APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-50544

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,

Plaintiff—Appellee,

versus

UNION PACIFIC RAILROAD COMPANY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas, El Paso
USDC No. 3:21-CV-122

April 13, 2022

Before DENNIS, HIGGINSON, AND COSTA, *Circuit Judges*.

GREGG COSTA, *Circuit Judge*:

The Railway Labor Act divests federal courts of jurisdiction over minor disputes between rail carriers and their employees. Most claims challenging employee discipline qualify as minor disputes that must be routed through arbitration. But there are exceptions. One is that the Act gives federal courts the authority to remedy carrier conduct motivated by

antiunion animus. The district court found that this was such a case, preliminarily enjoining the railroad's suspension of six union members—including all five actively-employed officers of the union's local division—over a fistfight at an offsite union meeting. Our primary question is whether the animus exception gave the district court jurisdiction to intervene.

I

Union Pacific is a national rail carrier operating in the western half of the United States. The Brotherhood of Locomotive Engineers and Trainmen is a labor union representing over 5,000 Union Pacific engineers. The union is made up of a number of local units or "divisions." Each provides representation to union members in its area. Elected representatives from each division also serve on general committees, which together negotiate collective bargaining agreements (CBAs) with carriers like Union Pacific.

Division 192 is the exclusive representative for Union Pacific employees in and around El Paso. During early 2021, tension arose within the division over the union's stance on "shoves." Engineers take shoves when they accept extra shifts at the request of the railroad. The CBA does not prohibit shoves, but the union views them as a safety risk and has asked its members to decline them. Not all of the division's members complied. One engineer in particular, David Cisneros, continued taking shoves. Two Division 192 officers—Local Chairman Peter Shepard and Vice Local Chairman Joe Reyes—confronted Cisneros about his behavior via text message and the division's Facebook page.

Mounting tensions ultimately erupted into an off-duty fist fight before a union meeting. Details about the fight are disputed but the record largely establishes the following.[1]

On March 9, 2021, Division 192 held a routine union meeting at a local restaurant. Cisneros arrived at the restaurant a half hour before the start time. A number of the division's officers, including Shepard and Reyes, had already arrived and were chatting in the parking lot. Cisneros approached Reyes and struck him repeatedly until he fell to the ground. Shepard and other division members attempted to separate the parties and a shouting match ensued. In the tumult, Cisneros crossed back over to Reyes, who had just risen to his feet, and punched him until he collapsed again. The two were finally separated and the union meeting took place without Cisneros or Reyes.

Almost two months later, on May 5, Cisneros filed a complaint with Union Pacific, alleging that he had been threatened and physically assaulted by Shepard and Reyes in retaliation for taking extra shifts. A company supervisor met with Cisneros about the incident and took statements from only two other employees: Jason Barnett and Mark Fraire. Barnett wrote that he had witnessed part of the altercation at the union meeting and helped to diffuse the situation. Fraire was not present for the fight but said that he also took shoves and had been subject to similar harassment by Reyes.

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[1] As the district court explained, the particulars of the fight are not material. The union's RLA claim turns on undisputed facts about Union Pacific's response to the fight.

About a week later, Union Pacific indefinitely suspended Shepard and Reyes without pay. It also suspended three other officers of Division 192 and one more union member. Cisneros's initial report to Union Pacific did not allege that those four were directly involved in the fight, and it appears they were simply bystanders. Union Pacific did not take statements from any of the suspended union members before disciplining them.

Notices of Investigations issued to all six individuals, telling them that they would be subject to disciplinary proceedings that could result in termination. Shepard and Reyes were charged with violating two Union Pacific policies: Item 10-I (forbidding "Violence & Abusive Behavior in the Workplace") and Rule 1.6 (forbidding "Discourteous," "Immoral," and "Quarrelsome" behavior). The bystanders were charged with violating Rule 1.6—in their case, for "fail[ing] to take any action" to stop the fight or "report the incident" to management.

Cisneros was not suspended or issued a notice, even though it is Union Pacific's policy to discipline every participant in a physical altercation. Union Pacific also declined to discipline Barnett, who gave a statement in support of Cisneros's claim, although he had not made any earlier efforts to report the incident.

The suspension of six union members—five of whom held office—effectively barred all of Division 192's leadership from Union Pacific's premises.[2] The suspended officers later testified that this damaged

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[2] The only remaining union officer, Steve Seale, was on medical leave at the time.

Division 192 because they could not perform most duties remotely.

Within days of the suspensions, the union sued Union Pacific in federal court. It alleged that Union Pacific was retaliating against the union for its shove policy by debilitating the union officers who sought to enforce it. This retaliation, the union argued, violated the section of the Railway Labor Act (RLA) that prohibits carrier interference with union activity. The union sought injunctive relief requiring Union Pacific to end its investigation of the suspended employees and ordering their return to work. Union Pacific responded with a motion to dismiss for lack of subject matter jurisdiction, arguing that the dispute needed to be arbitrated.

The district court held a preliminary injunction hearing. The union introduced the testimony of two suspended union members and the General Chairman of its western territory, as well as a number of documents. Union Pacific offered, among other things, the testimony of Cisneros and two Union Pacific supervisors involved in the disciplinary action. The day after the hearing, the court granted a preliminary injunction, finding a "strong likelihood" the union would prevail in showing that Union Pacific violated the RLA.

Union Pacific immediately appealed the injunction and unsuccessfully sought a stay in this court.

Meanwhile, the district court denied Union Pacific's motion to dismiss for lack of jurisdiction. It acknowledged that the RLA precludes federal jurisdiction over minor disputes between carriers and their employees. But it concluded that Union Pacific

had used its disciplinary proceedings "as pretext for undermining" the union. The case thus presented, in the court's view, an "exceptional circumstance" of antiunion animus in which federal court jurisdiction exists.

II

The first question is whether the district court had jurisdiction. *See Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 621 (5th Cir. 2017) (addressing jurisdiction in appeal of preliminary injunction).

