotive engineers and craft or class of trainmen are the employees who operate trains. Engineers operate locomotives. Trainmen duties include coupling and uncoupling freight cars, aligning switches so a locomotive or train can move from one track to another, and giving instructions to the engineer on the movement of the train. On WLE, there are two positions in the craft or class of trainmen, conductor and brakeman.

4. The craft or class of trainmen was originally represented by another union, the United Transportation Union ("UTU"). WLE reached a collective bargaining agreement with the UTU that covered the trainmen (the Trainmen Agreement). The BLET won an election in 2004 and replaced the UTU as the representative of trainmen. The BLET inherited the UTU trainman agreement. The current agreement that covers trainmen is the June 28, 2008 Trainmen Agreement. Relevant excerpts of the

Trainmen Agreement are attached as Exhibit No. 1 to my Declaration.

5. The craft or class of engineers is represented by BLET. WLE and BLET are party to a separate collective bargaining agreement that covers engineers, the June 28, 2008 Engineers Agreement. Relevant excerpts of the Engineers Agreement are attached as Exhibit No. 2 to my Declaration.

6. Employees who are represented by a union and covered by a collective bargaining agreement are sometimes referred to as "contract" employees because they are covered by a labor contract. I will occasionally use this term to distinguish them from management employees.

7. WLE is a regional railroad which operates over about 840 miles of track in Ohio, Pennsylvania, West Virginia, and Maryland. As a regional railroad, WLE needs to distinguish the service that it provides customers from that offered by the largest railroads like CSXT and Norfolk Southern and other modes of transportation. It is very important to WLE's success and future that it be as responsive as possible to its customers' needs and operate as safely and efficiently as possible.

8. WLE looks primarily to its contract engineer and trainmen (conductors and brakemen) employees represented by the BLET to operate its trains. The Engineer and Trainmen Agreements specify how WLE will fill train assignments from among such employees. There are regular assignments that an employee may hold. WLE also maintains extra boards, which are lists of employees, who can be called to fill positions on trains that are not regularly

scheduled or when the regularly assigned employee is not available because of vacation, sick leave, personal leave day, rest day, or some other valid reason. However, it has always been WLE's position that it retains the right under the Engineer and Trainmen Agreements in certain circumstances to use a supervisor as an engineer or conductor if rested contract engineers or trainmen are not available and operational or customer needs require that the train be moved before rested contract employees were again available. By rested, I mean that the employee has hours that he or she can work consistent with the limitations in the Hours of Service Act ("HSA"). The HSA limits the number of consecutive hours that a train crew employee can be on duty and requires that they receive a minimum amount of rest before they can be called to work again.

9. Nothing in the Engineer or Trainmen Agreements prohibits WLE's ability to use supervisors in certain circumstances when rested contract employees are not available to perform work as an engineer or trainmen. The Agreements contains provisions that specify how employees will be called for assignments (Eng. Ag. Art. 6; Trmn Ag. Art. 23), how they will fill those assignments (Eng. Ag. Art. 7 ; Trmn Ag. Art. 17-18), and how relief employees on extra boards can be used to fill temporary vacancies when the regularly assigned employee is not available (Eng. Ag. Art. 8; Trmn Ag. Art. 24). The Trainmen Agreement is silent on how WLE can staff a train if no contract trainmen are available. The Engineer Agreement, in Articles 1(i) and 10(f), provide that after making "reasonable attempts" to locate a rested engineer, WLE can use

"Carrier officials and management" to fill the engineer position on the train assignment.

10. Although the Trainmen Agreement does not contain provisions like Articles 1(i) and 10(f) of the Engineer Agreement, for years, the practice under both Agreements has been that WLE can use a supervisor to fill an engineer or trainmen position if no contract employee is available. WLE's ability to do so comes in the first instance, not from the Agreements, but from the managerial discretion that a carrier retains to conduct operations. This discretion is recognized by the past practice. BLET wanted WLE's discretion to be written into agreement language and it was in Articles 1(i) and 10(f) of the Engineer Agreement. the Trainmen Agreement has a different bargaining history since it was negotiated with a different union. Since replacing the UTU, BLET has not sought to bargain similar language in the Trainmen Agreement that would place some limits on WLE's discretion as do Articles 1(i) and 10(f) of the Engineer Agreement.

