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

BNSF RAILWAY CO. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:19-cv-00789-P**
	§	
INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS-TRANSPORTATION DIVISION,	§	
	§	
Defendant.	§	

PERMANENT INJUNCTION ORDER

Before the Court are Plaintiffs BNSF Railway Company; The Kansas City Southern Railway Company; CSX Transportation, Inc.; Grand Trunk Western Railroad Company; Norfolk Southern Railway Company; Illinois Central Railroad Company; Union Pacific Railroad Company; and The Belt Railway Company of Chicago's (collectively "Railroads" or "Plaintiffs") Motion for Preliminary Injunction (ECF No. 18), Defendant International Association of Sheet Metal Air, Rail, and Transportation Workers-Transportation Division's ("SMART-TD") Response (ECF No. 34), and the Railroads' Reply (ECF No. 38). Having considered the Parties' preliminary-injunction briefing and appendices attached thereto, arguments of counsel at the injunction hearing, and applicable law, the Court concludes that the Railroads' Motion for Preliminary Injunction should be and is hereby **GRANTED** and converted into a **PERMANENT INJUNCTION**.

BACKGROUND

A. The Parties and the Dispute

It is undisputed that the Railroads are "carriers" as defined by the Railway Labor Act ("RLA"). *See* 45 U.S.C. § 151 First. It is undisputed that SMART-TD is a "representative" labor organization as defined by the RLA. *Id.* § 151 Seventh.[1] The dispute that is at the heart of this lawsuit concerns the number of crewpersons—that is, the "crew consist"—that the Railroads must have on a train to operate it. *See* Compl. at ¶¶ 20, 40, 47, ECF No. 1; Mt. for Prelim. Inj. at 5, ECF No. 19. More specifically, the dispute concerns whether the RLA requires SMART-TD to begin bargaining ("negotiating" or "handling") with the Railroads over proposed changes to the current crew consist. The current crew consist is two: a single conductor and a single engineer. *See* Branon Decl. at ¶ 13, App'x in Support of Mt. for Prelim. Inj., ECF No. 20.

The Railroads served notices to SMART-TD stating that based on the Railroads' interpretation of the current labor agreements ("CBAs"), they seek to begin negotiations

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[1]SMART-TD, which represents railroad conductors, has the following three-tiered structure:

> (1) the International as the administrative head;
>
> (2) General Committees of Adjustment ("GCAs"), which are mid-level, semi-autonomous bodies that are responsible for negotiating with their designated territories; and
>
> (3) locals, where membership is held.

Previsich Dec. at ¶ 13, App'x in Opposition to Mt. for Prelim. Inj. at 5; ECF No. 36.

regarding crew consist pending arbitration and bargaining.[2] *See* Compl. at ¶ 44; Mt. for Prelim. Inj. App'x at 239, 559–70, 572, 577–78, Branon Decl. at ¶¶ 28–29, ECF No. 20. The Railroads contend that because of improvements in technology and regulatory compliance, they may be able to reduce or redeploy conductors from locomotives to ground-based positions. Compl. at ¶ 43; Branon Decl. at ¶¶ 24–26. SMART-TD responded that national handling of crew consist issues would be inappropriate. Resp to Mt. for Prelim. Inj. App'x at 180–91, Ferguson Decl. at ¶ 19, ECF No. 36. The Railroads assert that any proposed crew size reduction or redeployment is not inconsistent with the current CBAs (Mt. for Prelim. Inj. at 2), while SMART-TD asserts that any reduction in crew size has already been contemplated by moratorium provisions in the existing CBAs and thus new proposals on the subject are barred. *See* Resp. to Mt. for Prelim. Inj. at 10–11, ECF No. 35.

