

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS,)

and)

INTERNATIONAL ASSOCIATION OF)
SHEET METAL, AIR, RAIL &)
TRANSPORTATION WORKERS –)
MECHANICAL AND ENGINEERING)
DEPARTMENT,)

and)

INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, DISTRICT 19,)

Plaintiffs,)

v.)

BNSF RAILWAY CO.,)

Defendant.)

Case No. 3:23-cv-5012

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs International Brotherhood of Electrical Workers (“IBEW”), International Association of Sheet Metal, Air, Rail & Transportation Workers – Mechanical and Engineering Department (“SMART-MD”), and International Association of Machinists and Aerospace Workers, District 19 (“IAM #19”) (collectively “the Unions”) bring this action against Defendant BNSF Railway Co. (“BNSF” or “Defendant”) for violations of the Railway Labor Act, 45 U.S.C. § 151 et seq., and state as follows:

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief under the Railway Labor Act (“RLA”), 45 U.S.C. § 151 et seq., presenting a federal question over which this Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

2. Defendant conducts substantial business operations in this judicial district, a substantial part of the events giving rise to this Complaint relate to operations within this judicial district, and the IBEW General Chairman responsible for labor relations with BNSF resides in this judicial district. This Court therefore has jurisdiction over Defendant, and venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2).

PARTIES

3. Plaintiff IBEW is an unincorporated labor organization and is the exclusive bargaining representative – as defined by Section 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth – of the Mechanical Electricians employed by Defendant BNSF.

4. Plaintiff SMART-MD is an unincorporated labor organization and is the exclusive bargaining representative – as defined by Section 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth – of the Railroad Sheet Metal Workers employed by Defendant BNSF.

5. Plaintiff IAM #19 is a division of the International Association of Machinists and Aerospace Workers which is an unincorporated labor organization and is the exclusive bargaining representative – as defined by Section 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth – of the Machinists employed by Defendant BNSF. IAM #19 is authorized to provide IAM, representation to BNSF Machinists.

6. Together, the Plaintiff Unions represent approximately 4,800 employees performing mechanical inspection, maintenance, and repair of locomotives in numerous shops across BNSF's rail system.

7. Defendant BNSF is a carrier engaged in commerce within the meaning of the Railway Labor Act, 45 U.S.C. §§ 151, First and Fourth. BNSF has approximately 35,000 employees, with roughly 7,500 locomotives operating on a rail network of 32,500 miles spanning 28 states and three Canadian provinces.

8. Defendant BNSF is the principal operating subsidiary of Burlington Northern Santa Fe, LLC, a holding company and wholly owned subsidiary of Berkshire Hathaway, Inc.

FACTS

9. The Unions and their predecessors have continuously represented crafts and classes of mechanical shop employees of BNSF and its predecessors for decades.

10. The Unions and BNSF are parties to multiple collective bargaining agreements ("the Agreements"). Under the Agreements, employees represented by the Unions perform a variety of locomotive inspection, maintenance, and repair work.

11. IBEW represented Mechanical Electricians are responsible for the overhaul, maintenance, inspection, testing, modification, software upgrades, and repair of all the various electronic facets of a locomotive.

12. SMART-MD represented Railroad Sheet Metal Workers inspect, maintain, and repair locomotives. They perform tasks from repairing fuel leaks to completing a major overhaul of a locomotive. They maintain and repair locomotive cab equipment, including cab windshield wipers, locomotive horns, and sanders, and also ensure all requirements are met regarding the cab sanitation compartment.

13. IAM represented Machinists inspect, test, maintain, repair, and overhaul the mechanical and pneumatic systems on locomotives, as well as rebuild airbrake parts and the trucks that hold up locomotives. Machinists also use wheel truers to restore locomotive and car wheels back to Federal Railroad Administration (“FRA”) specifications and machine various parts. Machinists also maintain and repair in-plant machines used to repair locomotives and other equipment.

14. In accordance with the Agreements’ classification of work and scope of work rules, regularly scheduled inspection, maintenance, and repair of locomotives has historically been performed by, and has generally been recognized as work belonging to, employees represented by the Unions.