Congress enacted the RLA to minimize disruptions to railway service caused by labor disputes. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). The Act establishes distinct procedures for resolving "major" and "minor" disputes between carriers and their employees. *Id.* at 252–53. "Major disputes," which relate to the collective bargaining process, give rise to federal court jurisdiction. *See Conrail v. Railway Labor Executives' Association*, 491 U.S. 299, 302–03 (1989); *see also Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945) (describing major disputes as ones that "relate[] to disputes over the formation of collective agreements or efforts to secure them"). On the other hand, most "minor disputes" or grievances must be arbitrated before administrative bodies called Adjustment Boards. *Conrail*, 491 U.S. at 303–04. Minor disputes typically involve "the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Conrail*, 491 U.S. at 303. The "distinguishing feature" of a minor dispute is that it "may be conclusively resolved by interpreting the existing agreement." *Id.* at 305.

Not all disputes that might be governed by an existing CBA require arbitration. Federal courts sometimes have a role, such as when carriers act out of "anti-union animus." *Association of Professional Flight Attendants v. Am. Airlines, Inc.*, 843 F.2d 209, 211 (5th Cir. 1988); Douglas Hall et al., THE RAILWAY LABOR ACT, § 5.III.A (4th ed. 2016) (explaining that, once a CBA is in place, "courts exercise jurisdiction principally to address claims that carrier actions reflect antiunion animus or undermine the effective functioning of the union or cannot be adequately remedied by administrative means"). The animus exception encompasses direct attacks on the union, as well as more clandestine attempts to punish employees for their union associations. *See, e.g.*, *Air Line Pilots Association, International v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515–17 (9th Cir. 1987) (carrier's diversion of business to a newly established non-union subsidiary); *Railway Labor Executives' Association v. Bos. & Me. Corp.*, 808 F.2d 150, 157–58 (1st Cir. 1986) (discriminatory treatment of every employee who chose to strike); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (retaliatory discharge of a single employee).

The animus exception is rooted in Section 2 of the RLA, which provides that no carrier "shall in any way interfere with, influence, or coerce" the employees in their "choice of representatives."[3] 45 U.S.C. § 152. That requirement and similar provisions of the RLA are judicially enforceable because noninterference

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[3] Applying the animus exception, courts look to the third subpart of Section 2 (cited above), as well as the fourth subpart, which protect employees' right to organize and operate their union free from carrier interference. *See* 45 U.S.C. § 152.

with employees' chosen representation is a statutory right crucial to the Act's functioning. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 545–46 (1937); *Tex. & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930).

We first addressed the animus exception sixty years ago. *See Brotherhood of Railroad Trainmen v. Cent. of Ga. Ry. Co* ("*Central of Georgia*"), 305 F.2d 605 (5th Cir. 1962). A railroad had started disciplinary proceedings against an employee who was a local union representative, alleging that his efforts to encourage other employees to pursue workers' compensation claims constituted "gross disloyalty." *Id.* at 606. The union sought a federal court injunction, claiming the railroad was (1) violating the employee's contractual rights by disciplining him for conduct that was not prohibited by the CBA and (2) interfering with the union by using a baseless charge as pretext to terminate the employee "and thereby to disqualify him as a representative." *Id.* at 606–07. We explained that the district court lacked jurisdiction over the first claim because it could be resolved by interpreting the employee's "personal rights" under the CBA and was thus a minor dispute. *Id.* at 607. In contrast, federal court jurisdiction existed over the claim that the railroad was "frustrat[ing] and undermin[ing] the effectiveness of [the] bargaining agent by securing his discharge for unfounded, false or baseless charges." *Id*. at 608–09. If it was true that the railroad had used its "disciplinary proceedings as a guise for . . . undermining the effectiveness of the Brotherhood," then the railroad had "obviously" violated Section 2, Third, of the RLA. *Id.* at 609. In that case, a federal court injunction would be "appropriate if not compelled." *Id.*; *see also Steele v. Louisville & N. R.*

Co., 323 U.S. 192, 207 (1944) (finding injunctive relief appropriate to remedy conduct that undermined the RLA's bargaining scheme).

Central of Georgia looks a lot like this case. The suspended employees are elected officers of their local union division, who were disciplined after attempting to persuade their peers to adopt a pro-union position in a policy dispute. The employees are charged with violating vague provisions of the carrier's code of conduct. And once again the union alleges that the charges are pretext for a plot to inhibit the employees' ability to act as union representatives and thereby weaken the union.

Despite the similarities, Union Pacific argues that *Central of Georgia* is not controlling because its holding was diluted, if not entirely gutted, by *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) ("*TWA*"). *TWA* clarifies that Section 2, Fourth, of the RLA addresses "primarily the precertification rights and freedoms of unorganized employees" and is not usually grounds for judicial intervention once the union has been certified. *Id.* Union Pacific reads this as meaning *Central of Georgia* no longer applies to animus claims raised by certified unions.

Union Pacific overstates the impact of *TWA* on *Central of Georgia* and its kin. Soon after *TWA* issued, we reiterated that "actions taken by a carrier for the purpose of weakening or destroying the union" remain a "special circumstance[] in which federal courts may assert jurisdiction over cases that would otherwise involve minor disputes." *Brotherhood of Railway. Carmen v. Atchison, T. & S. F. R. Co.*, 894 F.2d 1463, 1468 n.10 (5th Cir. 1990) (citing *Central of Georgia*, 305 F.2d at 608–09). In line with that reaffirmation,

district courts in this circuit continue to apply *Central of Georgia*. *See CareFlite v. Office and Professional Employees. International Union*, 766 F. Supp. 2d 773, 778–79 (N.D. Tex. 2011); *PHI, Inc. v. Office & Professional Employees International Union*, 2007 U.S. Dist. LEXIS 85085, at *21–27 (W.D. La. Nov. 16, 2007). Other circuits to address the animus exception since *TWA* have recognized its vitality.[4] *See Stewart v. Spirit Airlines, Inc.,* 503 F. App'x 814, 819 (11th Cir. 2013); *United Transportation Union v. AMTRAK*, 588 F.3d 805, 813 (2d Cir. 2009); *Wightman v. Springfield Terminal Ry*., 100 F.3d 228, 234 (1st Cir. 1996); *Fennessy v. Sw. Airlines*, 91 F.3d 1359, 1362–63 (9th Cir. 1996); *Brotherhood of Locomotive Engineers v.*

