UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO. 16-3522

ASHTON WHITAKER,
a minor, by his mother and
next friend,
MELISSA WHITAKER,

Plaintiff-Respondent,

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS,
in her official capacity as
Superintendent of the Kenosha
Unified School District No. 1,

Defendants-Appellants.

Appeal from the United States
District Court for the Eastern
District of Wisconsin

District Court Case
No. 16-CV-943

The Honorable Pamela Pepper

DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANT'S MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis ("KUSD"), hereby submits this reply pursuant to Fed. R. App. P. 27(a)(4) to Plaintiff's response to KUSD's motion to stay preliminary injunction pending appeal.

I. KUSD HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS THAT TITLE IX DOES NOT ENCOMPASS TRANSGENDER STATUS.

A. Because It Is For The Legislature, Not Courts, To Expand Title IX It Is Likely That KUSD Will Succeed In Its Appeal.

Plaintiff's claim that KUSD is unlikely to succeed on the merits of its appeal is wishful thinking. First, this Court's decision to grant *en banc* review of its decision in *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016), *amended,* No. 15-1720, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), *reh'g en banc granted, opinion vacated* (Oct. 11, 2016) is not the death knell that Plaintiff would like it to be. The decision to grant *en banc* review is based upon the "exceptional importance" of the question presented, not a signal that the circuit is intent on reversing the panel's decision. *See* Fed. R. App. P. 35.

Second, KUSD still has a reasonable likelihood of success on the merits of its appeal even if *Hively* does not remain as precedent in this circuit. Regardless of the holding in *Hively*, the term "sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") should still be narrowly construed in line with this Court's reasoning in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

Specifically, in holding that Title VII of the Civil Rights Act of 1964 ("Title VII") does not encompass sexual orientation discrimination, this Court stated:

> Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. Moreover, Congress has not acted to amend Title VII even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace can no longer be tolerated . . . In short, Congress' failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem. And as a result, our understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct.

Hively, 830 F.3d at 701–02. Even without relying upon *Hively* as a reaffirmation of *Ulane*, the premise exemplified by the above reflects the long standing position of this Court that courts of appeals do not have the authority to infringe upon the legislative function of Congress:

> We as judges of the U.S. Court of Appeals have only the power to interpret the law; it is the duty of the legislative branch to make the law. We must refuse to infringe on the legislative prerogative of enacting statutes to implement public policy. The problems of public policy are for the legislature and our job is one of interpreting statutes, not redrafting them.

Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270-71 (7th Cir. 1993) (internal citations omitted).

The statutory language of Title IX and its implementing regulations says nothing about gender identity, gender expression, or any other concept related to transgender individuals. *See* 20 U.S.C. §§ 1681-1688; 34 C.F.R. §§ 106.33, 106.61. Courts are not vested with legislative power and it is their "duty to interpret and not change statutory law." *Zonolite Co. v. United States*, 211 F.2d 508, 513 (7th Cir.

1954); *see also Am. Home Assur. Co. v. Stone*, 61 F.3d 1321, 1328 (7th Cir. 1995), *as modified* (Aug. 24, 1995) ("Our duty as a reviewing court . . . is not to legislate but only to interpret the laws as enacted by the . . . legislature."); *In re Allard*, 196 B.R. 402, 408 n.3 (Bankr. N.D. Ill.), *aff'd sub nom. Great S. Co. v. Allard*, 202 B.R. 938 (N.D. Ill. 1996) ("It is not the function of this Court to legislate. It is the task of the Court to construe and apply the statute, not to reconstruct or correct it."); *United States v. One Elec. Pointmaker*, 149 F. Supp. 427, 429 (N.D. Ind. 1957) ("Courts cannot and must not legislate.").

Like the issues facing employees in the Title VII context, Congress is well-aware of the issues concerning transgender students under Title IX. Various Senators have continually attempted to pass legislation that would prohibit discrimination based on sexual orientation or gender identity in the form of the proposed legislation, the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015). *See* (Dkt. No. 23-1; Dkt. No. 23-2). Congress has repeatedly refused to enact this proposed legislation. Congress has explicitly rejected legislation that would extend federal legislation to cover sexual orientation and gender identity despite being keenly aware of the issue at hand.

The proper forum for changing the law is Congress and only after Congress has "had the opportunity for deliberation and reflection should a radical change" to the law be enacted. *Welsh*, 993 F.2d at 1271. "[F]ederal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress." *Id.* This Court has said that it will refuse to

read into a statute what Congress has declined to include and must assume that Congress understood the meaning of the words it incorporated into a statute. *Id.* at 1270 (citing *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 807 (7th Cir. 1988)); *see also Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 683 n.22 (W.D. Pa. 2015) (citing *Oiler v. Winn–Dixie Louisiana, Inc.*, 2002 WL 31098541, at *6 (E.D.La. Sept. 16, 2002)) ("The Court recognizes the changing perceptions in society concerning transgender individuals. 'However, the function of this Court is . . . to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress.").

The analysis undertaken by this Circuit in determining that it was without authority to expand the interpretation of "sex" is also reflected in *Ulane*:

> Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has **reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress** . . . Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals **would take us out of the realm of interpreting and reviewing and into the realm of legislating**. This we must not and will not do.

742 F.2d at 1086 (internal citations omitted) (emphasis added). For this Court to hold that Title IX protects transgender status would take it out of the realm of interpreting a statute and into the realm of legislating. The legislative history of the statute provides that "the intent of Congress in enacting Title IX was to open up educational opportunities for girls and women in education." *Johnston*, 97 F. Supp. 3d at 672. Therefore, in the absence of any binding precedent or legislatively enacted changes,

this Court should not expand the statutory rights of Title IX beyond the plain language of the statute and the accepted definition of "on the basis of sex" in this Circuit. Regardless of any changing perceptions, evolving norms, or societal pressures, this Court should not expand the statutory rights under Title IX by changing the definition of "sex" to include transgender status, absent direction from the Supreme Court or Congress. *See Gunnison v. Commissioner,* 461 F.2d 496, 499 (7th Cir. 1972) (maintaining that it is for the legislature, not the courts, to expand the class of people protected by a statute).

B. Acknowledging The Anatomical Differences Between The Sexes Does Not Create A *Price Waterhouse v. Hopkins* Sex-Stereotyping Claim.

Plaintiff relies on *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) in claiming that access to the boy's restroom is protected under Title IX. Plaintiff conflates the distinction between sex-discrimination and sex-stereotyping.

As to this injunction, Plaintiff alleges that KUSD engaged in "sex-stereotyping" because KUSD had a policy of requiring students to either use a bathroom consistent with their birth gender or a gender-neutral single-user bathroom and enforced that policy by monitoring students use of bathrooms. Pltf.'s Amended Comp. at ¶2 (Dkt. No. 12). Policies and practice that merely acknowledge the anatomical differences between the sexes does violate Title IX and do not amount to sex-stereotyping as a matter of law. *See, e.g.*, *See Johnston*, 97 F. Supp. 3d at 680-81; *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff'd,* 98 F. App'x 461 (6th Cir. 2004)

(finding that plaintiff's allegation that the defendant fired her because her appearance and behavior did not meet the company's sex stereotypes of a woman was "a disingenuous re-characterization of a transsexuality discrimination claim"). Again, these allegations do not plausibly suggest that KUSD discriminated against Plaintiff because of the way Plaintiff dressed, spoke, or behaved, or that Plaintiff was treated adversely for not dressing, acting, or speaking like a woman. *See Johnston*, 97 F. Supp. 3d at 681.

The District Court ignored this distinction in holding that Plaintiff "had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls." *Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829, at *4 (E.D. Wis. Sept. 22, 2016). This concept that KUSD engaged in sex-stereotyping by enacting policies related to the genitalia and acknowledged biological differences between men and women is misplaced and was misapplied by the District Court.

C. Plaintiff Ignores The Equal Protection Issue, Apparently Recognizing That KUSD Is Likely To Succeed On That Issue.

Plaintiff does not address KUSD's argument that transgender individuals do not constitute a suspect class for purposes of an Equal Protection challenge. Thus, Plaintiff concedes that KUSD has established that transgender status is not a protected category, and that Plaintiff's Equal Protection claim should have been reviewed under a rational basis standard. *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008); *Williams v. REP Corp.*, 302 F.3d 660, 667 (7th Cir. 2002).

Under rational basis review, courts presume the constitutionality of the classification and it "will not be set aside if any state of facts reasonably may be conceived to justify it." *Patrick v. Raemisch*, 550 F. Supp. 2d 859, 864 (W.D. Wis. 2008) (citing *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992)). Respecting the privacy right of students to perform bodily functions outside the sight of members of the opposite biological sex is a conceivable and rational reason and "separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause." *Johnston*, 97 F. Supp. 3d at 670.

II. CONSIDERATION OF THE IRREPARABLE HARM THAT WILL RESULT TO EACH SIDE WEIGHS IN FAVOR OF KUSD.

In addition to considering the success on the merits, in determining whether to grant a stay this court also considers "the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A&F Enters., Inc.*, 742 F.3d 763, 766 (7th Cir. 2014). The purpose of a stay pending appeal "is to minimize the costs of error." *Id.*

KUSD has identified that if the injunction is not stayed, KUSD and the students and parents it serves, will suffer irreparable harm as continued compliance with the injunction will have the effect of forcing policy changes, imposing financial consequences, and stripping KUSD of its basic authority to enact polices that the accommodate the need for privacy of all students. Likewise, the injunction puts students' parents' constitutional rights in jeopardy. Depriving parents of any say

over whether their children should be exposed to members of the opposite biological sex, possibly in a state of full or complete undress, in intimate settings deprives parents of their right to direct the education and upbringing of their children.

Plaintiff focuses on KUSD's harm and gives shallow consideration to Plaintiff's alleged irreparable harm. A plaintiff could claim that constitutional violations constitutes irreparable harm, *see Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978)), but, as explained above, Plaintiff appears to concede that there is not a likelihood of success on the Equal Protection claim.

Although Plaintiff has consistently alleged harm, there has been no showing that Plaintiff will suffer irreparable harm. Irreparable harm is harm that is "unlikely to be made whole by an award of damages or other relief at the end of the trial." *Vogel v. American Society of Appraisers*, 744 F.2d 598, 599 (7th Cir. 1984).

In finding that Plaintiff had shown irreparable harm the District Court appeared to misunderstand the standard. The District Court found irreparable harm to been met if "the damage be done and it won't be able to go back and be undone." Transcript of Oral Argument on Motion for Preliminary Injunction, at p. 59.[1] Likewise, the District Court stated: "I don't believe under the case law that I need to make a finding that there's no possibility ever in any world where he could overcome whatever suffering he has in order to prevail on a request for preliminary relief." *Id.* Plaintiff has alleged harm. That is undisputed. But all of Plaintiff's harm—increased stress, migraines, sleeplessness, difficulty focusing—as identified by Dr. Budge are

[1] The relevant portions of the Transcript of Oral Argument on Motion for Preliminary Injunction are attached as Exhibit A.

but harm, not irreparable harm. There is nothing in the record to reflect that Plaintiff has been subjected to irreparable harm. All of the harms identified could be addressed with an award of damages or other relief at the end of the trial. *See Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823, at *5 (N.D. Ill. Jan. 24, 2011) (stating that "emotional suffering is commonly compensated by monetary awards").[2]

Dated this 20th day of October, 2016

MALLERY & ZIMMERMAN, S.C.
Attorneys for Defendants

By: s/Ronald S. Stadler
Ronald S. Stadler
State Bar No. 1017450
Aaron J. Graf
State Bar No. 1068924
Jonathan E. Sacks
State Bar No. 1103204

731 North Jackson Street, Suite 900
Milwaukee, Wisconsin 53202-4697
telephone: 414-271-2424
facsimile: 414-271-8678
e-mail: rstadler@mzmilw.com
agraf@mzmilw.com
jsacks@mzmilw.com

[2] A copy of *Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823 (N.D. Ill. Jan. 24, 2011), is attached as Exhibit B.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendants-Petitioners hereby certifies that an electronic copy of the above document was served via ECF on counsel for Plaintiff-Respondent.

Dated this 20th day of October, 2016.

MALLERY & ZIMMERMAN, S.C.
Attorneys for Defendants

By: s/Ronald S. Stadler
Ronald S. Stadler
State Bar No. 1017450
Aaron J. Graf
State Bar No. 1068924
Jonathan E. Sacks
State Bar No. 1103204

731 North Jackson Street, Suite 900
Milwaukee, Wisconsin 53202-4697
telephone: 414-271-2424
facsimile: 414-271-8678
e-mail:rstadler@mzmilw.com
agraf@mzmilw.com
jsacks@mzmilw.com

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER, Plaintiff, vs. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1, Defendants.	Case No. CV 16-943 Milwaukee, Wisconsin September 20, 2016 1:05 p.m.

TRANSCRIPT OF ORAL ARGUMENT ON
MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: **Joseph J. Wardenski**
Michael G Allen
Relman Dane & Colfax PLLC
1225 19th St NW - Ste 600
Washington, DC 20036
202-728-1888
Fax: 202-728-0848
Email: jwardenski@relmanlaw.com
Email: mallen@relmanlaw.com

U.S. Official Transcriber: JOHN T. SCHINDHELM, RMR, CRR,
Transcript Orders: WWW.JOHNSCHINDHELM.COM

Proceedings recorded by electronic recording,
transcript produced by computer aided transcription.

can get better or never ever can be repaired. I think the question is where the damage be done and it won't be able to go back and be undone.

In other words, you can't put somebody back in the place where they were before the damage occurred. I think there is no question, at least there doesn't seem to be any question based on the affidavits that are on file, that Ash has already suffered harm; that he has already had physical repercussions from the policy as well as emotional repercussions from the policy.

So it's safe to assume that if he continues not to be allowed to utilize the boys' restroom that those same sorts of harms will continue. And I don't believe under the caselaw that I need to make a finding that there's no possibility ever in any world where he could overcome whatever suffering he has in order to prevail on a request for preliminary relief.

For example, in *Washington vs. Indiana High School Athletic Association*, 181 F.3d 840 at 854, the Seventh Circuit was dealing with a handicapped student, a student with a physical disability who was arguing that part of the treatment -- part of the impact of the treatment of that student was diminished academic motivation. And the Seventh Circuit recognized that that is, in fact, a harm that could be suffered -- an irreparable harm that could be suffered in the context of a preliminary injunction.

C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified October 7, 2016.

/s/John T. Schindhelm

John T. Schindhelm

John T. Schindhelm, RPR, RMR, CRR
United States Official Reporter
517 E Wisconsin Ave., Rm 236,
Milwaukee, WI 53202
Website: WWW.JOHNSCHINDHELM.COM

EXHIBIT B

2011 WL 221823
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, General Committee of Adjustment, Central Region, Plaintiff,
v.
UNION PACIFIC RAILROAD COMPANY, Defendant.

No. 10 C 8296.
|
Jan. 24, 2011.

Attorneys and Law Firms

Jorge Sanchez, Carol Tran Nguyen, Thomas Howard Geoghegan, Despres Schwartz & Geoghegan, Chicago, IL, for Plaintiff.

Thomas Anthony Andreoli, Union Pacific Railroad Company, Chicago, IL, Elizabeth A.G. Shansky, Patricia Oleary Kiscoan, Union Pacific Railroad Company, Omaha, NE, for Defendant.

MEMORANDUM OPINION AND ORDER

JAMES B. ZAGEL, District Judge.

I. INTRODUCTION

*1 This dispute surrounds changes made to the vacation planning methods implemented by Union Pacific Railroad Company ("UP" or "Carrier"). The Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Union") opposes the changes and asks that I issue a preliminary injunction requiring UP to return all vacation planning to the status quo as it existed in 2010 until the dispute is resolved though arbitration. In the alternative, BLET asks that I order the parties to arbitrate the issues on an expedited 60–day basis and require UP to make the engineers whole if its unilateral forcing of vacations is not approved in the arbitration. For the following reasons, BLET's motion for a preliminary injunction is denied.

II. STATEMENT OF RELEVANT FACTS

UP requires that all engineers be "full time" employees "marked up" and available for work on a seven-day, 24–hour basis. When called, engineers must present themselves at the terminal within one and a half and two hours. Because of the engineers' unpredictable schedules, planned vacation time is very important to the engineers and their families.

The parties have a National Agreement which addresses vacation and scheduling. Pursuant to the National Agreement, "due regard" shall be given to the preference of employees in the seniority order in the class of service in which engaged. The representatives of the carriers and the employers further agree to cooperate in arranging vacation periods.

In 1990, an award by Arbitrator La Rocco stated that "the Carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by doing so would result in a serious impairment in the efficiency of operations which could not be avoided by the employment of relief workers at that particular time or by the making of some other reasonable adjustment ." A second award by La Rocco in 1993 provided that UP could not require vacations to be "flat lined" or spread out evenly or inflexibly over a 52 week period, without regard to service needs and engineers' preferences. The 1993 award also states that if a Carrier wishes to place an inflexible or absolute cap on the number of engineers who can take vacation during any single week, the Carrier must justify the cap by needs of service.

Traditionally, the process of setting vacations proceeded as follows. First, engineers submit their preferred vacation dates to their BLET Local Chairman. The Local Chairman then reviewed all requests, accounted for seniority, and then passed to the Carrier the BLET vacation requests. Following the submission, negotiations might take place as to the maximum numbers of engineers who are allowed to take vacations at one time, though usually an agreement was reached that was acceptable to both the BLET and the Carrier.

In 2009, BLET opposed UP's 2010 vacation scheduling efforts. In particular, the Kansas City and St. Louis vacation groups were unable to reach an agreement with UP until February, 2010. At the heart of these disagreements were cut backs in the number of engineers

who were allowed to take vacation on any particular week. In some areas, the Carrier cut back the number of vacation slots available per week from fifteen to seven or eight. The Carrier also required a minimum number of engineers to be off every week of the year. BLET argued that these changes resulted in an impermissible denial of their preferences. They further contended that the Carriers had not shown that its service needs require such vacation scheduling. Pursuant to the Agreement, a Carrier is entitled to unilaterally rearrange vacations when required by the service needs of the company.

***2** The prolonged talks in 2009 and early 2010 led to vacations being scheduled on a compressed 46–week year. To ensure that the 2011 schedule was prepared by the start of the year, work began on the 2011 vacation schedule in August 2010. Patrick Kenny, UP's Director of Crew Utilization, presented a proposed 2011 vacation schedule on November 9, 2010 which was rejected. Again, the rejection focused on a cut back in available vacation slots, and perceived "flat lining." Between November 16, 2010 and December 4, 2010 over 200 letters were sent to each Local Chairman regarding the 2011 vacation schedule. The correspondence informed the union representatives that the deadline to input their members' vacations was December 15, 2010. According to UP, "it became evident, based on BLET–GCA's failure to return calls or otherwise respond," that there would not be cooperation. An extension for inputting vacation was granted until December 21.

On December 16, 2010, UP sent a broadcast to all employees inviting them to enter their own vacation bids prior to December 21, 2010. This was a departure from previous protocol whereby engineers' vacation bids went through the Local Chairmen. On December 20, 2010 95% of employee's vacations had been scheduled. The remaining 5% were almost exclusively in the Kansas City or St. Louis service units. These units demanded up to 15 vacation slots per week with no minimums. On December 22, 2010, the Kansas City and St. Louis vacation groupings had still not been scheduled. UP extended the deadline for scheduling to December 27, 2010. Schedules were still not completed, and finally, on December 29, 2010, UP scheduled the vacations for Kansas City and St. Louis based on the offer made on December 22, 2010.

III. DISCUSSION

The parties argue this motion assuming that the dispute at hand is 'minor' in nature. Minor disputes are those "involving the interpretation of application of existing labor agreements." *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Major disputes relate to the formation of collective bargaining agreements or efforts to secure them. *Id.* at 253. Though BLET argues that this Court has jurisdiction to enter an injunction in minor disputes, it does not concede that this cannot be considered a major dispute.[1] For purposes of this motion, I consider this a minor dispute.

UP opposes the injunction on two grounds. First, UP disputes that this Court has jurisdiction to issue an injunction, contending that this matter must go directly to arbitration. Next, UP argues that even if this Court does have jurisdiction to issue an injunction, the injunction should be denied on the merits.

Before I begin my analysis, I note that each party has a valid reason for standing their ground and applying their given leverage. From UP's perspective, unilaterally implementing vacation changes applies pressure on the Union to simply accept its modifications. Disputing any change is a costly process involving extensive negotiations and even arbitration. Furthermore, the Union runs the risk of losing at arbitration. From the Union's perspective, by not accepting the new policy, the Union can successfully delay a resolution of the process. This in turn causes the Carrier uncertainty and disrupts some of its ability to manage its employees. Though taking such positions has led to a stand off, a resolution will ultimately be reached through arbitration.

***3** At the hearing held on January 21, 2011, I heard testimony from representatives of each side, as well as extensive legal and factual argument. I have considered both the written briefs and oral argument in reaching my decision. However, BLET's testimony and argument regarding incorrect grouping for purposes of seniority plays no part in my decision. The processes that underlie employee grouping are separate and distinct from those at issue here. It is not uncommon for erroneous grouping to occur. Here, though an improper grouping in one or two cases may have damaged a vacation schedule, it was the grouping, and not the policy at issue in this dispute, that was the cause. Additionally, though UP puts forth an argument of unclean hands, given the timing of the Carrier's implementation of the 2010 schedule in late

December 2010, I am unwilling to tax the union alone for causing a delay.

A. This Court Does Have Jurisdiction To Issue A Preliminary Injunction.

In the case of minor disputes, a federal court has only limited power to order an injunction to maintain the status quo. *National Ry. Labor Conference v. International Ass'n of Machinists and Aerospace Workers,* 830 F.2d 741, 749 (7th Cir.1987). As a general rule, a railroad may "continue to apply its interpretation of the agreement during the pendency of a minor dispute." *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.,* 788 F.2d 794, 799 (1st Cir.1986), cert. denied, —— U.S. ——, 107 S.Ct. 111, 93 L.Ed.2d 59 (1986). Because the dispute itself lies within the exclusive jurisdiction of the railway adjustment board, the federal courts may issue an injunction against strikes arising out of minor disputes in order to effect the purpose of the Railway Labor Act to provide for compulsory arbitration in such disputes. *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.,* 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *see also Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railway Co.,* 363 U.S. 528, 531, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) ("M–K–T").

The status quo requirement is important because it discourages strikes while disputes are being resolved. *Shore Line R. Co. v. Transportation Union,* 396 U.S. 142, 150, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). BLET seeks a preliminary injunction under Section 6 of the Railway Labor Act which provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. 45 U.S.C. § 156. Under this section, a court may order an injunction when there is a major dispute, and a carrier attempts to, ignores or repudiates or changes the terms of an existing collective bargaining agreement. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n,* 491 U.S. 299, 303, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989).

Though BLET cites *Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railroad* ("M–K–T), 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960), for the proposition that this Court has jurisdiction to enjoin UP from altering the status quo to preserve the interest in arbitration—even in the case of a minor dispute—they overstate the application of that case. *Brotherhood of Locomotive Engineers* states that an injunction of minor disputes is proper to prevent strikes. It does not discuss injunctions outside the context of a strike. Another case relied upon by BLET is *International Brotherhood of Teamsters Airline Division v. Frontier Airlines, Inc.,* —— F.3d ——, 2010 WL 5060260 (7th Cir.2010). There, the Seventh Circuit stated that "preliminary injunctions may be issued in minor disputes despite the exclusive jurisdiction of disputes of the NLRB or its counterpart in the airline industry." The cases cited by the Seventh Circuit in support of that statement, are *M–K–T,* and *National Railway Labor Conference v. International Ass'n of Machinists & Aerospace Workers,* 830 F.2d 741, 749–50 (7th Cir.1987). In both of these cases, the Courts' discussions surrounding the issuance of an injunction in minor disputes revolved around preventing strikes or other self help.

***4** The Seventh Circuit however, has also held that a district court may issue an injunction to prevent irreparable harm. *Bhd. of Railway Engineers v. Atchison,* 847 F.2d 403, 405 n. 1 (7th Cir.1988). Specifically, the Seventh Circuit notes that "a court may enjoin employer actions that engender only minor disputes if the delay in obtaining an NRAB decision will result in irreparable harm to employees." BLET asserts irreparable harm, contending that a "long-delayed decision" would impose hardship and irreparable injury that arbitration cannot remedy. Given the precedent set by the Supreme Court and the Seventh Circuit, I find that I do have the authority to issue an injunction.

B. BLET's Request For A Preliminary Injunction Is Denied.

A plaintiff is entitled to a preliminary injunction only when it meets three requirements: (1) showing a likelihood of success on the merits; (2) an inadequate remedy at law; and (3) irreparable harm. *Ty, Inc. v. Jones Group, Inc.,* 237 F.3d 891, 895 (7th Cir.2001). In addition to these three requirements, the court must also balance the harm the moving party would endure without the injunction, with the harm the non-movant would suffer if the injunction is granted. *Id.* Finally, the court must consider "the wild card that is the public interest." *Lawson Products, Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1433 (7th Cir.1986).

1. Likelihood of success on the merits

UP argues that BLET has no chance of success on the merits. To meet this requirement, the Seventh Circuit requires only a "better than negligible chance of success." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1096 (7th Cir.2008) (internal citation omitted). This is a very low threshold. Furthermore, when determining whether to grant injunctive relief against an employer when arbitration is pending, the Seventh Circuit has recognized that determinations on the merits "would intrude significantly on the arbitrator's function." *Local Lodge No. 1266, Int'l Ass'n of Machinists and Aerospace Workers, AFL–CIO v. Panoramic Corp.*, 668 F.2d 276, 284 (7th Cir.1981). Accordingly, a plaintiff need only establish that he advocates a sound position. *Id.* Though UP engages in a lengthy explanation of how its new policy complies with the La Rocco Awards, I find that BLET has met its burden.

2. Adequate remedy at law

To satisfy this requirement, BLET must show that absent court intervention, any remedy would be "seriously deficient as compared to the harm suffered." *Foodcomm Intern. v. Barry*, 328 F.3d 300, 304 (7th Cir.2003). UP argues that BLET has an obvious remedy at law: arbitration through the RLA. BLET disagrees. Practically speaking, BLET contends that the arbitration process, even assuming a victory, will not be able to compensate engineers who are forced to take vacation, or who are denied their vacation preferences.

I am unpersuaded by BLET's arguments. The Union's harm is almost certainly capable of monetary compensation; disappointment is not irreparable in the classic sense of the word, and emotional suffering is commonly compensated by cash. UP has agreed to an expedited arbitration of this dispute, and the arbitrator is capable of offering full relief. Whatever harm that would be done to individuals by an arbitration that consumes more than sixty days can be adequately compensated by cash, days off, or similar pecuniary remedies. Accordingly, I find that BLET has an adequate remedy available at law.

3. Irreparable Harm

***5** The Seventh Circuit has recognized, in the context of a suit over Family and Medical Leave Act rights, that "working conditions pose problems for the workers. For instance, some workers are "on call", meaning they have no regularly set days off and may be called to duty at any time consistent with federal laws." *Brotherhood of Maint. of Way Employees, et al., v. CSX Transp., et al.*, 478 F.3d 814, 819 (7th Cir.2007). Likewise, the Court recognized that "workers cherish their vacations" and noted that "vacation agreements are the subject of apparently hard bargaining. Their right to time one's vacation and, to perhaps a slightly lesser degree, personal leave days, is a hard-won right of railroad workers." *Id.* Accordingly, BLET argues that depriving workers of their vacation preferences would inflict irreparable injury on many engineers. "There is no way to give a person back time spent with a toddler as they begin to walk or talk, with family members enjoying time together, and countless other events which engineers plan for their vacations."

UP states that BLET cannot show irreparable harm because "at worst, a UP employee may be instructed to take a paid vacation when the needs of service allow for it, rather than on the week of the employee's preference." This, argues UP, does not amount to irreparable harm. I agree. As noted above, any harm done to individual union members can be compensated through cash awards or additional days off. Though there will be the inevitable disappointment of an unplanned forced vacation, or cancelled plans, this is not irreparable in the classic sense of the word; emotional suffering is commonly compensated by monetary awards. I further note that even by the actual terms of the Agreement, harm is not irreparable. The Carrier has always retained the power to rearrange vacations at any time if the service needs of the railroad so dictate.

Finally, BLET argues that the Carrier is rewarding those engineers who have acquiesced to the Carrier's invitation to deal directly as to vacation slots. "The message is all too clear: If you acquiesce to the Carrier's requests to change working conditions and attempt to ice out the Union from its statutory and contractual role, you will be rewarded; if instead you insist on the Carrier respecting agreements and practices and through your lot with the Union, you will be punished." As discussed below, any loss in stature or authority that the Union faces in the absence of an injunction is not irreparable.

4. Balance of Harms and Public Interest

The balance of harms in this case results in a tie. There are two aspects to the harm UP will suffer. The first is monetary cost. UP states that cost of retraining engineers,

and recalling and retraining furloughed employees is great; in 2010, UP incurred retraining costs for the Kansas City Service Unit in excess of 1.8 million dollars, and for the St. Louis Service Unit in excess of 1.5 million dollars. Though these costs are substantial, they are typical. Each year requires a certain amount of retraining to accommodate vacation schedules, and UP does not contend that 2010 was unique. It is the 'cost of doing business.' A second harm to UP, if an injunction is issued, is seen in its inability to manage personnel effectively. Though disruptive, the situation will be temporary as the arbitrator's award will confirm the proper procedures to be followed and vacation scheduling will resume a normal pattern. This is the same injury that the Union faces in the absence of an injunction. Without a return to the status quo, the Union leadership faces damage to its stature and authority. If the Union goes on to win at arbitration, its strong stance will be vindicated and its stature will be restored. Conversely, if it loses, it will be placed in a position where it can assure its members that it 'fought to the death' for its members.

***6** Similarly, when the public interest is considered, the result is a tie.

V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction is denied. Pursuant to this order there will be no further broadcasts from UP to its employees encouraging direct scheduling. I further deny Plaintiff's request to order the arbitrator to make BLET's employees whole in the event they are successful at arbitration. The arbitrator is entitled to award an entire remedy. As he has not declined to issue such relief, it is not ripe for me to rule on this issue.

All Citations

Not Reported in F.Supp.2d, 2011 WL 221823, 160 Lab.Cas. P 10,339

Footnotes

1 In a supplemental filing, BLET argues that the dispute at hand can be considered a major dispute because it constitutes a unilateral imposition of work rule changes which are to be sought through collective bargaining. The parties' briefs assume that this is a minor dispute, and the parties did not argue orally over this issue at the preliminary injunction hearing.

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