B. Collective Bargaining Under the RLA

Collective bargaining between the Railroads and SMART-TD is governed by the RLA. *See* 45 U.S.C. §§ 151–165. The RLA imposes a duty on "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

[2]Although there was some dispute at the preliminary injunction hearing as to whether the Railroads had in fact served the "Section 6 notices" on the appropriate locals, the parties were able to agree that the notices were served on the appropriate local individuals. *See* Prelim. Inj. Hearing Transcript at 61, ECF No. 41; *see also* Branon Decl. at ¶ 31.

interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."[3] *Id.* § 152 First. The RLA further provides, *inter alia*, "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." *Id.* § 152 Seventh. Under the RLA, CBAs exist until stated otherwise and are amended only through the service of written notice of intended changes in agreements affecting the above-quoted list. *Id.* § 156; *see also* Branon Decl. at ¶ 12. These "Section 6 Notices," require the parties' representatives to begin conferencing about the proposed changes within thirty days provided in the notice. 45 U.S.C. § 156.

When carriers and representatives have a dispute over an interpretation of an existing CBA, the RLA provides two separate but mandatory procedures depending on whether the dispute is a "minor dispute" or a "major dispute." *Consol. Rail Corp. v. Ry. Labor Exec. Ass'n*, 491 U.S. 299, 302 (1989) ("*Conrail*"); *United Transp. Union v. Alton & S. Ry. Co.*, No. CIV. 05-190-GPM, 2006 WL 664181, at *2 (S.D. Ill. Mar. 10, 2006) ("*UTU*") ("The RLA provides two distinct avenues for dispute resolution, each being dependent upon whether the dispute is categorized as major or minor.").[4] The Supreme

[3]As noted above, the Railroads are "carriers" as defined by the RLA, and SMART-TD is an authorized "representative" of train service employees employed by the Railroads. *See* ECF No. 35 at 6; 45 U.S.C. § 151 First, Sixth.

[4]"'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration . . .; and finally to possible presidential intervention to secure adjustment." *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 725 (1945). If there is a minor dispute arising out of a disagreement over the interpretation or application of an existing CBA, it must be addressed by the parties first through conferences and

Court has explained that a "major dispute seek[s] to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U.S. at 302; *Burley*, 325 U.S. at 723–24.

C. Crew Consist Bargaining: Past and Present

Both sides acknowledge that crew size or crew consist has been an issue between them for many years. *See* Mt. for Prelim. Inj. at 5 ("The issue [of crew consist] was debated for decades in a series of increasingly acrimonious bargaining rounds."), Resp. to Mt. for Prelim. Inj. at 3 ("Crew size has been an issue between [Plaintiffs and Defendant] over the years."). In the first half of the twentieth century, trains generally operated with five employees, which included an engineer, a conductor, a "fireman", and two "brakemen." Gradia Decl. at ¶ 12, ECF No. 20-2 at 16. However, the Railroads have maintained that with innovation over the passage of time, fewer workers have been needed to operate the trains. Compl. at ¶ 21. Without engaging in a more exhaustive history and without ascribing motivation to either side, it is sufficient to state that Railroads have generally pursued a reduction in crew size, and SMART-TD (and its predecessors) has generally resisted reduction. Today, the current crew consist is a single engineer and a single conductor. Branon Decl. at ¶ 13.

As part of the back-and-forth of labor negotiations on the issue of crew size and crew reduction, it has been the case that in exchange for reducing crew sizes, the Railroads have agreed to provide certain benefits to "protected employees," so defined in various CBAs. *Id.* at ¶ 14. Another related agreement coming out of prior negotiations concerns

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handling "on the property." 45 U.S.C. §§ 142 Sixth, 153 First (i). If the disputed interpretation is not resolved, either party may submit the dispute to arbitration. *Id.* § 153 First (i).

rules of "attrition" or "pure attrition," in which said protected employees would not be furloughed as a result of crew size reductions. *Id.* at ¶ 15. Finally, prior negotiations have caused CBAs to generally include "moratorium provisions," which prohibit proposed changes to other "specific provisions" prior to the attrition of all protected employees. *Id.* at ¶ 18.