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[4] In the immediate aftermath of *TWA*, one circuit opinion suggested that the Supreme Court decision might affect the animus doctrine. *Central of Georgia's* author, Judge Brown, wrote an opinion as a visiting judge on the First Circuit, wondering whether his earlier ruling gave "sufficient deference" to the RLA's preference for arbitration in the postcertification context. *Nat'l R. Passenger Corp. v. International Association of Machinists & Aerospace Workers*, 915 F.2d 43, 53 n.15 (1st Cir. 1990). But Judge Brown's reservations did not gain traction in the courts. As mentioned above, courts (including the First Circuit) and commentators continue to recognize that the animus exception applies to postcertification disputes. *See, e.g.*, *Wightman v. Springfield Terminal Ry*., 100 F.3d 228, 234 (1st Cir. 1996) ("[W]e will intervene [in postcertification disputes] upon demonstration of carrier conduct reflecting anti-union animus, an attempt to interfere with employee choice of collective bargaining representative, discrimination, or coercion."). Indeed, the Second Circuit has persuasively explained that *TWA* is consistent with the well-recognized principle that antiunion animus is one of the few circumstances in which "a postcertification suit may be brought in federal court." *See United Transportation Union v. AMTRAK*, 588 F.3d 805, 813 (2d Cir. 2009).

Kan. City S. Ry., 26 F.3d 787, 795 (8th Cir. 1994); *Davies v. Am. Airlines, Inc.*, 971 F.2d 463, 468 (10th Cir. 1992); *but see IBT v. UPS Co.*, 447 F.3d 491, 502 (6th Cir. 2006) (acknowledging other circuits' adoption of the animus exception but reserving the issue for a future case). The treatise focused on the RLA also recognizes that courts can exercise jurisdiction over a disciplinary proceeding that "raises issues that can be resolved by interpretation of a [CBA]" if "the plaintiff can demonstrate antiunion animus or antiunion discrimination." Hall et al., *supra*, at § 5.III.D.4; *see also* ALI-ABA Continuing Legal Education, *Judicial Enforcement of the Railway Labor Act*, SS051 ALI-ABA 483, 501 (2011) ("Courts have jurisdiction over adequately pleaded coercion claims and may grant injunctive relief, notwithstanding the existence of a minor dispute, if such claims are borne out by the facts.").

It makes sense that no court has read *TWA* as overriding the animus exception. A Supreme Court decision overrules circuit precedent only when it does so "unequivocal[ly]." *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013). *TWA* did not involve any claim that a carrier had hidden an attempt to weaken a union behind a facially minor dispute. The *TWA* parties had just concluded a very public battle over the terms of their new CBA. *See* 489 U.S. at 429. They had already exhausted the administrative procedures mandated by the RLA and, at that the stage, the Court held only that the Act did not prohibit the carrier's adoption of self-help measures, which were not "inherently destructive" of union activity or the framework of the RLA. *See id.* at 442. *TWA* did not address a situation in which there was "discrimination or coercion against the representative," which can result in a breakdown of

the "essential framework for bargaining." *See Association of Professional Flight Attendants*, 843 F.2d at 211. Nor was it interpreting Section 2, Third, of the RLA—the provision we applied in recognizing the animus exception. *See Central of Georgia*, 305 F.2d at 608.

Animus claims like the one at bar may be litigated in federal court because they cannot "be conclusively resolved" by interpreting or applying a CBA. *See Conrail,* 491 U.S. at 305; *Andrews*, 406 U.S. at 324 (qualifying an employee's wrongful discharge claim as a minor dispute because it "stem[med] from differing interpretations of the collective-bargaining agreement"). Unlike an employee's "personal" claim challenging discipline, which can be fully resolved by interpreting and applying the CBA and thus must be arbitrated, *see Central of Georgia*, 305 F.2d at 607–08, the animus claim is a statutory right neither created nor defined by the parties' contract. The question to be answered in this case, for example, is whether the railroad interfered with the employees' choice of representation. 45 U.S.C. § 152. That is a statutory question, not a contractual one. The Supreme Court has long recognized that "but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act." *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943). It has confirmed that principle since *TWA*, explaining that "the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." *Hawaiian Airlines*, 512 U.S. at 256; *see also Fennessy*, 91 F.3d at 1362 (finding

judicial enforcement of animus claims to be consistent with *Hawaiian Airlines*).[5]

Union Pacific also argues that "[a] preliminary injunction may be issued in a case involving a minor dispute only in exceptional circumstances." *See Allied Pilots Association v. Am. Airlines, Inc.*, 898 F.2d 462, 465 (5th Cir. 1990) (instructing that injunctions should only be granted in minor disputes "where necessary to preserve the jurisdiction of the grievance procedure, or where a disruption of the status quo would result in irreparable injury . . ." (quoting *IBT, Local 19 v. Sw. Airlines Co.*, 875 F.2d 1129, 1136 (5th Cir. 1989)). But this is just another way of framing the RLA's general prohibition against judicial intervention in minor disputes. We have explained that antiunion animus is one of the "exceptional circumstances" that warrants federal jurisdiction. *Brotherhood of Railway Carmen*, 894 F.2d at 1468 n.10. Indeed, the district court deemed Union Pacific's selective discipline suspending five division leaders an "exceptional circumstance" warranting court intervention. And, once a court has jurisdiction to intervene in a dispute governed by the RLA, there is no heightened standard for injunctive relief. *See Conrail*, 491 U.S. at 302–03 (explaining that

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[5] In cases declining to apply the animus exception, the proper interpretation of a CBA term was "[t]he crux of the dispute." *See, e.g., Am. Airlines*, 843 F.2d at 212 (qualifying a dispute over a carrier's refusal to let employees wear a controversial button as minor because it turned on the meaning of the dress code in the CBA); *Brotherhood of Railway Carmen*, 894 F.2d at 1467 (affirming dismissal of a claim about a carrier's voluntary resignation program because it "turn[ed] on interpretation of the contractual agreements between the parties").

violations of the statutory requirements of the RLA may be enjoined "without the customary showing of irreparable injury").[6]

Federal courts thus have jurisdiction over postcertification disputes alleging that railroad conduct motivated by antiunion animus is interfering with the employees' "choice of representatives."[7] *See* 45 U.S.C. § 152; *Central of Georgia*, 305 F.2d at 608–09.

