UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BURLINGTON NORTHERN AND SANTA FE RAILWAY CO., et al., Plaintiffs,	)	Case No. 01 C 7743
v.	)	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Defendant.	)	Judge Joan B. Gottschall

ORDER

Plaintiffs are the nation's major freight railroads (the "Railroads").[1] They seek preliminary injunctive relief against the defendant, Brotherhood of Locomotive Engineers ("BLE"), which has allegedly threatened to conduct strikes over the Railroads' introduction of remote locomotive control technology and assignment of remote control work to conductors and trainmen. These conductors and trainmen are represented by another union, the United Transportation Union ("UTU"). For the following reasons, the court concludes that the Railroads are entitled to an injunction.

Background

The following facts are undisputed. Collectively, the Railroads carry more than 95 percent of the rail freight traffic in the United States. BLE is the collective bargaining representative of locomotive engineers while UTU is the collective bargaining representative of conductors, trainmen, yard foremen,

[1]The railroads include The Burlington Northern and Santa Fe Railway ("BNSF"), Consolidated Rail Corporation ("Conrail"), CSX Transportation ("CSXT"), Kansas City Southern Railway ("KCS"), Norfolk Southern Railway ("NS"), and Union Pacific Railroad ("UP").

the Railroads assign the remote control technology operations to ground service employees and not locomotive engineers.

Discussion

The Railroads are entitled to preliminary injunctive relief if they establish: (1) a reasonable likelihood of success on the merits; (2) irreparable injury and no adequate remedy at law; (3) that the threatened harm to the plaintiff outweighs the harm that an injunction would cause the defendant; and (4) that the injunction will not harm the public interest. *Cox v. City of Chicago*, 868 F.2d 217, 219 (7th Cir.1989).

In this case only the first requirement, a reasonable likelihood of success on the merits, is seriously in dispute. If the court finds that the first requirement has been met, the other three issues are clearly satisfied. As to the second requirement, a nationwide strike by the BLE would clearly create irreparable harm to the Railroads. As to the third requirement, assuming that an arbitrator could provide an adequate remedy, the balance of harms in this case favors an injunction. Finally, it seems clear that a preliminary injunction preventing the union from striking would not harm the public interest but protect it, as a wide variety of industries depends on the Railroads to be able to operate.

The Railroads argue that the parties' existing collective bargaining agreements permit the planned introduction of the remote control technology and its assignment to non-BLE members. Therefore, the Railroads argue, a strike by the BLE would be illegal. The BLE disagrees, arguing that locomotive engineers have exclusive jurisdiction over work involving the operation of locomotives. If the BLE is correct, then it is empowered to engage in a strike. This court must decide whether an injunction barring the union from striking should issue. To make this determination, the court must apply

at 305. In interpreting existing agreements, courts recognize that "collective-bargaining agreements may include implied, as well as express, terms." *Id.* at 311. In addition, the parties' "practice, usage and custom is of significance in interpreting their agreement." *Id.* (internal quotations omitted). On the other hand, major disputes relate to the formation of collective bargaining agreements. "They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945), *aff'd upon reh'g*, 327 U.S. 661 (1946).

If the carrier claims (as the Railroads do) that the parties' agreement gives it the right to make a decision about working conditions without prior negotiations, the dispute is deemed minor unless the carrier's position is "not arguably justified, obviously insubstantial, spurious [or] frivolous." *Conrail*, 491 U.S. at 306. A carrier's interpretation is "insubstantial" when it would "undercut [RLA prohibitions] against unilateral imposition of new contractual terms." *Id.* at 306. In other words, the Railroads' claims in this case are frivolous only if they constitute a unilateral alteration of the existing collective bargaining agreements. The Supreme Court has recognized "the relatively light burden which the railroad must bear in establishing exclusive arbitral jurisdiction under the RLA." *Id.* at 307 (internal quotations omitted); *see also BRASCFHESE*, 847 F.2d at 406 ("[W]e resolve all doubts in favor of finding the dispute at issue to be minor."); *BLE v. Atchison, T. & S.F. Ry. Co.*, 768 F.2d 914, 920 (7th Cir. 1985) ("*Atchison, T. & S.F. Ry.*") ("[W]hen in doubt, the courts construe disputes as minor.").