Related to the debate over crew size has been a debate about whether the issue should be handled (*i.e.*, bargained for) nationally or locally. For example, the United States Court of Appeals for the District of Columbia Circuit considered a case in which the carriers wanted national handling for the issue of crew consist and the representatives opposed national handling in favor of local bargaining. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R. Co.*, 383 F.2d 225, 228–29 (D.C. Cir. 1976). The court rejected both parties' positions on whether the RLA permits a party to demand that such disputes be referred to national handling. *Id.* at 228. A subsequent Presidential Emergency Board ("PEB") No. 219, addressed the issue and noted that "[c]rew consist has always been bargained locally and has never been the subject of a national agreement." PEB No. 219 Report at 83; Resp. to Mt. for Prelim. Inj. App'x at 98. And in 2004, the railroad carriers again argued that crew consist was a national issue. The District Court for the Southern District of Illinois held that the representatives were "not obligated to bargain nationally on issues related to crew consist," and while the representatives "may agree to do so, . . . [they] cannot be forced to do so." *UTU*, 2006 WL 664181, at *6.

Today, modern agreements concerning crew consist have been bargained and agreed upon based on locals or GCAs. Previsich Decl. at ¶ 18.

D. Procedural Background

The Railroads filed the instant civil action on October 3, 2019, in anticipation of a "new round of bargaining [that] formally opens on November 1 of this year." Compl. at ¶ 42. The Railroads seek a declaratory judgment that (1) the dispute over the applicable CBAs is a "minor dispute"; (2) SMART-TD's refusal to negotiate over the Railroads' proposed reduction in crew consist violated the RLA; and (3) SMART-TD is obligated to bargain on a craft-wide, system-wide basis. *Id.* at ¶¶ 50–62. Finally, the Railroads seek injunctive relief (1) requiring SMART-TD to arbitrate the current crew consist dispute, (2) requiring SMART-TD to negotiate with the Railroads in good faith regarding crew consist proposals pending arbitration, and (3) requiring SMART-TD to negotiate with the Railroads in good faith regarding alternative wage proposals pending arbitration. *See id.* at 19.

On November 1, 2019, the Railroads' representative served a national Section 6 Notice on SMART-TD, proposing changes to the various local crew consist agreements. Branon Decl. at ¶¶ 22, 30. The Railroads have also served individual Section 6 notices ("November 2019 Crew Consist Proposals") on SMART-TD's various locals. Branon Decl.¶ 31; Prelim. Inj. Hearing Transcript at 61–62. SMART-TD's representative responded that crew consist was not a matter for national handling, that he had not been provided authority on behalf of the local GCAs to engage in such bargaining, and that such proposals should be directed to the appropriate local General Chairperson. Ferguson Decl. at ¶ 19. The Railroads assert that the local Section 6 notices were never responded to and that SMART-TD's public statement asserting that the proposal will "once again be met by

a vigorous defense," which demonstrates SMART-TD's refusal to bargain over the crew consist issue. Mt. for Prelim. Inj. at 8; App'x at 240, 582–85.

In their Motion for Preliminary Injunction, the Railroads asks the Court to enjoin SMART-TD and require that SMART-TD begin to negotiate in good faith with the Railroads over the November 2019 Crew Consist Proposals. ECF No. 19. The Parties requested a briefing schedule (ECF No. 22), and on November 12, 2019, the Court entered one. ECF No. 23. The Court also conditionally set the matter for a December 19, 2019 hearing. *See id.* After receiving briefing from the Parties, the Court entered an order confirming the December 19 hearing and indicated that because the Court did not believe it would be necessary to weigh the credibility of the witnesses and instead that the Court could consider the evidence on the papers, the hearing would be for arguments of counsel and not an evidentiary hearing. ECF No. 39. The Court gave the Parties an opportunity to object to the non-evidentiary hearing in writing. *Id.* No one objected, and on December 19, 2019, the Court presided over the preliminary injunction hearing. *See* ECF No. 41.

At the hearing, the Railroads' counsel informed the Court that the Railroads were seeking a combined preliminary injunction and permanent injunction and final judgment that would be appealable. Prelim. Inj. Hearing Transcript 38–39. The next day, the Railroads filed a post-hearing supplement, which SMART-TD did not oppose. ECF No. 40. The Motion for Preliminary Injunction is now ripe for review.

