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11 BROTHERHOOD OF MAINTENANCE
12 OF WAY EMPLOYEES DIVISION/IBT,

13 Plaintiff,

14 v.

15 BNSF RAILWAY, INC.,

16 Defendant.

No. CV 15-5091 PA (PJWx)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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19 This matter is before the Court on Defendant BNSF Railway, Inc.'s ("BNSF")

20 Motion for a Preliminary Injunction. After fully reviewing the evidence and the

21 parties' arguments, the Court finds the following findings of fact and conclusions of

22 law. Any finding of fact that constitutes a conclusion of law is hereby adopted as a

23 conclusion of law, and any conclusion of law that constitutes a finding of fact is

24 hereby adopted as a finding of fact.

25 **I. Findings of Fact**

26 1. BNSF is a major freight railroad operating more than 1,000 trains each
27 day over 32,500 miles of track in twenty-eight states.

28 2. BMWED is a labor union representing maintenance of way workers, i.e.
workers who maintain track, bridges, and other infrastructure.

1 3. BNSF and BMWED members are parties to multiple collective
2 bargaining agreements, including the 2004 ATSF-BMWED agreement (the “CBA” or
3 “2004 Agreement”).

4 4. Rule 13 of the 2004 Agreement provides, among other things, that BNSF
5 may not “unjust[ly]” discipline BMWED members. BNSF must also provide
6 BMWED members written notice of any disciplinary investigation and conduct a
7 formal investigation hearing.

8 5. Rule 14 of the 2004 Agreement provides, among other things, for a
9 grievance process by which BMWED members may raise concerns about BNSF’s
10 violation of the 2004 Agreement. BMWED members are entitled to appeal to
11 BNSF’s highest officer designated to handle such disputes. If necessary, they may
12 then appeal to the National Railroad Adjustment Board (“NRAB”) or another board
13 of adjustment agreed to by the parties.

14 6. Bobby Tindell (“Tindell”) is employed by BNSF as a senior track
15 supervisor in Needles, California and belongs to BMWED.

16 7. Early in 2015, Tindell believed that BNSF was improperly denying him
17 priority for overtime assignments in favor of more junior colleagues.)

18 8. When overtime is assigned to a junior track supervisor, a senior track
19 supervisor may file a time claim to recover overtime that should have been assigned
20 to him or her under the CBA. Tindell filed between twenty-five and forty time claims
21 in 2015.

22 9. Tindell sought information about his colleagues’ overtime to support his
23 time claims.

24 10. Tindell first turned to a computerized BNSF payroll system to review his
25 junior colleagues’ overtime.

26 11. One of the colleagues whose time records Tindell viewed was Kyle
27 Sahlstrom (“Sahlstrom”). Sahlstrom complained to BNSF management when he
28 learned that Tindell had accessed his time records. BNSF Division Engineer Jimmy

1 Capps (“Capps”) addressed Sahlstrom’s complaint by sending Tindell an email in
2 March 2015 directing him not to use the payroll system in this way.

3 12. Tindell complied with the order not to access the payroll system to
4 review others’ time records, but began asking colleagues to tell him about any
5 overtime assignments they might receive. Two of the colleagues he approached were
6 Sahlstrom and Nicholas Mazanowski (“Mazanowski”). Sahlstrom complained to
7 management.

8 13. On April 17, 2015, BNSF notified Tindell that it was conducting an
9 investigation stemming from his creation of an “unpleasant work environment” by
10 confronting colleagues about their overtime.