15. Locomotives are a basic necessity for BNSF’s business and its performance of its obligations as a common carrier because locomotives provide the power to transport the freight of BNSF’s customers. Having a sufficient fleet of functional, well inspected and maintained locomotives is integral to BNSF’s provision of rail service and performance of its common carrier obligation.

16. Federal regulations require “periodic inspection” and maintenance of locomotives every 92 days. *See* 49 C.F.R. § 229.23(a). Certain locomotives, including the BNSF locomotives relevant to this suit, are equipped with advanced on-board electronic monitoring systems and only require a periodic inspection every 184 days. *See* 49 C.F.R. § 229.23(b).

17. Every periodic inspection requires a locomotive to pass certain tests, listed in 49 C.F.R. § 229.25. If a locomotive fails any given test of the periodic inspection, it must be repaired before returning to service. *See* 49 C.F.R. § 229.23(a). Locomotives are not available for use in

rail transportation and must be taken out of service if they have not been timely inspected or have not been repaired after a failed inspection.

18. Federal regulations also require locomotives to undergo an “annual test” every 368 days. *See* 49 C.F.R. § 229.27. If a locomotive fails any portion of the annual test, the error(s) must be corrected. *Id.* The annual test is traditionally performed simultaneously alongside the periodic inspection.

19. Accordingly, because of federal regulations, every BNSF locomotive should be inspected and, if necessary, repaired every 184 days by employees represented by the Unions.

20. Federal regulations also provide a process for carriers to petition for an “Emergency Waiver of Safety Rules” in the case of certain “emergency events.” 49 C.F.R. § 211.45. If the Administrator of the FRA declares that an emergency event exists, a railroad may submit a petition for an emergency waiver through the process outlined in § 211.45.

21. In addition to the required periodic inspections and annual tests – commonly referred to as “federal items” – locomotives also routinely require other “full maintenance” to ensure peak efficiency and performance. In other words, locomotives that have passed “Federal Items Only” (FIO), *i.e.*, the periodic inspection and annual test, are legally permitted to operate but still require other regularly scheduled maintenance not covered by federal law.

22. Historically, when a BNSF locomotive is “shopped,” it is inspected for federal items as well as BNSF’s own general maintenance items. Once each item is inspected and repaired, if necessary, the employee(s) performing the work mark the item as completed using a computer tracking system. If all inspection items have not been “signed off,” *i.e.*, marked as completed, the computer system auto-generates a “defect,” which can only be cured by returning the locomotive to a maintenance shop so all maintenance items can be completed.

23. Historically, BNSF limited inspections to Federal Items Only inspections only when necessary for the locomotive to operate legally while it traveled to a designated mechanical shop destination, where it would undergo its full regularly scheduled inspection, maintenance, and repair routine.

24. When performed by employees represented by the Unions, the regularly scheduled inspection, maintenance, and necessary repair of both federal and general maintenance items for a BNSF locomotive is normally completed in well under a week, and often in as little as a 24-hour period.

25. Employees represented by the Unions have historically performed the regularly scheduled inspection, maintenance, and necessary repairs of both federal and general maintenance items on BNSF locomotives.

26. The Agreements between the Unions and BNSF include the September 25, 1964 National Agreement (the “1964 Agreement”). Article II of the 1964 Agreement, as amended, mandates that work within the Unions’ classification or scope of work under the Agreements, or other work “historically performed and generally recognized as work of the crafts...*will not be contracted unless* certain criteria are met.”

27. Specifically, Article II, Section 1, as amended, provides:

Subcontracting of work, including unit exchange, will be done only when *genuinely unavoidable* because (1) managerial skills are not available on the property but this criterion is not intended to permit subcontracting on the ground that there are not available a sufficient number of supervisory personnel possessing the skills normally held by such personnel; or (2) skilled manpower is not available on the property from active or furloughed employees; or (3) essential equipment is not available on the property; or (4) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or (5) such work cannot be performed by the carrier except at a significantly greater cost,

provided the cost advantage enjoyed by the subcontractor is not based on a standard of wages below that of the prevailing wages paid in the area for the type of work being performed and provided further that if work which is being performed by railroad employees in a railroad facility is subcontracted under this criterion, no employees regularly assigned at that facility at the time of the subcontracting will be furloughed as a result of such subcontracting.