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[6] Union Pacific also maintains that the Norris-LaGuardia Act (NLGA) prohibits courts from granting injunctions in labor disputes without first finding the enjoined action would cause "substantial and irreparable injury" to the moving party. 29 U.S.C. § 107(b). But the NLGA "expresses a basic policy against the injunction of activities of labor unions. . . . [It] does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *Chi. & N. W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 581 (1971). To accommodate the "competing demands" between these statutes, the Supreme Court and this court have repeatedly held that courts enforcing the RLA are not required to follow the NLGA's procedures. *See, e.g., Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 445 (1987); *BNSF Ry. Co. v. SMART*, 973 F.3d 326, 338 (5th Cir. 2020).

[7] Of course, jurisdiction does not depend on the claim being successful. A plaintiff need only allege a "colorable" claim over which there is federal jurisdiction to allow a federal court to decide the dispute. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006); *see OJSC Ukrnafta v. Carpatsky Petrol. Corp.*, 957 F.3d 487, 496 (5th Cir. 2020) ("[T]he plaintiff need not, and often will not, succeed on the federal claim for a federal court to be able to decide it."); *see also Central of Georgia*, 305 F.2d at 609 (recognizing that federal district court had jurisdiction over animus claim and remanding so it could consider whether union proved that claim).

III

That leaves the factbound question of whether Union Pacific engaged in that unlawful interference when it suspended the five union officers. We review the grant of a preliminary injunction for abuse of discretion. *See Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018). Factual findings that support the injunction are reviewed for clear error while legal rulings are reviewed *de novo*. *See id*. Deference is especially warranted on the question of antiunion animus. *See Independent Union of Flight Attendants v. Pan Am. World Airways, Inc*., 789 F.2d 139, 143 (2d Cir. 1986) (noting reluctance "to overturn district court findings as to motive or intent" in this area).

Although the district court found all elements of a traditional preliminary injunction satisfied, Union Pacific focuses only on whether the union showed a substantial likelihood of success on its interference claim. And most of its challenge to substantial likelihood of success is rooted in the jurisdictional argument we have already addressed. Beyond the jurisdictional issue, the propriety of the injunction largely boils down to a factual dispute: Did the district court abuse its discretion in concluding that the disciplining of six union members, including five officers, likely was pretext for the railroad's efforts to "interfere with, influence, or coerce" employees in their choice of representatives. 45 U.S.C. § 152 (Third).

We see no abuse of discretion. The district court concluded that the union was likely to succeed in showing that the discipline was "motivated by a desire to weaken the local division." The following facts amply support that determination: (1) Union Pacific

indefinitely suspended all of Division 192's active-duty leadership because of a dispute they had with an employee who favored the company's position in a policy dispute; (2) Union Pacific premised the discipline on a fight that occurred off-duty and outside the workplace, even though four of the suspended union officials did not participate in the fight; (3) the pro-company employee who started the fight was not disciplined, despite the company's policy of disciplining all participants in a physical altercation; and (4) Union Pacific took a statement from the pro-company employee but did not take a statement from the union officials before suspending them. Indeed, the railroad's suspension of effectively all of Division 192's elected leadership presents a much stronger case of interference with the employees' choice of representatives than the case recognizing such a claim. *Contrast Central of Georgia*, 305 F.2d at 609 (recognizing that pretextual disciplining of even one employee can state an interference claim); *see also Conrad*, 494 F.2d at 918 ("Anti-union motivation invalidates even a discharge which could be justified on independent grounds.").

Unable to dispute most of these facts, Union Pacific argues that an interference claim needs to undermine the entire union, not just a local unit like Division 192. No authority supports that view. Before and after *TWA*, courts exercised jurisdiction over interference claims involving disciplinary actions that targeted an individual union representative or a particular union branch. *See, e.g.*, *Central of Georgia*, 305 F.2d at 606; *Conrad*, 494 F.2d at 918; *Fennessy*, 91 F.3d at 1363. Nor does the RLA's text create a national/local distinction. It says that carriers shall not "seek in any manner" to interfere with employees' "choice of representatives"; there is no mention of

particular offices or duties those representatives must have. 45 U.S.C. § 152(3).

The district court did not abuse its discretion in concluding that the union is likely to prevail in showing that Union Pacific's suspension of effectively all the division's elected representatives amounted to the interference the RLA prohibits.

* * *

We AFFIRM the injunction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Hon. David Briones Mag. Judge Schydlower Civil Action No. 3:21-cv-00122-DB-LS June 11, 2021

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

Having considered the Motion for Temporary and Preliminary Injunction of Plaintiff Brotherhood of Locomotive Engineers and Trainmen ("BLET," "Union," or "Plaintiff"), a division of the Rail Conference of the International Brotherhood of Teamsters, the briefs and other documentation filed in support of and in opposition to that Motion, and the testimony offered at the hearing, the Court hereby GRANTS Plaintiffs' Motion. For the reasons provided below, Defendant Union Pacific Railroad Company ("UP," or "Carrier" or "Defendant") is temporarily and preliminarily enjoined from interfering with the

federal, Railway Labor Act ("RLA") protected rights of its employees in the crafts or classes of locomotive engineers and trainmen represented by the BLET, as outlined in detail below.

The bases for this Order are as follows:

1. Plaintiff is a 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 crafts or classes of locomotive engineers and trainmen employed by UP. Defendant is a rail "carrier" within the meaning of the RLA, 45 U.S.C. § 151, First.

2. It is essential that the Court issue temporary and preliminary injunctive relief to prevent immediate and irreparable injury.

3. Unlawful acts have been threatened by Defendant and will be committed unless restrained and have been committed and will be continued unless restrained.