LEGAL STANDARD

"To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest." *Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015) (quoting *Trottie v. Livingston*, 766 F.3d 450, 451 (5th Cir. 2014)). If a party fails to satisfy any one of the four elements, a district court may not grant a preliminary injunction. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). A preliminary injunction is an "extraordinary and drastic remedy" that is to be granted "only when the movant, by a clear showing, carries the burden of persuasion" as to each element. *Digital Generation, Inc. v. Boring*, 869 F.Supp.2d 761, 772 (N.D. Tex. 2012) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

To be entitled to a permanent injunction the party must demonstrate (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *See VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006). A district court may utilize the record in a preliminary injunction hearing to enter a permanent injunction as long as the district court makes clear and appropriate findings as required for a permanent injunction. *See CIBA–GEIGY Corp. v. Bolar Pharm. Co.*, 747 F.2d 844, 847 (3d Cir. 1985) (observing that although the appellate court could convert the district court's preliminary-injunction opinion into a

permanent injunction, "we would much prefer that the district court recast its own opinion in the language of the standard it is applying. This would eliminate the possibility of confusion as to what the district court intended and would, in the long run, promote judicial economy"); *cf. F.T.C. v. Assail, Inc.*, 98 F. App'x 316, 317 (5th Cir. 2004) (explaining that "the district court ha[s] the power to convert the preliminary injunction into a permanent injunction" while appeal of the preliminary injunction is pending).

ANALYSIS

A. Disputes over Crew Consist are Not Bargained Nationally but Alternative Wage Proposals Can Be

As an initial matter, SMART-TD asserts that crew consist is and has always been an issue to be bargained for locally and that the Railroads, therefore, are attempting an "end run around local handling of crew consist" to avoid the numerous courts that have held crew consist to be subject to local and not national handling. Resp. to Mt. for Prelim. Inj. at 17. At the preliminary injunction hearing, counsel for the Railroads unequivocally asserted that the Railroads were not seeking to compel the Union to engage in national handling on the issue of crew consist. *See* Prelim. Inj. Hearing at 31:4–12; ECF No. 41; *see also* Branon Decl. at ¶ 29 (explaining that the Railroads "are not seeking to compel direct national bargaining over crew consist"). As noted above, in a prior lawsuit involving the Railroads and SMART-TD's predecessor, the United States District Court for the Southern District of Illinois, held that while the issue of crew consist is improper to be nationally bargained, an "alternative wage proposal is a valid proposal for a reduction in

pay." *UTU*, 2006 WL 664181, at *6. Thus, the *UTU* court ultimately refused to enjoin "bargaining on wages pending local resolution of crew consist issues." *Id.* at *5.

Based on the foregoing, the Court finds that the Railroads' request for declaratory judgment as to crew consist only applies to local handling. However, the Railroads' request for declaratory judgment as to alternative wage proposals can be addressed via national handling.

B. The Interpretation of the Moratorium Provisions of the Applicable CBAs is a Minor Dispute

Attached to the Railroads' Motion for Preliminary Injunction is a declaration from Brendan M. Branon, Chairman of the National Railway Labor Conference ("NRLC") and the National Carriers' Conference Committee ("NCCC").[5] Branon Decl., Mt. for Prelim. Inj. App'x at 231. According to Branon, most of the applicable CBAs contain moratorium provisions, which generally bar parties from serving new proposals to change terms in existing labor agreements for five years. *Id.* at ¶ 9. In their preliminary injunction appendices, SMART-TD sets forth over 40 separate labor agreements (Resp. to Mt. for Prelim. Inj. App'x at 145–161), and the Railroads set forth 45 separate labor agreements with moratorium language. Mt. for Prelim. Inj. App'x at 474–512. Although the parties certainly have different interpretations of the local labor agreements vis-à-vis crew consist, the parties do not appear to dispute the specific local labor agreements that are in place.