11. I am familiar with the practice of using supervisors from my years at WLE and in connection with administering its collective bargaining agreements covering engineers and trainmen. WLE has used supervisors in a variety of circumstances over the years, including when the regular crew has reached the maximum hours of service allowed by the HSA. WLE has used supervisors as a replacement crew when no other rested employees were available in order to finish delivering the train to a customer or to move the train off of the main line and into a rail yard when the regular crew reached its HSA limit while the train was on the main line. WLE has also

used a supervisor as an engineer or conductor when a contract engineer or conductor was not available and the train would be delayed because the train lacked an engineer or conductor. The non-supervisor member of the crew was a contract employee. Specific examples of when WLE has used supervisors as engineers and conductors are recited in the Declarations of James Hill, Andrew Lengyel, and Lorne Dodds.

12. Even though the BLET is or should have been aware of these instances of using supervisors, BLET has not pursued a grievance under the Engineer or Trainmen Agreements challenging this practice. If the BLET believes that WLE has improperly used a supervisor in violation of the Agreements, the proper procedure under the grievance procedures in these Agreements is for the union to file a time claim or grievance with the Company. These procedures are set out in Article 18 of the Engineer Agreement and Article 30 of the Trainmen Agreement. WLE will then investigate the grievance. If it is determined that WLE's actions violated the Agreement, then, WLE would pay the employee for the time he lost by not being called. If WLE denied the claim, the BLET or the employee could pursue the claim to the next step under the grievance procedures in the Agreement and, after exhausting the grievance procedures, submit the claim to binding arbitration. Even though the practice of occasionally using supervisors has been going on for years, I am not aware that the BLET has ever progressed an objection by appealing a declined claim through the grievance procedures in the Agreements. Nor has BLET ever taken such a claim to arbitration.

13. At the time that BLET engaged in its surprise strike I was researching the claims made in the September 13, 2013 letter from BLET General Chairman Linsey to myself (the "Linsey Letter"), which I received on that same day. A copy of this letter is attached to my Declaration as Exhibit 3. I have since responded to the contentions made in that letter in a letter dated September 25, 2013. A copy of my response is attached to my Declaration as Exhibit 4. WLE already had a meeting scheduled with BLET for September 23, 2013 in Chicago under the auspices of the National Mediation Board to discuss the parties' bargaining proposals. It never occurred to me as I was responding to the Linsey Letter and preparing for the mediation that BLET would engage in an unlawful, surprise strike.

14. General Chairman Linsey claimed in his September 13 letter that WLE operated a train on September 12 and again on September 13 using a supervisor as an engineer and no conductor and this was allegedly a repudiation of the crew consist provision in Article 1(h) of the Trainmen Agreement, which requires that a conductor be part of a train crew. He further claimed that WLE's operation of trains on those days only with an engineer violated the "status quo" that applies to the parties' on-going collective bargaining. He also argued that by using a supervisor as the engineer on Train 212 on September 13, WLE violated Article 1(i) of the Engineer Agreement because there were rested contract engineers who could have worked as the engineer of that train. And, he also took the position that WLE could never use a supervisor as a

conductor, because that was prohibited by the Trainmen Agreement.

15. It is true that in the current bargaining WLE has proposed modification of the crew consist provision in the Trainmen Agreement that requires assignment of a conductor to each train. However, General Chairmen Linsey is in error by claiming that WLE operated trains on September 12 and 13 without a conductor. A supervisor, Trainmaster Lengyel, was assigned to work as the conductor on each train along with the engineer, who was also a supervisor. The fact that he rode in a vehicle after performing conductor duties rather than riding back to the rail yard on the locomotive did not violate the Trainmen Agreement. Conductors perform most of their tasks off of the locomotive, such as coupling and uncoupling freight cars. There is nothing in the crew consist provisions of the Trainmen Agreement, Article 1(h), that require that the conductor ride in the locomotive when not performing his conductor duties.