11 14. The investigation hearing was held on May 15, 2015. Tindell was
12 represented by a union official, Brian Poston (“Poston”), and witnesses included
13 Capps; Sahlstrom; Mazanowski; Frank Barrera (“Barrera”), Tindell’s immediate
14 supervisor; and Michael Bradley (“Bradley”), one of Tindell’s colleagues. Sahlstrom
15 testified that he felt “harassed” by Tindell’s inquiries about his overtime pay: “I just
16 felt it wasn’t any of his business and he just kept asking me, and he would brag about
17 what he knows and brag about printing up everybody’s pay”

18 15. On June 1, 2015, BNSF assessed Tindell “a Level S 30 Day Record
19 Suspension” and a one year “review period” during which “[a]ny rules violation . . .
20 could result in further disciplinary action.” BNSF determined that Tindell was “in
21 violation of MWOR [Maintenance of Way Operating Rule] 1.6 Conduct and MWOR
22 1.13 Reporting and Complying with Instructions” based on his “confronting
23 [colleagues] about their overtime pay after it was clearly instructed for [him] to
24 stop.”^{1/}

26 ^{1/} MWOR 1.6 prohibits employees from, among other things, being quarrelsome
27 or discourteous. MWOR 1.13 requires employees to “report to and comply with
28 instructions from supervisors who have the proper jurisdiction” Defendant

(continued...)

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2 16. On June 22, 2015, Tindell received notice of another investigation based
3 on his use of inappropriate language during an argument with Sahlstrom. Sahlstrom
4 had objected to Tindell's overtime claims during a meeting and suggested that "we all
5 just need to handle our own shit." Tindell told Sahlstrom to "sack up" and put in his
6 own overtime claims per the union agreement. Sahlstrom responded, "fuck the
7 union" and "fuck the union agreement."

8 17. Capps testified that in his opinion Sahlstrom's comments to Tindell "did
9 not warrant discipline." He added that "HR has got an ongoing investigation on
10 Mr. Sahlstrom and his conduct."

11 18. Meanwhile, in Arizona, track supervisor Carlos Zamora ("Zamora")
12 filed his own time claim. On July 8, 2015, Zamora's supervisor, Willie Naron
13 ("Naron"), questioned him about his time claim and threatened to write him up for
14 failing to finish a task in a timely manner.

15 19. BMWED initiated this action on July 6, 2015. In its First Amended
16 Complaint ("FAC"), BMWED seeks a declaration that "BNSF's investigation and
17 disciplining of Mr. Tindell for his efforts to gather information to determine whether
18 BNSF violated the CBA in assigning overtime work, and for use as evidence in
19 support of a time claim or grievance, and BNSF's threat of discipline of Mr. Zamora
20 for filing a time claim, violated Section 3 of the [Railroad Labor Act ("RLA")] by
21 imposing discipline and penalties on use of the statutorily mandated minor dispute
22 resolution processes of the RLA."

23 20. On July 17, 2015, BMWED sent BNSF a notice that they would strike if
24 BNSF did not rescind Tindell's discipline within ten days. BNSF filed an Ex Parte
25 Application for Temporary Restraining Order and Order to Show Cause Re:
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27 _____
28 ^{1/} (...continued)

conceded that the reference to an MWOR 1.13 violation was in error.

1 Preliminary Injunction on July 22, 2015. The parties stipulated to the withdrawal of
2 the Application for Temporary Restraining Order, and the Court scheduled a hearing
3 on BNSF’s Motion for Preliminary Injunction.

4 **II. Conclusions of Law**

5 1. Pursuant to Section 7 of the Norris-LaGuardia Act (“NLGA”), 29 U.S.C.
6 § 107, the Court may issue an injunction involving a labor dispute only after hearing
7 the testimony of witnesses in open court and finding:

8 (a) That unlawful acts have been threatened and will be
9 committed unless restrained or have been committed and
10 will be continued unless restrained . . .;

11 (b) That substantial and irreparable injury to
12 complainant’s property will follow;

13 (c) That as to each item of relief granted greater injury
14 will be inflicted upon complainant by the denial of relief
15 than will be inflicted upon defendants by the granting of
16 relief;

17 (d) That complainant has no adequate remedy at law; and

18 (e) That the public officers charged with the duty to
19 protect complainant’s property are unable or unwilling to
20 furnish adequate protection.^{2/}

21 2. In the Ninth Circuit, any party seeking a preliminary injunction “must
22 establish that he is likely to succeed on the merits, that he is likely to suffer
23

24 ^{2/} BMWED cites Section 4 of the NLGA, 29 U.S.C. § 104, to argue that the
25 Court has no jurisdiction to enjoin striking and picketing. (Opp. at 8.) This is
26 incorrect: Courts may enjoin strikes concerning arbitrable disputes. See Buffalo
27 Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397, 407, 96 S. Ct.
28 3141, 3147, 49 L. Ed. 2d 1022 (1976) (“Striking over an arbitrable dispute would
interfere with and frustrate the arbitral processes by which the parties had chosen to
settle a dispute.”).