28. Upon information and belief, BNSF has never subcontracted regularly scheduled maintenance, even to address high numbers of out-of-service locomotives in need of their regularly scheduled full maintenance.

29. The number of out-of-service BNSF locomotives in need of regularly scheduled maintenance has been high multiple times in the past, and employees represented by the Unions have worked overtime and even switched to mandatory six-day work weeks to reduce the number of out-of-service locomotives.

30. At present, and at all times material hereto, Defendant BNSF employs and has employed Mechanical Electricians, Machinists, and Railroad Sheet Metal Workers, all of whom are represented by the Unions, at approximately 25 different maintenance shops across its rail network where regularly scheduled inspection, maintenance, and necessary repair of locomotives is performed.

31. Other shops along BNSF's network – such as the Topeka, Kansas facility – are “back shops” primarily used for major overhauls and rebuilds of locomotives. These shops, however, do still occasionally perform routine inspection, maintenance, and repair work and have, in the past, temporarily halted overhauls and rebuilds to assist in addressing high locomotive inspection and maintenance backlogs.

32. In recent years, BNSF has removed a number of locomotives from service and placed them in storage. Returning a stored or “laid up” locomotive to service often requires more

rigorous inspections and repairs than are performed on an in-service locomotive due to a variety of reasons, such as prolonged periods without operating or vandals dismantling and stealing expensive materials and components, which render “laid up” locomotives unusable. Accordingly, “laid up” locomotives normally cannot be quickly reintroduced into the active fleet. As of early February 2023, the number of BNSF locomotives that were “laid up” in storage was approximately 1,750.

33. Since 2020, BNSF altogether closed or decreased its workforce at numerous maintenance shops across its network, including shops in Birmingham, Alabama; Barstow, California; Commerce, California; Richmond, California; Chicago, Illinois; Sioux City, Iowa; Kansas City, Kansas; Topeka, Kansas; Glendive, Montana; Alliance, Nebraska; Tulsa, Oklahoma; Memphis, Tennessee; Dayton, Texas; Fort Worth, Texas; Houston, Texas; Galveston, Texas; Silsbee, Texas; Spokane, Washington; Superior, Wisconsin; Donkey Creek, Wyoming; and Guernsey, Wyoming.

34. Although BNSF freight volumes suffered during the first part of 2020 due to the COVID-19 pandemic, according to BNSF’s own financial reports, volumes had recovered to pre-pandemic levels by the end of 2020.

35. Since 2020, BNSF has furloughed over 400 maintenance employees represented by the Unions performing work across BNSF’s network. Many furloughed maintenance employees were not recalled to service for many months even as demand for rail service returned starting in the summer of 2020. When BNSF finally started recalling furloughed employees in late 2021 and early 2022, many declined to return. As mechanical employees declined recall, BNSF did not immediately begin hiring to fill the positions those employees would have held.

36. Since 2020, 277 Mechanical Electricians represented by the IBEW were furloughed at some point in time. The IBEW has seen a net loss of 341 employees it represents. In 2022 alone, the IBEW saw a net loss of 111 Mechanical Electricians.

37. Since 2020, 32 Railroad Sheet Metal Workers represented by SMART-MD were furloughed at some point in time. SMART-MD has seen a net loss of 50 employees it represents since 2020.

38. Since 2020, 96 Machinists represented by IAM were furloughed at some point in time. IAM has seen a net loss of approximately 580 employees since 2020.

39. Beginning around September 2021, BNSF also began deferring regularly scheduled maintenance of its locomotives, limiting inspections and repairs to federal items only. In other words, locomotives that were in the shop were only inspected and repaired to meet the minimum standards required by federal law so they could continue to legally operate. All other necessary regularly scheduled maintenance was otherwise deferred.

40. On September 2, 2021, James Brackett of BNSF instructed BNSF's maintenance shop field leaders to complete federal items only inspections on locomotives entering the shop for their regularly scheduled inspection and maintenance. Brackett also included detailed instructions on how employees should mark general inspection and maintenance items as completed in the computer system – even though those items were not performed – to avoid a “defect” from being generated in BNSF's computer system indicating that the locomotive needed to be “shopped” for additional inspection and maintenance. A copy of that correspondence is attached to the Complaint as **Attachment 1**.