16. General Chairman Linsey is also wrong that use of a supervisor as the engineer on Train 212 on September 13 violated Article 1(i) of the Engineer Agreement, because four rested engineers were available from the engineer extra board to handle that train assignment. Before assigning a supervisor to act as the engineer on that train, WLE researched available engineers. WLE did not call those employees to fill the engineer position on Train 212 because we already knew that they were needed to crew other trains later that same day. If we had called any of them for Train 212, we just would have shifted the problem of lack of rested engineers and

conductors to other trains and had to use supervisors on them.

17. Finally, as I explain in my response to General Chairman Linsey's letter, WLE does not violate the Trainmen Agreement by using a supervisor as the conductor because nothing in the Trainmen Agreement prohibits use of supervisors when a rested conductor is not immediately available. In addition, as I have explained, WLE has a past practice of using supervisors as both engineers and conductors on occasion.

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

Executed on September 26, 2013.

/s/ Joseph C. Burley
Joseph C. Burley

APPENDIX J

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

WHEELING & LAKE ERIE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No. 5:13-cv-02105
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN ("BLET"), *et al.*,	)	
Defendants.	)	

DECLARATION OF JAMES S. HILL

I, James S. Hill, declare and state as follows:

1. I have personal knowledge of the facts contained in this declaration, and if called as a witness, could and would testify as to their accuracy.

2. I am over the age of 21 and am legally competent to make this declaration.

3. I am employed by the Wheeling & Lake Erie Railway Company ("WLE") as Division Superintendent, I have been employed with WLE in this position for approximately 8 years. Prior to holding the position of Division Superintendent, I was employed with WLE as the Superintendent of Safety Rules and Training for approximately 5 years. Prior to that, I served as Road Foreman of Engines for approximately 2 years.

4. As Division Superintendent, I am responsible for the movement of trains over WLE's system and ensuring that customer needs are met.

5. Before entering WLE management, I worked for WLE as a locomotive engineer for approximately eight years. Although I no longer regularly operate trains in my capacity as Division Superintendent, I retain my Federal Railroad Administration engineer and conductor certifications, and remain qualified as an engineer and conductor.

6. In my capacity as Division Superintendent, I am aware of occasional circumstances when WLE has used supervisors to crew trains when contract engineers or conductors were unavailable or already assigned to other jobs later in the day. Although WLE maintains "extra boards" of engineers and conductors in order to fill temporary vacancies when other employees are absent or unavailable for work, those extra boards occasionally become depleted due to high levels of employee absence, emergency situations, trains that are not regularly scheduled, and the effect of Hours of Service Act ("HSA") limitations on the number of consecutive hours employees are permitted to work. For example, if an assignment takes longer to complete than anticipated

for some reason, the train crew may reach their HSA limit and therefore be unable to complete the assignment, requiring a replacement crew. If all regular or extra board employees are unavailable or have been assigned to other jobs later in the day, WLE will assign a supervisor like myself, who is also qualified to work as an engineer or conductor, to complete the train assignment.

7. I myself have occasionally worked as an engineer or conductor during my time as a supervisor. For example, on October 20, 2011, I served as the engineer on an assignment while Trainmaster Hank Allender served as the conductor on a train from Hartland Yard in Collins, OH to service a customer in Parkertown, OH. We then taxied to the Huron Ore Dock in Huron, OH to finish loading an ore train, and then moved that train from the dock to Shinrock, OH. Trainmaster Allender and I were needed to work this assignment because there were no available engineers or conductors. A copy of the Train Sheet from October 20, 2011 reflecting this assignment is attached hereto as Exhibit 1. Train Sheets are documents maintained by the dispatchers on a daily basis which reflect the crewing and movement of trains.

8. I am also aware that on October 13, 2011, Trainmaster Allender worked as a conductor, alongside a contract (non-management) engineer to recrew Train 224. Mr. Allender and the contract engineer rode by taxi from Hartland Yard in Collins, OH to Toledo, OH, and operated the train back from Toledo to Hartland Yard. Mr. Allender was needed to work this assignment because the conductor scheduled to work it had marked off sick, and there

were no other conductors available. A copy of the Train Sheet from October 13, 2011 reflecting Trainmaster Allender's assignment is attached hereto as Exhibit 2.

9. I am also aware that over the last several years, Trainmaster/Road Foreman of Engines Andrew Lengyel, Trainmaster Darren Ohler, and Road Foremen of Engines Lorne Dodds, Edward Steiner and Jason Cowart, all of whom report to me, have also worked as conductors and engineers on occasion, as needed. Examples of such occasions are reflected in the Train Sheets attached hereto as Exhibits 3-6.

10. As Division Superintendent, I am also familiar with the practice of conductors occasionally "shadowing" the train to which they are assigned in a car, rather than riding in the locomotive, either because of an operational issue, or because the train crew had to drive in order to pick up the train at a point distant from where they report to work to start a one-way assignment and needs to return the car along with the locomotive. In fact, I recall conductors doing this from time to time years ago, when I was working as a contract engineer for WLE. This practice does not impede a conductor's ability to perform the tasks required of him as a member of the train crew.

11. More recently, for example, I issued a Division Notice on September 6, 2013 regarding a new split point derail, which is a device used to prevent unauthorized train movement onto a track by diverting it off of the main track. In order for a train to pass through the derail, which is hand-operated, the Division Notice requires that the conductor is to

get down from the locomotive and line the derail for the train to operate through, while the engineer alone operates the train through the derail. The conductor must then restore the derail to the operating position once the train has passed through, and then is driven by taxi approximately 3 miles to meet back up with the locomotive. A copy of the September 6, 2013 Division Notice is attached hereto as Exhibit 7.

12. As the result of the surprise strike by the Brotherhood of Locomotive Engineers and Trainmen on September 20, 2013, WLE's operations were severely impacted. WLE was unable to staff approximately 18 assignments with contract employees, meaning that WLE was unable to serve some customers. It has taken several days for WLE to return to normal operations. The impact on WLE's operations would have been worse were it not for the Temporary Restraining Order ending the strike entered by the Court on the afternoon of September 20.

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

Executed on September 26, 2013.

/s/James S Hill
James S. Hill

APPENDIX K

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

WHEELING & LAKE ERIE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No.: 5:13-cv-02105
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN ("BLET"), *et al.*,	)	
Defendants.	)	

DECLARATION OF LORNE DODDS

I, Lorne Dodds, declare and state as follows:

1. I have personal knowledge of the facts contained in this declaration, and if called as a witness, could and would testify as to their accuracy.

2. I am over the age of 21 and am legally competent to make this declaration.

3. I am employed by the Wheeling & Lake Erie Railway Company ("WLE") as a Road Foreman of Engines. I have been employed with WLE as a Road Foreman of Engines for approximately 7 years. A

Road Foreman of Engines is a supervisory position. My duties include supervising WLE engineers and trainmen.

4. Before entering WLE management, I worked for WLE as a locomotive engineer. Although I no longer regularly operate trains in my capacity as Road Foreman of Engines, I retain my Federal Railroad Administration engineer and conductor certifications, and am qualified as an engineer and conductor.

5. Throughout my time as Road Foreman of Engines, on occasion, when no qualified, rested engineers or trainmen are available and not otherwise assigned to other jobs later in the day, I have worked as an engineer or conductor. For example, on June 10, 2013, there was an available contract engineer but there were no trainmen available to work Train 535 from Mingo Junction, OH to Warrenton, OH and back, so I worked that assignment as a conductor alongside a contract engineer, *i.e.*, an engineer represented by the Brotherhood of Locomotive Engineers and Trainmen ("BLET").

6. The following day, on June 11, 2013, the reverse situation occurred, and there was an available contract conductor but no engineer available to work Train 329 from Mingo Junction, OH to Terminal Junction, OH and back, so I worked that assignment as an engineer alongside a contract conductor represented by the BLET.

7. As another example, on October 27, 2010, I served as the engineer operating an eastbound coal train from Wayco to Mingo Junction, OH. Andrew

Lengyel, a WLE Trainmaster/Road Foreman of Engines, served as the conductor on that train. I served as an engineer or conductor on at least 4 other occasions in 2010.

8. Most recently, on September 12, 2013, I served as the engineer on a stone train. That train had operated from Brewster, OH to Martins Ferry, OH to service National Lime & Stone's facility. The unloading of the train took longer than anticipated, and the engineer and conductor working that assignment hit the limit of their allowed working hours under the Hours of Service Act ("HSA"), and thus could not move the empty cars back to WLE's rail yard at Mingo Junction. No other engineers or trainmen were available for service, and I therefore worked as the engineer to return the train to Mingo Junction, while Mr. Lengyel served as the conductor.

9. Again on September 13, 2013, the train crew bound for National Lime & Stone reached their HSA limit, this time on the main track at Jewett, Ohio. Once again, Mr. Lengyel and I were assigned to move the train off of the main track and to Mingo Junction, because the only rested contract employees were already assigned to operate other trains later in the day.

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

Executed on September 26, 2013.

s/ Lorne Dodds
Lorne Dodds

APPENDIX L

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

WHEELING & LAKE ERIE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No.: 5:13-cv-02105
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN ("BLET"), *et al.*,	)	
Defendants.	)	

DECLARATION OF ANDREW LENGYEL

I, Andrew Lengyel, declare and state as follows:

1. I have personal knowledge of the facts contained in this declaration, and if called as a witness, could and would testify as to their accuracy.

2. I am over the age of 21 and am legally competent to make this declaration.

3. I am employed by the Wheeling & Lake Erie Railway Company ("WLE") as a Trainmaster/Road

Foreman of Engines. This is a management position. I have been employed with WLE as a Trainmaster for approximately 15 years, and have been a Road Foreman of Engines for approximately 10 years. As Trainmaster/Road Foreman of Engines, I am responsible for managing and directing the work of train crews.

4. Before entering WLE management, I worked for WLE as a locomotive conductor. Although I no longer regularly operate trains in my capacity as Trainmaster/Road Foreman of Engines, I am qualified as an engineer and conductor and maintain Federal Railroad Administration engineer and conductor certifications.

5. Throughout my 15 years as a Trainmaster, on occasion, when no qualified, rested engineers or trainmen were available, I have worked as an engineer or conductor. For example, on one occasion this past summer, there was a rested, available engineer but there were no trainmen available to work Train 610, which was a yard job at Rook Yard in Carnegie, PA. Typically, WLE's collective bargaining agreement requires that there be a conductor as a member of the train crew. So I worked that assignment as a conductor, performing switching work and spotting cars, alongside a contract engineer, *i.e.*, an engineer represented by the Brotherhood of Locomotive Engineers and Trainmen ("BLET").

6. As another example, on October 27, 2010, I served as the conductor on an eastbound coal train from Wayco to Mingo Junction, OH. Lorne Dodds, another WLE supervisor, served as the engineer on that train. Again, Mr. Dodds and I took that

assignment because there were no engineers or trainmen available to work when that train needed to be moved.

7. Most recently, on September 12, 2013, I served as the conductor on a stone train. That train had operated from Brewster, OH to Martins Ferry, OH to service an important WLE customer, National Lime & Stone. The unloading of the train took longer than anticipated, and the engineer and conductor working that assignment reached the limit of their allowed working hours under the federal Hours of Service Act ("HSA"), and thus could not move the empty cars back to WLE's rail yard at Mingo Junction. No other engineers or trainmen were available for service, and I therefore worked as the conductor to return the train to Mingo Junction, while Mr. Dodds served as the engineer.

8. Because Mr. Dodds and I had to drive to Martins Ferry to replace the contract crew that reached their HSA limit, we also had to return our motor vehicle to Mingo Junction. While I performed all required conductor tasks, such as doubling three tracks, *i.e.*, throwing switches and coupling cars together as they are combined from multiple tracks to make up one train, and air testing the train brakes before the train of empties left the customer's facility, I did not ride on the locomotive, but instead drove the motor vehicle alongside the train. To my knowledge, it is not uncommon in the railroad industry for the conductor to accompany the train of which he is a crew member in a vehicle, and contract employees do this as well. Contrary to the conjecture in the September 13, 2013 letter of BLET General Chairman Linsey, I was not acting as a taxi service

as there was nobody else in the car with me, and I was still the conductor of that train.

9. Again on September 13, 2013, I served as conductor after the regular train crew operating a train bound for National Lime & Stone reached their HSA limit, this time on the main line track at Jewett, Ohio. Once again, Mr. Dodds and I were assigned to remove the train from the main line and move it to the rail yard at Mingo Junction, because the only contract employees available for service were needed for trains later in the day, and the customer needed to be served.

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

Executed on September 26, 2013.

s/ Andrew Lengyel
Andrew Lengyel

APPENDIX M

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25061
Docket No. 44613
99-1-97-1-8-6741

The First Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim in behalf of Utility Person D. F. August for basic penalty day account Trainmaster R. Bailey assisted yard assignment #1315 on February 15, 1995."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

It is the contention of the Claimant that while working the utility position on Assignment No. 3871 at Bensenville Yard in the Chicago Terminal that other than a train service employee was observed assisting Bensenville Yard Assignment No. 1315 spot their train on K-17 track in Bensenville Yard in violation of the 1994 Crew Consist Agreement, Appendix A, Section 8, and that he is therefore entitled to a penalty payment of a basic day.

Section 8 of Appendix A of the 1994 Crew Consist Agreement reads:

> "No company supervisor, official, nor craft employee, other than those working under the UTU agreement, will be used to supplant or perform work exclusively reserved to UTU-represented employees."

It is evident in study of the record that the Claimant has failed to meet a necessary burden of proof to substantiate consideration of the claim on its merits.

The claim as filed and appealed did not articulate the work that was allegedly performed in violation of the above mentioned rule. The claim as instituted on the property consists of a brief written note that reads: "Claim 8 hrs. YDM R. Bailey spotting 'K 17' with assignment #1315 while U-man was attached to #425 1630 hrs."

In denial of the claim on the property the Carrier identified the referenced "R. Bailey" as being a

Trainmaster rather than as cited in the claim, a Yardmaster. More importantly, the Carrier advised the Organization in writing that there is nothing within the crew consist provisions or schedule rules that reserves the work of advising a crew or train of when it is in the clear to utility positions and that the Train master did not perform any work that is not performed by all sorts of employees on a regular day to day basis across the system. The Carrier also submitted that Assignment No. 1315 was staffed in accordance with applicable contract provisions and that the advice of being in the clear neither resulted in nor permitted the elimination of any position. Further, the Carrier asserted that even if the Trainmaster had spotted or told the assignment that it was in the clear that such one time advice was *de minimus* in nature and would have taken but a few minutes to perform.

The Carrier also advised the Organization in its written denial of the claim that since the Claimant was fully employed on the date of claim, and engaged in activities away from the area at the time of the claim, that he was not eligible or deserving of another day's pay.

The statements of the Carrier remained uncontested during the handling of the claim on the property. In particular, nothing of record was shown by the Organization to establish that the Trainmaster had been used to "supplant or perform work exclusively reserved to UTU-represented employees" in violation of Section 8 or Appendix A of the 1994 Crew Consist Agreement. Moreover, it is evident that the nature of the claim in this dispute does not involve circumstances like those referenced

in Awards cited to us by the Organization, i.e., where a Roundhouse Foreman spotted and fueled an engine on a dock track, where a Yardmaster accompanied a yard crew to pick up a disabled tie tamper and gave hand signals for the move to the yard engineer, or where a Trainmaster coupled air joints on cars in the performance of work that was shown by custom and practice to be reserved to UTU-represented employees.

Under the circumstances, we have no alternative but to deny the claim in a finding that neither the Claimant nor the Organization on his behalf have met a necessary burden of proof by providing convincing factual data to support the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois,
this 8th day of November 1999.