4. Plaintiff will suffer substantial immediate, irreparable loss and damage to its and its members' rights to collectively bargain through the labor organization of their choice guaranteed, *inter alia*, by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq*.

5. Unless the petitioned-for Order is issued, substantial and irreparable injury to employees' rights under the RLA to engage in organizing and union activity "without interference, influence, or coercion," pursuant to 45 U.S.C. § 151, Third and Fourth, will result.

6. While Plaintiff would be irreparably harmed by UP continuing to interfere with BLET's and its members' rights under the RLA, UP would suffer no

adverse consequences if required to comply with its obligations under the RLA.

7. An injunction is in the public interest because the public has a strong interest in vindicating the RLA's public policy of permitting employees to organize, choose their own representatives and bargain collectively free from interference, influence, or coercion by carriers; hence, the interests of the public are aligned with Plaintiff herein.

8. Unless each item of relief is granted, far more injury will be done to Plaintiff, whose members are individual employees lacking in economic power and whose members' RLA-protected rights are being violated, than to the Defendant, an economically healthy corporation that does not have any right to interference, influence or coerce employees, as its has been found to have done.

9. There is no adequate remedy at law for the stifling of rights to be free of undue interference, influence or coercion, given that discipline of BLET Division 192 Local Chairman Peter Shepard, who also is Division 192's delegate to the Union's General Committee, President David Butler, Secretary-Treasurer John Moye, Third Vice Local Chairman Joe Reyes, First Vice Local Chairman and Alternate Trustee Kevin Seale, and member Joe Telehany sends a clear message that the Carrier is willing to violate the law to coerce employees in their choice of representatives.

10. There is no public officer who has been charged with the duty to protect Plaintiff and its members' rights to be free of discrimination and such unlawful acts in violation of the RLA.

11. Plaintiff has exerted every reasonable effort to settle such dispute.

12. This case was heard on Plaintiffs Motion for Temporary and Preliminary Injunction. Defendant has been given timely notice of the Plaintiffs Motion and was present to argue against the issuance of this Order.

13. In finding of the above-enumerated facts, and after due consideration, the Court has concluded that there is a strong likelihood that Plaintiff will prevail in their arguments that the actions restrained by this Order would violate the RLA.

In light of these findings, IT IS HEREBY ORDERED THAT the Plaintiff's Motion for Temporary and Preliminary Injunctive Relief is GRANTED; and it is further

ORDERED that Defendant UP, its officers, agents, employees, attorneys and representatives, successors and predecessors in interest are immediately restrained and enjoined from engaging in surveillance of the Union and its members; and it is further

ORDERED that Defendant UP, its officers, agents, employees, attorneys and representatives, successors and predecessors in interest are immediately restrained and enjoined from unlawfully interfering with the Union in its representational capacities, including without limitation disciplining members of the Union and Union leadership for their involvement or support for the Union and its interests, objectives and/or concerted protected activities; and it is further

ORDERED that Defendant UP, its officers, agents, employees, attorneys and representatives,

successors and predecessors in interest are immediately restrained and enjoined from unlawfully interfering with, influencing, and/or coercing UP employees represented by the BLET and its representatives; and it is further

ORDERED that Defendant UP immediately reinstate to work in their former positions of employment the affected BLET Division 192 members, including Local Chairman Peter Shepard, President David Butler, Secretary-Treasurer John Moye, Third Vice Local Chairman Joe Reyes, First Vice Local Chairman and Alternate Trustee Kevin Seale, and Member Joe Telehany; and it is further

ORDERED that Defendant UP immediately conspicuously post copies of this Court's order at Defendants' **EL PASO RAIL YARD OPERATIONS** at locations used by UP BLET crew for a period of one-hundred eighty (180) days: and

This Order shall remain in full force and effect until further order of the Court. The Court upon due consideration sets bond at $1,000.

Dated 6-11-2021

/s/ David Briones
David Briones
U.S. District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,	§	
Plaintiff,	§	**EP-21-CV -122-DB**
v.	§	
UNION PACIFIC RAILROAD COMPANY,	§	July 2, 2021
Defendant.	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant Union Pacific Railroad Company's ("UP") "Amended Motion to Dismiss with Incorporated Memorandum of Law" ("Motion") filed on June 1, 2021. ECF No. 11. Plaintiff Brotherhood of Locomotive Engineers and Trainmen ("BLET") filed a "Memorandum in Opposition" ("Response") on June 22, 2021. ECF No. 44. After due consideration, the Court will deny UP's Motion.

BACKGROUND

This case presents a cautionary tale about how wounded pride and delicate egos—of grown men—can escalate a personal conflict to a federal court case, drawing in large institutions and their competing

agendas. Nevertheless, those institutions—a union and a corporation—are now parties before the Court, and the Court must now adjudicate the matter. Accordingly, the Court now considers the instant Motion.

The legal issues in this case arise from UP's indefinite suspension and disciplinary investigation of five officers and one other member of BLET Division 192. Comp. ¶¶ 2, 12-13, ECF No. 1; Mot. 2-3, ECF No. 11. BLET is a labor union representing locomotive engineers and trainmen employed by UP. Compl. ¶ 4, ECF No. 1. Headquartered in El Paso, Texas, BLET Division 192 ("local division") is a local division of BLET and has "the exclusive responsibility of providing day-to-day representation to the BLET-represented employees working for [UP]." *Id.* ¶ 6.

But the dispute in this case has more personal origins. Three union members—local division Local Chairman Peter Shepard ("Mr. Shepard"), Vice Local Chairman Joe Reyes ("Mr. Reyes"), and David Cisneros ("Mr. Cisneros")—engaged via Facebook and text message in an argument over Mr. Cisneros taking "shoves." Facebook Posts and Text Messages, ECF 11-1 at 7-26; Compl. ¶ 23, ECF No. 1. A locomotive engineer takes a "shove" when he voluntarily takes extra work, at the request of UP, outside of his regular assignment. Compl. ¶ 23, ECF No. 1; Mot. 2, ECF No. 11. BLET characterizes the taking of "shoves" as "pro-company," and the local division had requested that union members not take them. Compl. ¶ 23, ECF No. 1.