[5]The NRLC is a nonprofit association of railroads (which includes all Plaintiffs) that represents its members in certain matters related to labor-management relations, and the NCCC is a committee of the NRLC that represents railroads in collective bargaining with railroads' employees' unions. Branon Decl. at ¶ 1.

Accordingly, the Court utilizes the Parties' summaries and excerpts in analyzing whether the current disagreement amounts to a major or minor dispute.

When determining whether a dispute is major or minor, *Conrail* held as follows: "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." 491 U.S. at 307. Thus, the threshold issue the Court must decide whether the Railroads' interpretation of the CBAs at issue is "arguably justified" or "frivolous."[6] *Id.* at 306; *see also Int'l Bhd. of Teamsters v. Southwest Airlines Co.*, 875 F.2d 1129, 1133–34 (5th Cir. 1989) (recognizing that a dispute is minor if the carrier's interpretation is merely "arguable"). The Eighth Circuit Court of Appeals has gone so far as to state that there is a "presumption that disputes between railroads and their unionized employees are minor, and thus, arbitrable." *Schlitz v. Burlington N. R.R.*, 115 F.3d 1407, 1414 (8th Cir. 1997). Other United States Circuit Courts of Appeals have followed a similar course. *See also RLEA v. Norfolk & Western Ry.*, 833 F.2d 700, 705 (7th Cir. 1987) ("[I]f there is any doubt as to whether a dispute is major or minor, a court

[6]While the Court has to resolve the threshold question of whether this case presents a major or minor dispute, and thus decide whether the Railroads' interpretation of the current CBAs is "arguable" or if the Railroads' interpretation is actually an attempt to create a new contractual right, the Court notes that its present role is not to actually interpret the current CBAs. *See Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). Instead, the Court simply reviews the CBAs and the Railroads' interpretation thereof to determine if the interpretation is arguable; actually interpreting the CBAs is a matter for the arbitrator. *See Air Line Pilots Ass'n, Intern. v. E. Air Lines, Inc.*, 869 F.2d 1518, 1522 (D.C. Cir. 1989) (explaining that in the context of an RLA dispute, "[c]onstruing the 'common law of a particular industry' is a question of contract interpretation within the expertise and authority of an arbitrator, not the court"); *see also Porter v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F. Supp. 571, 575 (N.D. Tex. 1991) (McBryde, J.).

will construe the dispute to be minor."); *BLE v. Burlington N. R.R.*, 838 F.2d 1102, 1111 (9th Cir. 1988) (Pregerson, J., concurring) ("When in doubt, courts construe disputes as minor."). And the United States District Court for the Southern District of Illinois has likewise affirmed that "if there is any doubt as to whether a dispute is major or minor, a court will construe the dispute to be minor." *UTU*, 2006 WL 664181, at *3.

Here, the CBAs at issue generally contain moratorium provisions that bar new proposals. *See* Compl. at ¶ 26. The Railroads argue that these moratorium provisions bar proposals only for changing specific provisions of the CBAs that are limited to a list of subjects detailed therein. *See* Mt. for Prelim. Inj. at 12. The Railroads reason that the "vast majority" of these moratorium provisions do not even mention crew size or crew consist but instead concern certain benefits for protected employees that are labeled such because of crew size reductions. *Id.* According to the Railroads' interpretation, it is at least arguable that these moratorium provisions are to prevent attempts to renegotiate what the Railroads paid for in the last round of crew size reductions. *Id.*

The Railroads next argue that the "pure attrition" terms of the CBAs at issue do not mean crew size or crew consist. *Id.* at 13. These pure attrition terms generally provide that workforce reductions "shall not be made solely on a pure attrition basis, *i.e.*, no . . . positions available to a protected employee under schedule rules will be blanked, except under certain conditions specifically provided for in this agreement." *See e.g.*, Mt. for Prelim. Inj. App'x at 137. The Railroads argue that in this context, "pure attrition" is "*how* a railroad goes about reducing positions to achieve smaller crews, not the minimum [crew] size itself." Mt. for Prelim. Inj. at 13 (emphasis in original). Thus, "limits on renegotiation

of 'pure attrition' do not prohibit proposals to change crew consist." *Id.* The Railroads support this interpretation by noting that the text of the CBAs at issue repeatedly use the phrase "crew consist" in other sections, so by referring to the phrase "pure attrition," the CBAs would not also be referring to crew consist. *Id.* at 14.[7]