In a case such as this, "it is important to emphasize what [the court] is not deciding." *Norfolk & Western*, 833 F.2d at 707. The court is not deciding whether the Railroads' plan to implement the

operation of remote control technology or that require such operations to be assigned to employees represented by BLE." (*Id.*) The only provision in the agreements to which the BLE could point, the Railroads argue, is a so-called "scope rule." (*Id.* ¶ 6.) Examples of these rules provide that "locomotive engineers shall have preference for positions as engineers" on locomotives and that no non-BLE employees may "supplant or substitute in the exclusive work of any employee working under BLE Agreements." (Gradia Sec. Dec., Att. 2 at 2.) The Railroads do not dispute this language, but argue that such provisions do not apply here. The Railroads argue that under the remote control system, ground service employees are not given positions as "engineers" and do not "supplant or substitute in the exclusive work" of engineers. Rather, the Railroads argue that the engineers are being replaced by the remote control technology itself, which is not prohibited in any of the BLE agreements.

It appears that there is no specific provision within the parties' agreements that addresses the introduction of remote control technology or that gives exclusive jurisdiction over all operation of locomotives to members of the BLE. The BLE cites a 1996 agreement, no longer in effect, which stated that engineers must be used to "operate all sources of motive power . . . on any and all tracks of Southern Pacific Lines." (Defs.' Mem. Support Cross-Mot. Dismiss & Opp. Pls.' Mot. Prelim. Inj. ("Defs.' Mem.") at 7 n.2.) Otherwise, the BLE points to no other similar explicit provision. In fact, the BLE admits that the agreements "do not specify the precise details of locomotive operation placed under the engineer's control." (Def.'s Mem. at 14.)

The Railroads point to a specific provision in a 1986 agreement between the parties which, they argue, explicitly allows the planned implementation and assignment of the new technology. In that agreement, ground service employees (non-BLE members) are given permission to perform a number

remote control technology without prior negotiation. The BLE, on the other hand, argues that locomotive engineers have traditionally held exclusive jurisdiction over the operation of locomotives in terminals, and therefore there is an implied agreement that the Railroads may not assign the technology to non-BLE members.

1. *Introduction of new technology*

First, the Railroads point to seven instances in which railroads implemented new technology without prior union consent. However, none of these examples show an implied agreement specifically between the Railroads and the BLE, as is necessary to establish an implied contractual term. *See Norfolk & Western*, 833 F.2d at 705 (implied agreements are indicated by the "*parties'* course of dealing") (emphasis added). More helpful to the Railroads are three examples of "a specific past practice permitting introduction of remote control locomotive technology in the rail industry." (Pls.' Mem. at 16.) The most favorable example is a 1995 arbitration award regarding a dispute between the Burlington Northern Railroad Company and the BLE. (*BLE v. Burlington Northern R.R. Co.*, Public Board No. 5464, Award No. 11, Joint Stip. Ex. 17.) That case involved the movement of train cars at a Nebraska car repair facility. The BLE distinguishes this case because it involved a repair facility and not terminal operations or transit, but the court finds the example relevant nonetheless.

At the Nebraska facility, movement of cars was initially accomplished by two switch engines, which were operated by non-BLE members. By 1988, the railroad had replaced this system by introducing a "remote (radio) controlled, on-rail, self-propelled machine," which was also operated by non-BLE members. After four years, the BLE formally objected, arguing that the new equipment should be operated by engineers, but the arbitrator sided with the railroad "on the basis of

C. Remote Control Technology

The Railroads argue that the proposed remote control technology consists of two separate pieces of equipment: the on-board computer and the remote transmitter. According to the Railroads, the on-board computer will essentially take the place of the engineer, as it will control the movement and speed of the train, adjusting for necessary variants, such as the grade of the track. In other words, the Railroads contend that this is "just another instance of where work has been lost due to technological changes." (*UTU v. Norfolk Southern Ry. Co.*, Public Law Board No. 5252, Award No. 1, Joint Stip. Ex. 19 at 4.) The Railroads argue that the ground service personnel, who will operate the remote transmitter, will not perform any of the engineers' exclusive duties. The remote transmitter, the Railroads argue, is merely a communication device which tells the on-board computer when to move and at what speed, precisely the current function of ground service personnel when communicating with locomotive engineers.