The argument between the three union members escalated into a physical altercation immediately before an off-duty, off-property union meeting.[1] Compl. ¶¶ 2, 14, ECF No. 1. After the fight, Mr. Shepard and Mr. Reyes were suspended, indefinitely and without pay, by UP. Compl. ¶ 2, ECF No. 1. UP also suspended, indefinitely and without pay, local division President David Butler, Secretary-Treasurer John Moye, Vice Local Chairman and Alternate Trustee Kevin Seale, and union member Joe Telehany. *Id.* BLET maintains that those four were bystanders to the fight. *Id.* ¶ 14. Mr. Cisneros was not suspended. *Id.* ¶ 22.

UP also initiated disciplinary investigations into the six suspended union members. *Id.* ¶¶ 13, 15-17; Mot. 2-3, ECF No. 11. "UP has charged all these men with failing to intervene in the fight and failing to report the incident at the Union meeting to UP

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[1] The parties dispute some of the details of the fight, such as who was the aggressor and who initiated physical contact. *See generally* Hearing Transcript, ECF No. 39. Much of the June 10, 2021 hearing was devoted to establishing these details. *See id*. And, to establish these details, BLET sought to admit a security camera video purportedly showing the fight. *See* Def.'s Mot. to Exclude Video Evid., ECF No. 29; Pl.'s Mot. to Admit and Proffer of Video Evid., ECF No. 41; Def.'s Memo. Of Law in Opp., ECF No. 45. The Court ultimately excluded the video evidence. Order, ECF No. 48.

However, the Court does not find these disputed details, even if established, determinative in deciding the instant Motion. Both parties agree that there was a fight and that UP stated the fight was the reason for disciplining the union members. *See* Compl. ¶¶ 12-13, ECF No. 1; Mot. 2-3, ECF No. 11. Accordingly, the Court will base its decision solely on these undisputed facts, although it could also resolve disputed facts in deciding a Rule 12(b)(1) motion. *Ramming*, 281 F.3d at 161.

management." Compl. ¶ 15, ECF No. 1. In addition, UP charged Mr. Shepard and Mr. Reyes with violation of "Item 10-I: Union Pacific Railroad Policies—Policy to Address Violence & Abusive Behavior in the Workplace." *Id.* ¶ 20.

BLET argues that the policy against violence does not authorize discipline for off-duty conduct at a union meeting. *Id.* ¶¶ 20-21. In its Complaint, BLET requests injunctive relief including reinstatement of the six suspended union members to their former positions and termination of the disciplinary investigations, which BLET characterizes as "surveillance of the Union and its members." *Id.* at 16. BLET also requests "a declaratory judgment that WIT s conduct in taking adverse action against said Union members was in violation of . . . the Railway Labor Act [("RLA")]." *Id.* at 17. Finally, BLET requests monetary damages. *Id.*

LEGAL STANDARD

In its Motion, UP argues that this Court should dismiss Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") for lack of jurisdiction. Mot. 1, ECF No. 11.

Rule 12(b)(1) permits dismissal if a court lacks subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). A case is presumed to lie outside the scope of a federal court's subject-matter jurisdiction, and the burden of establishing otherwise rests with the party seeking to invoke the court's jurisdiction. *Id.* "It is incumbent on all federal courts to dismiss an action whenever it

appears that subject matter jurisdiction is lacking." *Stockman v. Fed Election Comm'n,* 138 F.3d 144, 151 (5th Cir. 1998).

In evaluating a motion to dismiss pursuant to Rule 12(b)(1), a court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996)).

Rule 12(b)(1) challenges to subject-matter jurisdiction come in two forms: "facial" attacks and "factual" attacks. *See Lawrence v. Dunbar,* 919 F.2d 1525, 1528-29 (11th Cir.1990); *Paterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1981). A Rule 12(b)(1) motion is a factual attack when accompanied by supporting evidence challenging the court's jurisdiction, as UP's Motion does. *Paterson,* 644 F.2d at 523; Exhibits to Mot., ECF No. 11-1. A plaintiff responding to a factual attack on the court's jurisdiction generally bears the burden of proving by a preponderance of the evidence that the court has subject-matter jurisdiction. *Paterson,* 644 F.2d at 523.

ANALYSIS

In its Complaint, BLET requests injunctive relief to reinstate the six suspended union members and stop UP's disciplinary proceedings against them because the suspensions and proceedings violate Section 2, Third and Fourth, of the RLA, 45 U.S.C. § 152 ("§ 152"). Compl. ¶¶ 2, 23, 38-47. In the instant Motion, UP seeks to dismiss BLET's Complaint for

lack of jurisdiction because disciplinary proceedings are "'minor dispute[s]' within the meaning of the RLA and must be resolved through the RLA's exclusive dispute resolution processes." Mot. 4, ECF No. 11. Further, UP argues that BLET's claims do not rise to a level warranting jurisdiction for the Court to issue injunctive relief under the RLA. *Id.* at 9.

The Court holds that this case presents the exceptional circumstance of a carrier taking actions to weaken a union and thus warranting the Court's jurisdiction under § 152, notwithstanding that the case may also present a minor dispute. The Court finds its holding consistent with case law on the RLA.

1. This Case Presents an Exceptional Circumstance Warranting the Court's Jurisdiction Under § 152 Notwithstanding That It May Also Present a Minor Dispute.

"Generally, RLA claims are classed as either 'major' disputes, which fall within district courts' narrow jurisdiction, or 'minor' disputes, which are subject to binding arbitration." *Wright v. Union Pac. R.R. Co.,* 990 F.3d 428, 435 (5th Cir. 2021) (citing *Consolidated Rail Corp. v. Railway Labor Execs.' Assn.,* 491 U.S. 299, 303 (1989)). "'Major' disputes concern 'the formation of collective agreements or efforts to secure them. . . They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Id.* (quoting *Elgin, J & E. Ry. Co. v. Burley,* 325 U.S. 711, 723 (1945)). "In major disputes, 'district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures, without the customary showing of irreparable injury.'" *Id.* (quoting *Consolidated Rail Corp.,* 491 U.S. at 303).