41. On September 21, 2021, BNSF General Foreman Paul McLeod forwarded a substantially similar email from James Brackett to employees at the Alliance, Nebraska facility with instructions to “*Sign off the general maintenance items; they do not need to be performed.*”

42. For fiscal year 2021, BNSF reported an operating income of nearly \$8.8 billion and a net income of nearly \$6 billion, a 14% and 16% increase from 2020, respectively. Those increases were accompanied by a 7% increase in total volume of freight compared to 2020. BNSF’s parent company, Berkshire Hathaway, announced that BNSF’s 2021 net income was the highest ever for the railroad.

43. As of the end of the third quarter of 2022, BNSF had reported an operating income of \$6.5 billion and a net income of \$4.5 billion, a 2% increase and 4% increase compared to the same periods in 2021, respectively, despite total volume of freight decreasing 5% compared to the same periods in 2021.

44. On about December 15, 2022, BNSF submitted a request to the FRA for an “enforcement discretion” that would temporarily relieve BNSF from its obligation to perform periodic inspections and annual tests for hundreds of locomotives. The FRA granted BNSF’s request, citing a “winter storm” as the reason for granting BNSF temporary relief. On about December 27, 2022, again in response to BNSF’s request, the FRA extended the “enforcement discretion” period until January 14, 2022.

45. Although the FRA granted BNSF an “enforcement discretion,” the procedures for petitioning the FRA for an emergency waiver of safety rules under 49 C.F.R. § 211.45 were never triggered because the FRA Administrator never declared an emergency event in December 2022. And the FRA has affirmatively stated that no waiver of the FRA’s safety rules was issued to BNSF.

46. On December 29, 2022, Henry Schafer of BNSF circulated an email to mechanical employees announcing that BNSF was planning to implement a “0% overtime initiative” in 2023 as part of BNSF’s efforts to reduce the mechanical budget by approximately \$51 million across its rail system. A copy of Schafer’s December 29 email is attached to the Complaint as **Attachment 2**.

47. On January 5, 2023, Derek Cargill, BNSF’s General Director of Labor Relations, sent a letter to representatives of the Unions giving notice of BNSF’s intent to “contract out for work needed to reduce the number of out of service locomotives in the system.” A complete and accurate copy of that letter is attached to the Complaint as **Attachment 3**.

48. The January 5 letter asserted that the need to contract out regularly scheduled maintenance was “driven by locomotive demand being beyond plan for over 12 months and early winter weather, resulting in a higher than normal number of bad order locomotives on the road and in the shop.” As a result, BNSF claimed that “it is necessary and essential to outsource up to 30 locomotives per week to third party vendors for the next 3-6 months.”

49. More specifically, BNSF’s January 5 letter indicated that “[t]here are currently approximately 1,000 units currently FIO’d [inspected for federal items only] which need their full maintenance completed... BNSF currently does not have the necessary manpower and shop capacity available on the property to perform this work within the necessary time frame, as there is an immediate need to address the high number of bad order locomotives on the road and in the shop.”

50. All the locomotives that BNSF indicated in its January 5 letter to the Unions would be sent to subcontractors for their regularly scheduled periodic inspections and maintenance were

included among the locomotives for which BNSF sought an “enforcement discretion” from the FRA in December 2022.

51. Although the emergency waiver of the FRA’s safety rules was never invoked or granted, the “enforcement discretion” BNSF received from the FRA nevertheless allowed BNSF ample time to redirect a number of locomotives overdue for their regularly scheduled inspections, maintenance, and necessary repairs to subcontractors’ maintenance shops.

52. On January 18, 2023, representatives of the IBEW and BNSF held a conference over BNSF’s subcontracting of regularly scheduled locomotive inspection, maintenance, and repair.

53. On January 27, 2023, Derek Cargill sent a follow-up a letter to IBEW General Chairman Jeff Allred further outlining BNSF’s reasons for its decision to subcontract the regularly scheduled locomotive inspection, maintenance, and necessary repair work.