Finally, the Railroads argue that none of the moratorium provisions contain any terms that would prevent proposals to modify compensation in lieu of improvements to operational efficiency or staffing changes. *Id.*

SMART-TD asserts that all of the various locally bargained-for CBAs contain moratorium provisions that bar the Railroads' Section 6 notices until employees covered thereunder have "voluntarily attrited." Resp. to Mt. for Prelim. Inj. at 10; *see also* Resp. to Mt. for Prelim. Inj. App'x at 144–161. SMART-TD contends that the Railroads' proffered interpretation is flawed because it is based on cherry-picking one of among the dozens of crew consist agreements that does not include the phrase "crew consist." *Id.* SMART-TD further argues that even if the phrase "crew consist" is omitted from one or more of the moratorium provisions, it does not matter "because the very essence of these agreements was about crew size. That is their explicit purpose[.]" *Id.*

Upon review of the various CBA excerpts highlighted by the Parties, the Court is unconvinced that the language addressed by SMART-TD, which contains the phrase

[7]Although the Railroads acknowledge that some of the moratorium provisions do mention "crew size" or "crew consist," they reason that these provisions still do not bar their current crew consist proposals because they permit redeployment of conductors to bolster operational efficiency. *Id.* That is, the Railroads interpret these provisions as allowing a "zone defense" approach whereby a conductor is repositioned from a locomotive to a fixed station would not actually change crew consist. *Id.* Therefore, the Railroads argue that their proposals are not barred.

"reduced crew members," means that the CBAs comprehensively address how to reduce crew size. That is, it is arguable that when viewed in context, the complete phrase is "special allowance payments to reduced crew member," can be read as a reference to additional compensation for certain employees who operate without a brakeman. *See* Mt. for Prelim. Inj. App'x at 508–512. Moreover, as the Railroads point out, specific "crew consist" or "crew size" language is only present in 7 of the 38 CBAs with moratorium provisions. *See* Reply in Support of Mt. for Prelim. Inj. at 5. And as the Railroads contend, simply because the moratorium provisions are included in a document entitled, "crew consist agreement," it does not mean that any proposals regarding crew consist are therefore barred. *Id.* at 5. Rather, the only topics barred by the moratorium provisions in the crew consist agreements concern the specific topics delineated therein and crew consist is not one of these specified topics. The Railroads' interpretation that "had the parties intended a broader prohibition, they could have easily said so (*i.e.*, 'The parties shall not serve or progress any proposal for changing this Agreement.')," has some force and is not frivolous. *Id.* at 6.

Regardless of whether the Railroads' interpretations are in fact correct or will ultimately be successful, the Court agrees that the Railroads have met the "relatively light burden" necessary to show that their interpretations of the CBAs are arguably justified such that the instant dispute is a minor one.[8] *See Conrail*, 491 U.S. at 320.

[8]The Court is also unconvinced by SMART-TD's assertion that the Railroads' Section 6 notices, which are expressly intended to initiate a major dispute, clearly demonstrate that this is in fact a major dispute. *See* Resp. to Mt. for Prelim. Inj. at 12 (citing *Chicago & N.W. Transp. v. RLEA*, 908 F.2d 144, 148 (7th Cir. 1990)). As the Seventh Circuit Court of Appeals has aptly

C. The Railroads Have Established the Requirements for a Preliminary Injunction

1. Likelihood of Success

Having concluded that the dispute over bargaining over a crew size reduction is minor, it follows that the Railroads have established a likelihood of success on the merits of their claim for declaratory judgment that SMART-TD has violated the RLA. That is, the RLA imposes a duty on "all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. The Supreme Court has recognized that while this duty does not compel agreements, "it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with authorized representatives of its employees . . . —in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2 First." *Va. Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548 (1937).