Minor disputes, on the other hand, concern an already existing and certified collective agreement and "relate[] either to the meaning or proper application of a particular provision [of the agreement] with reference to a specific situation or to an omitted case." *Consolidated Rail Corp.,* 491 U.S. at 303 (quoting *Burley,* 325 U.S. at 723). For example, "[a] minor dispute concerns grievances or the interpretation or application covering rates of pay, rules, or working conditions." *Ballew v. Cont '1 Airlines, Inc.,* 668 F.3d 777, 782-83 (5th Cir. 2012) (quoting *Mitchell v. Conti Airlines, Inc.,* 481 F.3d 225, 230-31 (5th Cir. 2007)).

Generally, minor disputes are resolved through the RLA's mandatory arbitration procedures via adjustment boards, not through federal court litigation. As the Supreme Court has stated:

> The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so called "minor" disputes within the Adjustment Board and out of the courts.

Union Pac. R.R. Co. v. Sheehan, 439 U.S. 89, 94 (1978) (internal citations omitted).

Accordingly, the Fifth Circuit has held that "the RLA requires minor disputes that cannot be settled through internal grievance procedures to be resolved through a mandatory, exclusive, and comprehensive resolution process before a claims adjustment board

established by the employees' union and the employer through the [collective agreement]." *Ballew,* 668 F.3d at 783.

However, the Fifth Circuit has recognized that federal courts have jurisdiction over even minor disputes in the "exceptional circumstance involv[ing] actions taken by a carrier for the purpose of weakening or destroying a union." *Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry. ("Railway Carmen"),* 894 F.2d 1463, 1468 n.10 (5th Cir. 1990), *cert. denied,* 498 U.S. 846 (1990) (citing *Bhd. of R. R. Trainmen v. Cent. of Georgia Ry. Co. ("Central of Georgia"),* 305 F.2d 605, 608 (5th Cir. 1962)). Under such an exceptional circumstance, federal courts can have jurisdiction under "RLA § 152 [which] protect[s] employees' freedom to organize and to make choice of their representatives without company interference or pressure." *Wright,* 990 F.3d at 435 (quoting *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants ("TWA"),* 489 U.S. 426,440 (1989)) (internal quotations omitted). "Conduct in violation of [§ 152] is subject to restraint by federal court injunction, regardless of whether such conduct also generates a major dispute." *Ruby v. TACA Int'l Airlines, S.A.,* 439 F.2d 1359,1364 (5th Cir. 1971).

In this case, UP argues that its suspension of the union members are disciplinary matters which are minor disputes within the exclusive jurisdiction of the adjustment board. Mot. 6-9, ECF No. 11. BLET responds "that UP has tried to weaken the Union by suspending all its available local union leaders based upon an off duty, off premises fight." Resp. 3, ECF No. 44. Thus, BLET argues that because this case is characterized by the exceptional circumstance of UP trying to weaken the union, the Court has jurisdiction.

Id. (citing *Ry. Carmen,* 894 F.2d at 1468 n.10). BLET cites *Central of Georgia* as an instance when the Fifth Circuit held that discipline of a union official was motivated by weakening or destroying the union, thus justifying jurisdiction in federal court notwithstanding that the case may have also presented a minor dispute. *Id.* at 3-5 (discussing *Cent. of Georgia,* 305 F.2d 605).

The Court agrees with BLET. The Court finds substantial evidence that UP is trying to weaken the union, thus creating the exceptional circumstance that warrants the Court's jurisdiction. *Ry. Carmen,* 894 F.2d at 1468 n.10. Four of the union members suspended by UP were not involved in the fight but were merely bystanders. Compl. ¶¶ 2, ECF No. 1. Three of those four were officers of the local division; thus, a substantial portion of the local division's leadership was suspended. *Id.* The individual involved in the fight arguing for the "pro-company" position, Mr. Cisneros, was not suspended. *Id.* ¶¶ 22-23; Resp. 5, ECF No. 44. However, the two individuals involved in the fight arguing against the "pro-company" position, Mr. Shepard and Mr. Reyes, were suspended. Compl. ¶¶ 2, 22-23, ECF No. 1; Resp. 5, ECF No. 44. The selective suspensions were contrary to UP's general practice of taking all participants of a fight out of service. Compl ¶ 22, ECF No. 1; Resp. 5, ECF No. 44.

The aforementioned facts lead the Court to the conclusion that, in disciplining the union members, UP was motivated by a desire to weaken the local division and used the fight as a pretext for its actions. Thus, the case has the exceptional circumstance that warrants the Court's jurisdiction notwithstanding that it may also present a minor dispute. *Ry. Carmen,*

894 F.2d at 1468 n.10. BLET has met its burden of proving by a preponderance of the evidence that the Court has subject-matter jurisdiction. *Paterson,* 644 F.2d at 523.

2. Finding Subject-Matter Jurisdiction is Consistent with Case Law on the RLA.

The Court is also convinced by this case's similarity to *Central of Georgia* that the Court has jurisdiction. 305 F.2d at 608. In *Central of Georgia,* a railroad employee and union representative, Byington, was investigated and disciplined by the railroad company. *Id.* at 606. "The charge against Byington was that as an employee of the Railroad, his efforts to prevent or discourage employees of the Railroad . . . from making settlement claims involving personal injuries, and his improperly making unsolicited calls on persons for the purpose of inducing . . . lawsuits against the Railroad constituted gross disloyalty to the Railroad by inciting and promoting lawsuits against the company." *Id.* (internal citations and alterations omitted). In finding jurisdiction under § 152 to enjoin the disciplinary proceeding, the Fifth Circuit explained that:

> On the one hand, status as bargaining representative does not insulate Byington as an employee from lawful disciplinary action. On the other hand, the Railroad may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood, or Byington as its agent, in their statutory responsibilities as bargaining representatives.

Id. at 609 (internal citations omitted).