1 irreparable harm in the absence of preliminary relief, that the balance of equities tips
2 in his favor, and that an injunction is in the public interest.” Winter v. Natural
3 Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249
4 (2008).^{3/}

5 3. A strike or work stoppage is “unlawful” under § 107, and BNSF is
6 therefore “likely to succeed on the merits” under Winter, if the strike concerns a
7 “minor” dispute subject to mandatory arbitration under the RLA, 45 U.S.C. § 151, et
8 seq. Minor disputes are those “growing out of grievances or out of the interpretation
9 or application of agreements concerning rates of pay, rules, or working conditions.”
10 45 U.S.C. § 153(i). When a railroad takes the position that a dispute concerns
11 interpretation of an existing agreement, the dispute is minor unless the railroad’s
12 position is “‘not arguably justified,’ ‘obviously insubstantial,’ ‘spurious,’ [or]
13 ‘frivolous’” Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n, 491
14 U.S. 299, 306, 109 S. Ct. 2477, 2483 (1989) [hereinafter “ConRail”]. These
15 formulations “‘illustrate the relatively light burden which the railroad must bear’ in
16 establishing exclusive arbitral jurisdiction under the RLA.” Id. (quoting Brotherhood
17 of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R. Co., 802
18 F.2d 1016, 1022 (8th Cir. 1986)); see also Ass’n of Flight Attendants v. Mesa Air
19 Grp., Inc., 567 F.3d 1043, 1047 (9th Cir. 2009) (“When in doubt, courts construe
20 disputes as minor.”).

21 4. BMWED’s threatened work stoppage arises from a minor dispute.
22 BNSF’s discipline of Tindell arises from its interpretation of existing agreements, and
23 BNSF’s position that Tindell’s discipline is justified because he harassed colleagues
24 is not frivolous. See Brotherhood of Maintenance of Way Employees Division/IBT
25 v. Norfolk Southern Ry. Co., 745 F.3d 808, 815 (7th Cir. 2014) (holding that a

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27 ^{3/} BMWED contends that the public interest is not relevant in an NLGA case.
28 The Court notes the public interest here only in relation to the Winter framework. It
does not factor into the Court’s analysis under Section 7 of the NLGA.

1 dispute arising from employee discipline was a “quintessential” minor dispute).

2 Accordingly, the threatened strike is unlawful.

3 5. The threatened strike is unlawful because it arises from a minor dispute.

4 6. The threatened strike would likely cause substantial and irreparable
5 injury to BNSF insofar as it would cause delays and disruptions lasting beyond the
6 strike and cause BNSF to suffer a loss of customer goodwill.

7 7. The harm to BNSF in the event of a strike vastly exceeds the harm to
8 BMWED and its members if the strike is enjoined because the only effect of an
9 injunction will be to force BMWED’s members to arbitrate their grievances.

10 8. BNSF has no adequate remedy at law and public officers are otherwise
11 unable to protect its interests.

12 9. An injunction is in the public interest because the threatened work
13 stoppage would impact members of the public who rely on timely and uninterrupted
14 rail service.

15 **III. Analysis**

16 BMWED argues that a preliminary injunction is not appropriate because the
17 threatened strike arises from a major dispute based on BNSF’s violation of the RLA.
18 BMWED alleges that BNSF’s stated reasons for disciplining Tindell and threatening
19 to discipline Zamora are mere pretext for retaliating against employees pursuing time
20 claims. According to BMWED, these pretextual reasons are based on frivolous
21 interpretations of the relevant agreements. BMWED also argues that Section 8 of the
22 NLGA^{4/} precludes an injunction because BNSF has violated the RLA by retaliating
23 against its employees. Finally, BMWED argues that the balance of harms tips in its
24 favor. The Court concludes, after reviewing the evidence, that the dispute is minor,
25 that BNSF has not violated the RLA, and that the balance of harms tips in BNSF’s
26 favor.