The BLE argues, on the other hand, that it is not the on-board computer that will replace the engineer, but the ground service personnel. The union argues that the operator of the remote transmitter is, in effect, the operator of the locomotive. The BLE claims that the transmitter is equipped with knobs that act as a throttle and brake, similar to those currently operated by engineers on board the locomotives.

The court holds that while it is arguable that the operation of the remote control technology is exclusively reserved to locomotive engineers, the opposite is also arguable. The Railroads point out that arbitrators in disputes such as this have often found that "technological advances do not automatically constitute a contractual violation." (*Id.*) In one case, an arbitrator found that "there is no

transmitters. However, the court need not make this determination. "The resolution of the case depends upon the interpretation of the agreement, and while we realize that the [Railroads'] actions might be in violation of that agreement, it is for the appropriate adjustment board, and not this court, to draw the boundaries of the practices allowed by the agreement." *Nat'l Ry. Labor Conference v. Int'l Assoc. Machinists Aerospace Workers*, 830 F.2d 741, 748 (7th Cir. 1987). The Railroads have successfully established a nonfrivolous argument that the agreements permit their proposed technology plan. Therefore, the dispute is minor.

III. Bargaining Process

The BLE argues that the parties have entered collective bargaining regarding the implementation of the remote control technology, and therefore the court must apply a different standard than the traditional major/minor dispute analysis. In support of this argument, the BLE cites *Detroit & Toledo Shore Line R. Co. v. UTU*, 396 U.S. 142, 149 n.14, 150-52 (1969), for the proposition that when the parties are bargaining over an issue, neither may unilaterally alter the status quo with regard to that issue.

The BLE points out that the Railroads issued the following notices of bargaining proposals on the BLE, in compliance with section 6 of the RLA, on November 1, 1999:

> Eliminate any existing restrictions on the use of employees, whether or not represented by the Organization, to perform any work as and where needed without claim or penalty; and provide that a carrier in its discretion may require any employees represented by the Organization to perform any work as and where needed that the carrier deems appropriate.
>
> If and where any restrictions exist, provide that there will be no restrictions on (or additional compensation for) the use of new technology by employees in any craft, and such use shall not create an exclusive right thereto.

3.) This language belies the BLE's conclusion that the *existing* collective bargaining agreements clearly prohibit the assignment of remote control technology to ground service personnel.

Furthermore, the BLE's reliance on *Shore Line* is misplaced. The pertinent issue in the present case is not whether the parties are bargaining over assignment of the new technology, but rather whether the Railroads' proposed plan would "violate the status quo *as defined* by the collective bargaining agreements." *Chicago & Northwestern Trans. Co. v. RLEA*, 908 F.2d 144, 153 (7th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The Seventh Circuit has addressed this distinction:

> [W]hat the agreements do not forbid, either explicitly or implicitly . . ., the railroad is allowed to do as a matter of contract; and what the railroad is allowed to do *is*, one might suppose . . . the status quo, even if the railroad has not been doing it. Redecorating the railroad's executive dining room does not violate the status quo even if this is the first time the room has ever been redecorated and the collective bargaining agreement is silent about redecoration.

Id. at 153-54. In other words, if the existing agreements do not prohibit the implementation of the remote control technology, then the Railroads' proposal would not violate the status quo. *See also Bhd. Ry. Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422, 1428 (8th Cir. 1991) ("[O]nce the court finds that an employer's actions are arguably justified under the terms of existing agreements, the status quo issue is mooted.") (internal quotation omitted); *CSX Transp., Inc. v. UTU*, 879 F.2d 990, 999 (2d Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) ("[T]here is generally no duty to maintain the status quo during a minor dispute, but only during a major dispute.").

Thus, the proper inquiry is whether assigning the remote control technology to ground service personnel is arguably permitted by the parties' existing agreements. As this court has discussed, the

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Railroads have provided a nonfrivolous argument that it is. Therefore, the dispute is minor and the

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BURLINGTON NORTHERN AND SANTA FE RAILWAY CO.
2500 Lou Menk Drive
Fort Worth, Texas 76102

CONSOLIDATED RAIL CORP.
2001 Market Street
Philadelphia, Pennsylvania 19103

CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

KANSAS CITY SOUTHERN RAILWAY CO.
114 West 11th Street
Kansas City, Missouri 64105-1804

NORFOLK SOUTHERN RAILWAY CO.
Three Commercial Place
Norfolk, Virginia 23510-2191

UNION PACIFIC RAILROAD CO.
1416 Dodge Street
Omaha, Nebraska 68179

Plaintiffs,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1701

Defendant.

Civil Action No. 01-C-7743
Judge Joan B. Gottschall

PRELIMINARY INJUNCTION

PRELIMINARY INJUNCTION

This matter came to be heard upon a complaint, motion for preliminary injunction, and

supporting declarations and memorandum of points and authorities filed by plaintiffs Burlington Northern and Santa Fe Railway ("BSNF"), Consolidated Rail Corporation ("CRC"), CSX Transportation ("CSXT"), Kansas City Southern Railway ("KCS"), Norfolk Southern Railway ("NS"), and Union Pacific Railroad ("UP"), from which it appears that the defendant Brotherhood of Locomotive Engineers ("BLE") is threatening to commence a strike against the plaintiff railroads over disputes arising from the railroads' plans to use remote control technology in locomotive operation in their terminal operations in or around terminals and work assignments in connection therewith; that such disputes are minor disputes subject to mandatory arbitration under § 3 of the Railway Labor Act, 45 U.S.C. § 153 First(i); that strikes over such disputes are unlawful under § 3; and that such a strike will, unless enjoined, cause a shutdown of the plaintiffs' rail operations, with resulting immediate and irreparable harm to the plaintiffs, their shippers, communities, and employees, and the public generally,

IT IS THEREFORE ORDERED:

1. That the defendant, its subordinate units, divisions, lodges, locals, officers, agents, employees, members, and all persons acting in concert or participation with any of them, is hereby enjoined from authorizing, encouraging, permitting, calling, engaging in, or continuing any strikes, work stoppages, picketing (other than for informational purposes), slowdowns, work-to-rule campaigns, or other self-help against the plaintiffs over any disputes concerning the plaintiffs' use or plans to use remote control technology in the operation of locomotives in their terminal operations in or around terminals, or work assignments in connection therewith, until a hearing is held and final judgment entered on the complaint herein.

2. That the defendant is hereby directed to make every reasonable effort to prevent and discourage its subordinate units, divisions, lodges, locals, officers, agents, employees, and

members, and all persons acting in concert or participation with any of them, from engaging in conduct enjoined by this injunction;

3. That defendant shall notify all of its subordinate units, divisions, lodges, locals, officers, agents, employees, and members having jurisdiction or working on any of the plaintiff railroads of the issuance, contents, and meaning of this injunction, and that failure to comply could result in the imposition by the Court of fines and/or imprisonment;

4. That this injunction is granted upon the condition that an undertaking in the sum of twenty-five thousand dollars ($25,000), or cash in that amount, be filed within 72 hours from the time and date of this injunction to make good such damages not to exceed said sum as may be sustained by anyone who is found to be wrongfully enjoined; and

5. That for purposes of service of notice of this injunction, in addition to the methods of service of process provided by statute, notice may be given to defendant, its members, and all other persons by the posting of copies of this decree at the entrances of the plaintiffs' premises, which shall be considered prima facie evidence of notice and knowledge of this injunction to and by all persons who may commit, or attempt to commit, any act or acts in violation thereof at or near the premises of the plaintiffs. In addition, this injunction may be served by any person over the age of eighteen years selected for the purpose by the plaintiffs.

Dated: 1/15 o'clock 11 m. on January 16, 2002

United States District Judge