Like Byington in *Central of Georgia,* the suspended union members in this case, five of them local division officials, were disciplined after acting contrary to UP's interest. Compl. ¶ 1123, ECF No. 1. Whereas Byington was acting contrary to the company's interest by discouraging employees from settling claims and encouraging lawsuits, the local division officials were requesting that union members not take shoves. *Id.*

UP argues that union representatives are not shielded from disciplinary actions by their status as representatives. Mot. 8, 15, ECF No. 11. The Fifth Circuit in *Central of Georgia* acknowledged that "status as bargaining representative does not insulate . . . an employee from lawful disciplinary action." 305 F.2d at 609. However, the Fifth Circuit explained that "the Railroad may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the [union or its agents] in their statutory responsibilities as bargaining representatives." *Id.* The Court finds that UP has used disciplinary proceedings concerning the fight as a pretext for undermining BLET. *See supra* 7-8. Thus, the Court has jurisdiction to enjoin the disciplinary proceedings. *Cent. of Georgia,* 305 F.2d at 609.

UP argues that the cases cited by BLET—*Central of Georgia,* 305 F.2d 605, and *Railway Carmen,* 894 F.2d 1463—are limited by the Supreme Court *case TWA,* 489 U.S. 426. Mot. 13, ECF No. 11. UP asserts that *TWA* holds that § 152 "address[es] primarily the ***precertification*** rights and freedoms of ***unorganized employees."*** *Id.* at 9 (quoting *TWA,* 489 U.S. at 440) (emphasis by UP). Therefore, UP argues, the Court does not have jurisdiction in this post-certification context with organized employees. *Id.* at 9-15.

The Court does not read *TWA* and subsequent cases as limiting either *Central of Georgia* or *Railway Carmen,* the latter decided after *TWA.* Following *TWA,* the First Circuit stated in *Amtrak v. JAM*:

> In a post-certification controversy such as the one here, judicial intervention under [§ 152] is limited to circumstances where the employer's conduct has been motivated by anti-union animus or an attempt to interfere with its employees' choice of their collective bargaining representative. . . or constitutes discrimination or coercion against the representative, . . . or involves acts of intimidation [which] cannot be remedied by administrative means. . . . Judicial intervention would also be permitted under [§ 152] if the employer engaged in a fundamental attack on the collective bargaining process, or a direct attempt to destroy a union.

915 F.2d 43, 51 (1st Cir. 1990) (internal quotations and citations omitted); *see also* Mot. 10, ECF No. 11 (quoting the above passage).

Thus, while *TWA* may hold that § 152 protects *"primarily* the precertification rights and freedoms of unorganized employees," 489 U.S. at 440 (emphasis added), courts post-*TWA* have still found jurisdiction possible in the post-certification context when the employer's conduct is "motivated by anti-union animus." *See, e.g., LAM,* 915 F.2d at 51. This is consistent with the "exceptional circumstance" exception in *Central of Georgia,* 305 F.2d at 608, and *Railway Carmen,* 894 F.2d at 1468 n.10. And courts, including the Fifth Circuit, have continued to recognize the "exceptional circumstance" exception after *TWA. See, e.g., Allied Pilots Ass'n v. Am. Airlines, Inc.,* 898 F.2d 462, 465-66 (5th Cir. 1990); *PHI, Inc. v. Off & Pro. Emps. Intl Union,* No. CIV.A. 06-1469, 2007 WL 4097345, at *4 (W.D. La. Nov. 16, 2007), *aff'd*, 440 F. App'x 394 (5th Cir. 2011).

CONCLUSION

The Court holds that this case presents the exceptional circumstance of UP taking actions to weaken BLET, thus warranting the Court's jurisdiction under § 152.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Union Pacific Railroad Company's "Amended Motion to Dismiss with Incorporated Memorandum of Law," ECF No. 11, is **DENIED.**

SIGNED this 2nd day of **July 2021.**

/s/ David Briones
THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, Plaintiff,	:	Case No. 3:21-cv-00122
v.	:	
UNION PACIFIC RAILROAD COMPANY, Defendant.	:	August 9, 2021

ORDER

On this date, the Court considered the parties' Joint Motion for Stay of Proceedings Pending Appeal. After considering the Motion, the Court finds the Motion shall be **GRANTED**.

IT IS THEREFORE ORDERED the parties' Joint Motion for Stay of Proceedings Pending Appeal is **GRANTED**.

IT IS FURTHER ORDERED that all proceedings in this case and any applicable deadlines are hereby **STAYED** pending disposition of the appeal filed with the United States Court of Appeals for the Fifth Circuit by Defendant Union Pacific Railroad Company.

SO ORDERED.

SIGNED this 9th day of Aug., 2021.

/s/ David Briones
HON. DAVID BRIONES
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, Plaintiff,	:	Case No. 3:21-cv-00122
v.	:	
UNION PACIFIC RAILROAD COMPANY, Defendant.	:	June 1, 2022

ORDER

On this date, the Court considered the parties' Joint Motion for Continuation of Stay of Proceedings. After considering the Motion, the Court finds the Motion shall be **GRANTED**.

IT IS THEREFORE ORDERED the parties' Joint Motion for Continuation of Stay of Proceedings Pending Appeal is **GRANTED.**

IT IS FURTHER ORDERED that the Order staying all proceedings in this case and any applicable deadlines issued by this Court on August 9, 2021 shall continue in effect pending disposition of any petition for certiorari filed with the United States Supreme Court by Defendant Union Pacific Railroad Company.

SO ORDERED.

SIGNED this 1st day of June, 2022.

/s/ David Briones
HON. DAVID BRIONES
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-50544

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,

Plaintiff—Appellee,

versus

UNION PACIFIC RAILROAD COMPANY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:21-CV-122

May 10, 2022

ON PETITION FOR REHEARING EN BANC

Before DENNIS, HIGGINSON, and COSTA, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

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.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the

employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an

employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

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.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance

with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. In any such election for which there are 3 or more options (including the option of not being represented by any labor organization) on the ballot and no such option receives a majority of the valid votes cast, the Mediation Board shall arrange for a second election between the options receiving the largest and the second largest number of votes. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as

may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or

retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to

membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

Twelfth. Showing of interest for representation elections

The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

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.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations,

national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or

property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(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.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship

and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions

shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) hereof, with respect to a division of the Adjustment Board.

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 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.