27 **A. The Dispute is Minor**

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^{4/} 29 U.S.C. § 108.

1 BMWED points to five purported facts in support of its position that BNSF's
2 discipline of Tindell is pretextual and not based on an arguably justified interpretation
3 of relevant agreements: (1) Tindell complied with all directives regarding his
4 gathering information to support a time claim; (2) colleagues whom Tindell
5 interrogated about their overtime did not testify that Tindell threatened or intimidated
6 them; (3) BNSF refused to provide overtime data despite representing that it would
7 do so; (4) in investigating Tindell for his use of inappropriate language, BNSF did not
8 also investigate Sahlstrom for using more extreme language; and (5) Zamora was
9 threatened with discipline on account of his filing a time claim.

10 **1. Tindell was not disciplined for failure to follow instructions**

11 BMWED contends that Tindell did not access payroll data after he was told to
12 stop and that Tindell was never specifically directed not to question colleagues about
13 overtime. However, as explained by Capps, Tindell was only disciplined for his
14 harassment of colleagues—not for failure to comply with instructions.

15 **2. Tindell's interrogation of colleagues arguably justified**
16 **discipline for creating an unpleasant work environment**

17 BMWED argues Tindell's interrogation of Sahlstrom and Mazanowski does
18 not support a finding that he created an "unpleasant work environment" because
19 neither Sahlstrom nor Mazanowski testified that they felt threatened or intimidated.
20 Sahlstrom did testify, however, that he felt "harassed" by Tindell. Regardless of
21 whether or not Tindell spoke to Sahlstrom and Mazanowski in a civil tone, BNSF's
22 determination that the conversation created an unpleasant work environment is not
23 frivolous in light of Sahlstrom's testimony.^{5/}

24 **3. BNSF's refusal to provide overtime data does not undermine**
25 **its reasons for disciplining Tindell**

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28 ^{5/} The Court takes no position on the truth of Sahlstrom's testimony. It is
sufficient that this testimony presents an arguable basis for BNSF's disciplinary
decision.

1 BMWED maintains that Capps contradicted his hearing testimony that he
2 would have provided overtime data upon request. However, BMWED fails to
3 adequately explain how this undermines the stated reasons for Tindell’s discipline.
4 BMWED also suggests that Capps made Tindell’s conduct appear worse than it was
5 by testifying that Tindell could have obtained the information he was seeking from
6 other sources. Even if Tindell had no direct means to investigate a potential overtime
7 claim,^{6/} BNSF could still determine that Tindell’s conversation with Sahlstrom and
8 Mazanowski created an unpleasant work environment.

9 **4. BNSF’s purported investigation of Tindell, and not Sahlstrom,**
10 **for use of inappropriate language is arguably justified**

11 BMWED argues that BNSF’s investigation of Tindell for telling Sahlstrom to
12 “sack up” and file overtime claims is pretextual in light of its failure to discipline
13 Sahlstrom for saying “fuck the union” and union agreement.^{7/} However, BNSF could
14 reasonably take the position that Tindell’s language was more abusive because
15 Tindell’s comments criticized Sahlstrom personally whereas Sahlstrom’s comments
16 concerned the union.

17 **5. BNSF’s threatened investigation of Zamora does not**
18 **undermine its reasons for disciplining Tindell**

19 BMWED argues that BNSF’s threatened discipline of Zamora is further
20 evidence that BNSF disciplined Tindell in an effort to chill challenges to its
21 assignment of overtime to junior track supervisors. However, BNSF has not
22 launched an investigation of Zamora. Moreover, Zamora’s supervisor, Naron, had
23 nothing to do with the investigation of Tindell.