Therefore, because the Railroads' interpretation is not frivolous and that the dispute over the current CBAs is a minor one, under the RLA, SMART-TD must meet and confer within 30 days as provided in the Section 6 notices. 45 U.S.C. § 156. Because it is

noted, merely "[f]iling a section 6 notice may kick off a major dispute; it does not transform a minor dispute into a major one." *Id.* at 158 (Posner, J.).

undisputed that 30 days have passed and SMART-TD has refused to bargain (Branon Decl. at ¶¶ 32–34), the Railroads have demonstrated that they would likely prevail on their request for declaratory judgment that SMART-TD violated the RLA.

Accordingly, the Railroads have satisfied the first element for a preliminary injunction.

2. Substantial Threat of Irreparable Injury

The Railroads claim SMART-TD's refusal to bargain is causing a substantial threat of substantial injury because the advent of new technology allows the trains to operate with fewer crewpersons while still as safely and efficiently. Branon Decl. at ¶ 38. Each day that passes without a reduced crew consist is a day of lost savings. *Id.* Thus, each day that SMART-TD refuses to bargain is a delay to a final agreement. *Id.* at ¶ 39.

The Railroads also present testimony that SMART-TD's refusal to bargain causes injury because it prevents the Railroads from reaching labor agreements with the eleven other unions that represent their other non-conductor employees. *Id.* at ¶ 40. Finally, the Railroads assert injury because in labor disputes, a party's ability to refuse to bargain is essentially a thing of value in negotiations, and SMART-TD's refusal to bargain provides it an advantage. *Id.* at ¶ 42; *see also* PEB No. 172.

In light of the foregoing evidence, the Court concludes that the Railroads have demonstrated the second element for a preliminary injunction. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) (affirming preliminary injunction and finding likelihood of irreparable harm for refusal to bargain in good faith which likely causes "a myriad of irreparable harms").

3. Balancing the Harms

The balance of harms favors the Railroads. *First*, SMART-TD is not harmed because it is simply being enjoined to comply with a statutory duty to negotiate. *See* 45 U.S.C. § 152 First; *cf. Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 280 F. Supp. 3d 59, 105 (D.D.C. 2017) (concluding that the balance of harms favored preliminary injunction in favor of the carrier in part because "in the absence of an injunction, [the carrier] would lose the benefit that the RLA status quo obligation confers upon it"), *aff'd*, 928 F.3d 1102 (D.C. Cir. 2019). *Second*, the Court has already found likely irreparable harm and, in the context of a preliminary injunction to ensure collective bargaining, a "District Court's determination that the [the moving party] had shown likely irreparable harm to the collective bargaining process meant that there was also considerable weight on his side of the balance of the hardships." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1365 (9th Cir. 2011).

Thus, the Court concludes that the Railroads have demonstrated the third element for a preliminary injunction.

4. Public Interest

The Railroads have established that the public interest favors an injunction. The President of SMART-TD, Jeremy Ferguson, points out that the Railroads haul hazardous materials, so the safest rather than the most affordable way to carry these items should be the main concern. Ferguson Decl. at ¶ 4, App'x at 163. At a minimum, a conductor provides a "second set of eyes" which Ferguson identifies as "crucial in avoiding accidents which can cost lives." *Id.* at ¶ 5.

While the Court finds this argument compelling, it is ultimately unconvincing at the preliminary injunction stage because the injunctive relief here does not permit an immediate reduction of crew size, but merely compels SMART-TD to begin good-faith negotiating over crew size proposals. Thus, if SMART-TD is correct—and it may be correct—that a reduction in crew consist would cause significant safety issues, any such harm would not occur even if the Court enters injunctive relief in favor of the Railroads. Finally, by facilitating bargaining and increasing the chances of settlement, the public is served by the prevention of a strike. *See Virginian Ry.*, 300 U.S. at 552 (explaining that the in the context of the RLA's purposes, "[t]he peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern"); *Tex. & N. O. R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (recognizing the "major purpose of Congress in passing the [RLA] was to provide a machinery to prevent strikes" and thereby "safeguard the vital interests of the country") (internal quotation marks omitted).