54. In the January 27 letter, Cargill stated that “BNSF does not have the necessary manpower and shop capacity available on the property to address the unusually high out of service count and back log of scheduled maintenance events.” BNSF did not address, however, how permanent shop closures, force reductions, placing locomotives in storage, and deliberately deferring regularly scheduled maintenance likely affected the out of service count or maintenance backlog.

55. Despite BNSF’s acknowledgement in its January 27 letter that the “job market for electricians and other skilled crafts has been unusually tight over the last several years, resulting in a slower hiring pace at specific locations,” BNSF has not hired a sufficient number of employees to fill the electrician and machinist positions capable of performing the necessary locomotive inspection, maintenance, and repair work, and has not actively sought to hire any workers into

sheet metal worker positions. As stated in ¶¶ 36-38, the Unions have experienced net losses in the number of employees they represent since 2020, totaling approximately 750 workers.

56. BNSF's subcontracting plan has been implemented and is ongoing. As of February 8, 2023, subcontractors were completing the regularly scheduled inspection, maintenance, and repair of locomotives in 10.34 days per locomotive, on average, without accounting for the added time it takes to transport the locomotives to and from the subcontractors.

COUNT I
(Violation of the Railway Labor Act, 45 U.S.C. § 151 et seq.)

57. The allegations set forth in paragraphs 1 through 56 above are incorporated by reference.

58. Section 2, First of the RLA provides:

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.

59. Section 2, First is “more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.” *Chi. & N.W. Ry. v. Transportation Union*, 402 U.S. 570, 577 (1971). “Congress intended the enforcement of § 2 First to be overseen by appropriate judicial means.” *Id.* at 581.

60. Under Section 2, First, BNSF was obligated to exert every reasonable effort to maintain its agreement with the Unions and to deal with the Unions in good faith, *see Chi. & N.W. Ry.*, 402 U.S. at 575-78, which required BNSF to comply with its contractual mandate that the

work performed by employees represented by the Unions would not be subcontracted out unless “genuinely unavoidable.”

61. BNSF’s actions, including laying locomotives up in storage; permanently closing mechanical shops; furloughing hundreds of qualified mechanical employees and failing to timely recall them; deferring regularly scheduled inspections and maintenance of locomotives; failing to maintain adequate staffing levels capable of performing the necessary and foreseeable inspection and maintenance work; and planning to implement a 0% overtime initiative for 2023, left BNSF unable to timely perform the most basic locomotive inspection and maintenance functions of a railroad. BNSF’s current locomotive inspection backlog is not an accident or the result of events outside BNSF’s control, but is the result of BNSF’s own affirmative decisions. These actions demonstrate a failure by BNSF to exert every reasonable effort to maintain its agreements with the Unions.

62. Furthermore, BNSF’s deliberate course of action, culminating in its January 5 pronouncement that it was subcontracting regularly scheduled inspection, maintenance, and repair work historically performed by employees represented by the Unions, constitutes a bad-faith attempt to evade its contractual obligations.

63. BNSF’s justifications for its claim that “it is necessary and essential to outsource up to 30 locomotives per week” rely solely on the conditions created by BNSF’s own bad-faith course of action.

64. Accordingly, BNSF’s course of action and plan to subcontract the regularly scheduled inspection, maintenance, and repair work historically performed by employees represented by the Unions, as communicated in its January 5 letter, constitutes a violation of

BNSF's duty under Section 2, First of the RLA to "exert every reasonable effort to make and maintain agreements."

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) Declare, pursuant to 28 U.S.C. § 2201, that Defendant's course of action and plan to subcontract the regularly scheduled maintenance of locomotives violated its duty under Section 2, First of the RLA to exert every reasonable effort to make and maintain agreements;

(b) Enjoin Defendant from any and all acts and communications in furtherance of its plan to subcontract the regularly scheduled maintenance of locomotives as communicated in Defendant's January 5 letter to the Plaintiffs;

(c) Order Defendant to exert every reasonable effort to maintain its agreements with Plaintiffs as required by Section 2, First of the RLA; and

(d) Provide any other relief the Court deems just and proper.

Dated: February 24, 2023

Respectfully Submitted,

/s/ Quinlan B. Moll

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