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25
26 ^{6/} Gary Marquart, a BMWED officer, testified that the CBA does not provide for
27 discovery in support of time claims. (Tr. 37:24-38:5.) However, there is no evidence
28 that BMWED could not solicit overtime data from its members.

^{7/} Capps testified that an investigation of Sahlstrom is pending.

1 Accordingly, BNSF’s determination that Tindell’s harassment of colleagues
2 created an unpleasant work environment is arguably justified.

3 **B. RLA and NLGA**

4 BMWED argues that BNSF has “undermined or negated the grievance
5 arbitration process” in violation of the RLA by retaliating against Tindell and Zamora
6 for submitting time claims. Section 8 of the NLGA provides that “[n]o restraining
7 order or injunctive relief shall be granted to any complainant who has failed to
8 comply with any obligation imposed by law which is involved in the labor dispute in
9 question, or who has failed to make every reasonable effort to settle such dispute
10 either by negotiation or with the aid of any available governmental machinery of
11 mediation or voluntary arbitration.” BMWED suggests that because BNSF retaliated
12 against employees in violation of the RLA, the Court lacks jurisdiction to enjoin the
13 threatened strike. In other words, BNSF’s violation of the RLA is sufficient to
14 sidestep the ConRail analysis and requires the Court to resolve BMWED’s claims on
15 the merits.

16 Although BMWED cites cases that injunctive relief is not available to a party
17 who has violated the RLA,^{8/} it cites no analogous cases in which a court lacked
18 jurisdiction to enjoin a strike because employee discipline violated the RLA. This
19 would turn the RLA on its head. Unions could cast any dispute involving employee
20 discipline as a violation of the RLA and strike, despite the fact that “‘the purpose’ of
21 Section 8 ‘is to head off strikes,’ not encourage them.” Aircraft Serv. Intern., 779
22 F.3d at 1079. “[T]he ‘over-all policy’ of the RLA and the NLGA is the same: ‘to

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24 ^{8/} See, e.g., Brotherhood of Ry. Trainmen, Enterprise Lodge, No. 27 v. Toledo, P.
25 & W. R.R., 321 U.S. 50, 55, 64 S. Ct. 413, 416-17 (1944); Ry. Exp. Agency, Inc. v.
26 Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, 437 F.2d 388, 394 (5th
27 Cir. 1971); United Air Lines, Inc. v. Int’l Ass’n of Machinist & Aerospace Workers.
28 AFL-CIO, 243 F.3d 349, 364-65 (7th Cir. 2001); Norfolk & Western Ry. Co. v.
Brotherhood of R.R. Signalmen, 164 F.3d 847, 856 (4th Cir. 1998); Aircraft Serv.
Intern., Inc. v. Int’l Brotherhood of Teamsters, 779 F.3d 1069 (9th Cir. 2015).

1 encourage use of the nonjudicial processes of negotiation, mediation and arbitration
2 for the adjustment of labor disputes.” Id. (quoting Toledo, 321 U.S. at 58, 64 S. Ct.
3 at 413). BMWED may pursue its retaliation theory in arbitration. There is no
4 indication that BNSF is unwilling to submit to arbitration. Rather, BMWED is the
5 party seeking to sidestep the nonjudicial processes to which the RLA and NLGA
6 channel such disputes.

7 **C. Balance of Harms**

8 BMWED argues that “all of the harm that BNSF alleges would result from a
9 strike would be precipitated by BNSF’s own unlawful actions” and that BMWED
10 will be irreparably harmed by an injunction because “no arbitrator has the authority to
11 compel compliance with the RLA.” If BNSF has, in fact, disciplined Tindell in
12 violation of the RLA or pursues an investigation against Zamora, an arbitrator can
13 fashion an appropriate remedy.

14 **Conclusion**

15 For all of the foregoing reasons, BNSF’s motion for a preliminary injunction is
16 granted.

17 DATED: September 22, 2015



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19 _____
Percy Anderson
UNITED STATES DISTRICT JUDGE