Thus, the Court concludes that the public interest favors a preliminary injunction.

D. A Preliminary Injunction is Not Violative of the Norris-LaGuardia Act

Having found that the instant dispute is minor, that SMART-TD has refused to bargain, that such refusal is in violation of the RLA, and having concluded that the Railroads have established the requisites for a preliminary injunction, the Court finds that an injunction is necessary to preserve the status quo. SMART-TD argues that such a remedy is unavailable because it controverts the Norris-LaGuardia Act. Resp. at 8–9; *see* 29 U.S.C. § 101; *see also Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961).

SMART-TD's position is unsupported, and accordingly the Court rejects it. The Supreme Court has held that the Norris-LaGuardia Act does not bar a United States District Court from entering an injunction to enforce compliance with the RLA. *See Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 513 (1989) (reaffirming prior holding that where a challenged action violates specific provisions of the RLA, "the specific provisions of the [RLA] take precedence over the more general provisions of the Norris-LaGuardia Act.") (quotation omitted); *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 583–84 (1971).

Therefore, the Court concludes that an injunction is an available and appropriate remedy in this case.

E. Conversion to Permanent Injunction

A final issue is the Railroads' oral request to convert any preliminary injunction that may issue into a permanent injunction. Prelim. Inj. Hearing Transcript at 38–39. As stated above, a district court has the power to convert the preliminary injunction into a permanent injunction. *See F.T.C.*, 98 F. App'x at 317. And in converting a preliminary injunction to a permanent injunction, a district court may utilize the record in a preliminary injunction hearing as long as the district court makes clear and appropriate findings under the permanent-injunction standard. *See CIBA–GEIGY Corp.*, 747 F.2d at 847. The only additional finding required for a permanent injunction is a showing of actual success, rather than merely a likelihood of success on the merits. *See BNSF Ry. Co. v. Am. Train Dispatchers Ass'n*, No. CIV.A. 405CV152Y, 2005 WL 1132983, at *8 (N.D. Tex. May 12,

2005) (Means, J.) ("The standard for a permanent injunction is essentially the same as for a preliminary injunction.").

Because the Court has made findings and conclusions that the underlying dispute is minor and that SMART-TD has refused to engage in good-faith bargaining as required by the RLA, the Court finds that the Railroads have not only demonstrated a likelihood of success but actual success. Indeed, there was nothing in the record at the preliminary injunction hearing or from the briefing indicating there is any factual development necessary regarding SMART-TD's refusal to bargain on the issue of crew consist. It does not seem that this fact has ever been in dispute, and there was nothing in the record at the preliminary injunction hearing or from the briefing that would indicate that SMART-TD would be able to dispute this fact.

Accordingly, the Court finds that the Railroads have demonstrated actual success and that the preliminary injunction should be converted to a permanent injunction and final judgment entered. *See Chicago & N.W. Ry. v. UTU*, 330 F. Supp. 646, 652 (N.D. Ill. 1971) (entering injunction requiring union and carriers to negotiate over crew consist).

PERMANENT INJUNCTION

IT IS THEREFORE ORDERED that Defendant SMART-TD (including its divisions, lodges, locals, general committees, and officers) is hereby permanently enjoined from refusing and/or failing to bargain in good faith with each of the Railroads over the November 2019 Crew Consist Proposals in the manner required by the RLA;

IT IS FURTHER ORDERED that Defendant SMART-TD (including its divisions, lodges, locals, general committees, and officers) is hereby permanently enjoined

from refusing and/or failing to bargain in good faith with the multi-carrier group of Railroads with respect to the Railroads' November 2019 Alternative Wage Proposal;

SO ORDERED on this **11th day** of **February, 2020**.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE