MEMORANDUM

To: Don M. Hahs, President-BLET

From: Harold A. Ross, General Counsel-BLET

Date: June 7, 2004

Re: BLET, et al. v. BNSF, et al.
USDC N.D. Ill., E. Division
Case Nos.: 03 C 9419, 04 C 0163, 04 C 1873 and 04 C 2138
FMLA Policy Litigation

Enclosed for your files and information is a copy of the Second Amended Complaint filed in the above cases. The case is brought against the BNSF, CSXT, including the former Conrail, UP, NS and the Indiana Harbor Belt. There are three claims for relief set forth in the complaint: (1) Violations of FMLA; (2) Violations of RLA §§2, Seventh and 6 (Major Dispute); and (3) breach of duty to maintain agreements, RLA §2, First.

Copies of the complaint are being sent the involved Chairmen.

H.A.R.

enclosure

cc: E. W. Rodzwicz, FVP-BLET — w/enclosure
All BNSF General Chairmen :
All CSXT General Chairmen :
R. R. Pasquarella, General Chairman-BLET :
All UP General Chairmen-BLE :
All NS General Chairmen-BLE :
T. E. Roberts, GC-BLET :
J. P. Tolman, CofS-BLET :

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Reading
BLE U.P. SOUTHERN GCA

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

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, et al., Plaintiffs, v. CSX TRANSPORTATION, INC., et al., Defendants.	Case No. 03 C 9419 Consolidated with: 04 C 0163 04 C 1873 04 C 2138 Judge Wayne R. Andersen Magistrate Judge Geraldine Soat Brown
BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN, et al., Plaintiffs, v. BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, et al., Defendants.	Civil Action No. 04 C 0163

SECOND AMENDED COMPLAINT OF BLE, IAM, TWU, TCU, USCA, UTU, AND INDIVIDUAL PLAINTIFFS

1. This complaint seeks declaratory and injunctive relief for violations of the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188. Defendants have violated the FMLA by promulgating policies relating to FMLA leave that by design and intent interfere with, restrain, and deny the exercise of rights provided under the FMLA. By promulgating their FMLA leave policies, defendants have also abrogated collective bargaining agreements between defendants and plaintiff unions, and

unilaterally altered the working conditions of employees represented by plaintiff unions in violation of the RLA.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. This Court may grant declaratory judgment with respect to the rights of the parties pursuant to 28 U.S.C. §§ 1651 and 2201.

3. Venue is proper in this district under 28 U.S.C. § 1391 because defendants are subject to personal service in this judicial district and/or operate their businesses in this district.

PARTIES

4. Plaintiff Brotherhood of Locomotive Engineers & Trainmen, a Division of Railway Conference, International Brotherhood of Teamsters ("BLE") is an unincorporated railway labor organization and the exclusive collective bargaining representative under the RLA for certain crafts or classes of employees employed by defendants. BLE is headquartered in Cleveland, Ohio. BLE brings this action against defendants Burlington Northern & Santa Fe Railway Company, CSX Transportation, Inc., Indiana Harbor Belt Railroad Company, Union Pacific Railroad Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation.

5. Plaintiff International Association of Machinists and Aerospace Workers ("IAM") is an unincorporated labor organization

and the exclusive collective bargaining representative under the RLA for certain crafts or classes of employees employed by defendants. IAM is headquartered in Upper Marlboro, Maryland. IAM brings this action against defendants Burlington Northern & Santa Fe Railway Company, CSX Transportation, Inc., Indiana Harbor Belt Railroad Company, Union Pacific Railroad Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation.

6. Plaintiff Transport Workers Union ("TWU") is an unincorporated railway labor organization authorized to enforce collective bargaining agreements under the RLA for certain crafts or classes of employees employed by defendant CSX Transportation, Inc. TWU is headquartered in New York, New York. TWU brings this action against defendant CSX Transportation, Inc.

7. Plaintiff Transportation Communications International Union ("TCU") is an unincorporated railway labor organization and the exclusive collective bargaining representative under the RLA for certain crafts or classes of employees employed by defendants. TCU is headquartered in Rockville, Maryland. TCU brings this action against defendants Burlington Northern & Santa Fe Railway Company, CSX Transportation, Inc., Indiana Harbor Belt Railroad Company, Union Pacific Railroad Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation.

8. Plaintiff United Supervisors Council of America ("USCA") is an unincorporated labor organization and the exclusive collective bargaining representative under the RLA for

yardmasters employed by defendant Union Pacific Railroad Company. USCA brings this action against defendant Union Pacific Railroad Company.

9. Plaintiff United Transportation Union ("UTU") is an unincorporated railway labor organization and the exclusive collective bargaining representative under the RLA for certain crafts or classes of employees employed by defendants. UTU is headquartered in Cleveland, Ohio. UTU brings this action against defendants Burlington Northern & Santa Fe Railway Company, CSX Transportation, Inc., Union Pacific Railroad Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation.

10. Plaintiff Reginald Baker is an employee of defendant Burlington Northern & Santa Fe Railway Company and is represented by UTU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Baker brings this action against defendant Burlington Northern & Santa Fe Railway Company.

11. Plaintiff Peggy J. Bricker is an employee of defendant Indiana Harbor Belt Railroad Company and is represented by TCU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of herself and others

similarly situated. Plaintiff Bricker brings this action against defendant Indiana Harbor Belt Railroad Company.

12. Plaintiff Michael S. Cheeks is an employee of defendant Union Pacific Railroad Company and is represented by UTU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Cheeks brings this action against defendant Union Pacific Railroad Company.

13. Plaintiff C.R. Losgren is an employee of defendant Union Pacific Railroad Company and is represented by BLE for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Losgren brings this action against Union Pacific Railroad Company.

14. Plaintiff Tyrone Minor is an employee of defendant Burlington Northern & Santa Fe Railway Company and is represented by TCU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Minor brings this action against defendant Burlington Northern & Santa Fe Railway Company.

15. Plaintiff Thomas Richard is an employee of defendant Union Pacific Railroad Company and is represented by TCU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Richard brings this action against defendant Union Pacific Railroad Company.

16. Plaintiff Robert F. Sullivan is an employee of defendant CSX Transportation, Inc. and is represented by UTU for collective bargaining purposes. Plaintiff resides and is employed in this judicial district. Plaintiff is an "eligible employee" under Section 2611(2) of the FMLA, 29 U.S.C. § 2611(2), and raises this complaint on behalf of himself and others similarly situated. Plaintiff Sullivan brings this action against defendant CSX Transportation, Inc.

17. Defendant Burlington Northern & Santa Fe Railway Company ("BNSF") operates an interstate rail network and is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First. BNSF is a Delaware corporation with its headquarters in Fort Worth, Texas.

18. Defendant CSX Transportation, Inc. ("CSXT") operates an interstate rail network and is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First. CSXT is a Virginia corporation with its headquarters in Jacksonville, Florida.

19. Defendant Indiana Harbor Belt Railroad Company ("IHB") operates an interstate rail network and is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First.

20. Defendant Union Pacific Railroad Company ("UP") operates an interstate rail network and is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First. UP is a Utah corporation with its headquarters in Omaha, Nebraska.

21. Defendant Norfolk Southern Railway Company ("NSR") operates an interstate rail network and is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First. NSR is a wholly-owned subsidiary of defendant Norfolk Southern Corporation ("NSC"), a Virginia Corporation with its headquarters in Norfolk, Virginia. Defendant NSC is a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. § 151 First.

FACTUAL BACKGROUND

22. For at least six decades, plaintiff unions and their predecessor organizations have collectively bargained with defendants and their predecessors to obtain valuable rights regarding leave, including medical and sick leave, personal leave, and vacation leave. These valuable rights are set forth in various collective bargaining agreements between the parties. These valuable rights include not only the entitlement to take such leave, often with pay, but also the right of employees represented by plaintiff unions to determine when and how to use the various forms of leave to which they are entitled.

23. Vacation leave rights are set forth, for the most part, in agreements known as the National Vacation Agreements ("NVAs"). The NVAs are the result of national bargaining between a group of rail employers, including defendants, and groups of rail unions, including plaintiff unions. These NVAs provide that paid vacations are scheduled based upon seniority and employee preference. The NVAs further provide that once scheduled the carrier cannot alter the scheduling of vacations, unless justified by essential service requirements or demands.

24. Under the NVA covering operating employees, such as those represented by BLE and UTU, employees are entitled to split their allowed vacation time into two blocks of time each year. In addition, an employee may elect to take up to one week of allowed vacation in single day increments.

25. Under the NVA covering non-operating employees, such as those represented by IAM, TCU and TWU, employees are entitled to select their allowed vacation by weeks. Under certain non-operating agreements, employees can also elect to take vacation days in single day increments.

26. Other national and local agreements between the parties provide for other types of leave such as medical and sick leave, personal leave, and unpaid leaves of absence. These national and local agreements set forth the terms and conditions for exercise of these leave rights. For example, under applicable agreements, some employees represented by plaintiff unions are entitled paid personal leave, which employees may choose to use for any

purpose. Some employees are also entitled under applicable collective bargaining agreements to take unpaid leaves of absence for purposes including their own sickness, the sickness of a family member, or the birth/adoption of a child.

27. In November 2003, defendants BNSF, CSX, and UP announced that effective January 1, 2004, they would implement new FMLA leave policies requiring employees represented by plaintiff unions to use the paid leave to which they are entitled under applicable collective bargaining agreements concurrently with qualifying FMLA leave in certain circumstances. In July 2003, defendant IHB announced that effective August 15, 2003 they would implement a new FMLA leave policy requiring employees represented by plaintiff unions to use the paid leave to which they are entitled under applicable collective bargaining agreements concurrently with qualifying FMLA leave in certain circumstances. By notice dated May 3, 2004, defendants NSR and NSC announced that, effective August 1, 2004, they would implement an FMLA policy requiring employees represented by plaintiff unions to use paid leave to which they are entitled under applicable collective bargaining agreements concurrently with qualifying FMLA leave in certain circumstances.

28. Defendants stated that they were implementing these FMLA policies in response to perceived "abuses" of FMLA leave. Defendants also asserted that the FMLA, 29 U.S.C. § 2612(d)(2)(A) and (B) granted them the statutory right to require such concurrent use of paid leave and FMLA leave.

29. The FMLA policy implemented by BNSF on January 1, 2004, provides that all approved medical leave will now automatically be deemed to constitute FMLA leave. The policy requires employees to substitute paid leave for any portion of unpaid FMLA leave. Specifically, an employee eligible for sick leave benefits must substitute paid sick leave for the employee's own unpaid medical leaves. An employee who is eligible for sick leave benefits but is not eligible for other paid disability leave must substitute up to four weeks of sick leave for their own unpaid family leave. If paid sick leave is exhausted or otherwise unavailable, an employee must substitute other paid leave in the following order: paid personal leave, annual leave, comp days, or vacation leave for any unpaid FMLA leave. This substitution requirement applies to all FMLA leaves without regard to whether the employee is eligible for paid sick leave. Defendant BNSF's FMLA policy also dictates the manner in which the right to blocks of vacation time, as provided for under applicable collective bargaining agreements, must be exhausted.

30. Under the FMLA policy implemented by CSXT on January 1, 2004, defendant CSXT now designates medical leaves of absence taken pursuant to applicable collective bargaining agreements as FMLA leave. Having so designated a leave of absence, an employee must substitute paid sick leave and personal leave for FMLA leave taken due to an employee's own serious health condition. In addition, an employee must substitute paid vacation for FMLA leave taken on an intermittent or reduced schedule basis due to

an employee's own serious health condition. An employee must substitute paid personal leave or vacation for FMLA leave taken due to the birth/adoption of a child or the serious health condition of a family member.

31. Under the FMLA policy implemented by IHB on August 15, 2003, defendant IHB requires that an employee substitute paid sick leave for for FMLA leave taken due to an employee's own serious health condition. In addition, an employee must substitute paid personal leave or vacation for FMLA leave taken due to the birth/adoption of a child or the serious health condition of a family member.

32. Under the FMLA policy implemented by UP on January 1, 2004, defendant UP now designates medical leaves of absence taken pursuant to applicable collective bargaining agreements as FMLA leave. Having so designated a leave of absence, an employee must substitute paid sick leave first for FMLA leave taken due to an employee's own serious health condition. When paid sick leave is exhausted or an employee is not eligible for sick leave, an employee must substitute paid personal leave and vacation for FMLA leave due to an employee's own serious health condition. An employee must substitute paid personal leave or vacation for FMLA leave taken due to the birth/adoption of a child or the serious health condition of a family member.

33. Under the FMLA policy announced by NSR and NSC on or about May 3, 2004, an employee must substitute paid sick leave, personal leave or vacation for intermittent FMLA leave taken due

to his or her own serious health condition. An employee must substitute paid personal leave or vacation for FMLA leave taken due to the birth/adoption of a child or the serious health condition of a family member.

34. Defendants' policies operate to deprive employees represented by plaintiff unions of long-standing collectively bargained rights, such as the right to lock-in vacation scheduling, the right to take vacations of a certain length for continuous or intermittent periods in accordance with the terms of applicable agreements, the right to determine when and for what reasons paid personal leave should be used, and the right to take contractually provided unpaid leaves of absence.

35. Further, upon information and belief, as a direct result of defendants' unilateral promulgation of their FMLA policies, employees represented by plaintiff unions are being inhibited and restrained from taking qualified FMLA leave in order to avoid forfeiting their collectively bargained rights regarding the use of leave.

36. Defendants did not seek to collectively bargain with plaintiff unions regarding their FMLA leave policies before implementation. Plaintiff unions have not agreed or acquiesced to defendants' implementation of their FMLA leave policies.

COUNT I

VIOLATIONS OF FMLA

37. Paragraphs 1 through 36 are incorporated by reference as if restated herein.

38. The purpose of the FMLA is to entitle all eligible employees to a minimum level of leave in the event of the birth/adoption of a child, an employee's own serious health condition, or the serious health condition of a family member. In setting a minimum level, Congress stated that it did not intend to curtail more generous collectively bargained leave policies. 29 U.S.C. § 2653. Thus, the FMLA specifically provides that:

> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

29 U.S.C. § 2652(a).

39. With the purpose of curbing perceived "abuses" of FMLA leave, defendants have implemented FMLA leave policies that unlawfully interfere with, restrain, and deny the exercise of FMLA rights by conditioning the exercise of such rights on the abandonment of rights secured under applicable collective bargaining agreements, such as the right to lock-in vacation scheduling, the right to take vacations of a certain length for continuous or intermittent periods in accordance with the terms of applicable agreements, the right to determine when and for what reasons paid personal leave should be used, and the right to take contractually provided unpaid leaves of absence. Thus, defendants' FMLA policies by design and intent work to inhibit employees represented by plaintiff unions from taking qualifying

FMLA leave. Accordingly, defendants have violated Section 2615(a)(1) of the FMLA and/or Section 2652(a). 29 U.S.C. §§ 2615(a)(1) and 2652(a).

40. Section 2612(d)(2) of the FMLA, 29 U.S.C. § 2612(d)(2), does not provide an exception for defendants' unlawful conduct. Section 2612(d)(2) allows employers to require that employees substitute paid leave for FMLA leave in certain circumstances. The statutory permission to require such use of paid leave, however, is contingent upon the absence of other limiting factors such as the provisions of applicable collective bargaining agreements. See 29 U.S.C. § 2652(a); 60 Fed. Reg. 2180, Summary of Major Comments on § 825.207 (January 6, 1995).

41. To the extent that defendants' FMLA polices purport to require employees to substitute various types of paid leave in an order determined solely by defendants, defendants unlawfully interfere with, restrain, and deny the exercise of the right of employees under the FMLA to determine in the first instance the manner in which unpaid leave is to be substituted for FMLA leave. Accordingly, defendants have violated Section 2615(a)(1) of the FMLA. 29 U.S.C. §§ 2615(a)(1); see also 29 C.F.R. § 825.207.

42. To the extent that defendants' policies purport to require employees to substitute paid sick leave for FMLA leave taken due to the birth/adoption of a child or the serious health condition of a family member, defendants unlawfully interfere with, restrain, and deny the exercise the FMLA rights in

violation of Sections 2615(a)(1) and 2612(d)(2), 29 U.S.C. §§ 2615(a)(1) and 2612(d)(2).

COUNT II

VIOLATIONS OF THE MAJOR DISPUTE PROVISIONS OF THE RLA (RLA Section 2, Seventh and Section 6)

43. Paragraphs 1 through 42 are incorporated by reference as if restated herein.

44. Section 2, Seventh of the RLA, 45 U.S.C. § 152, Seventh, prohibits a carrier from changing "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."

45. Section 6 of the RLA, 45 U.S.C. § 156, sets forth the procedure which must be followed prior to any changes in "agreements affecting rates of pay, rules, or working conditions." The carrier or the employee's representative must provide thirty days written notice of a proposed change to an agreement, a conference on the proposed amendment shall be held, and either party may request the mediation services of the National Mediation Board. A carrier cannot alter the rates of pay, rules, or working conditions while it and an employee's representative are involved in this procedure for amending agreements.

46. Defendants' unilateral promulgation of their FMLA leave policies constitutes an unlawful attempt to circumvent, defeat and avoid existing collective bargaining agreements between

plaintiff unions and defendants, which establish the sole terms and conditions for employees' contractual rights to various types of leave, including medical or sick leaves of absence for themselves or to care for family members, personal leave, and vacation leave.

47. Defendants' actions also constitute a unilateral alteration of the long-standing working conditions of employees represented by plaintiff unions, embodied in collectively bargained agreements, as well as long-standing custom and practice. Such working conditions include the right to lock-in vacation scheduling, the right to take vacations of a certain length for continuous or segmented periods of time at the employee's discretion, the right to determine when and for what reasons paid personal leave should be used, and the right to take contractually provided leaves of absence on an unpaid basis. Defendants' unilateral alteration of working conditions is unlawful because they have failed to exhaust the major dispute notice, mediation and bargaining processes of the RLA, in violation of Section 2, Seventh and Section 6 if the RLA.

48. Defendants' actions constitute and unlawful resort to self-help without first exhausting the major dispute processes of the RLA.

COUNT III

FAILURE TO MAINTAIN AGREEMENTS
(Section 2 First)

49. Paragraphs 1 through 48 are incorporated by reference as if restated herein.

50. Section 2 First of the RLA, 45 U.S.C. § 152 First, requires carriers "to exert every reasonable effort to make and maintain agreements concerning the rates of pay, rules, and working conditions" of employees of a carrier and "to settle all disputes . . . in order to avoid any interruption to commerce or the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

51. Defendants' actions violate their obligations under Section 2 First of the RLA, 45 U.S.C. § 152 First.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that this Court grant the following relief:

A. Enter a judgment declaring that defendants' policies relating to FMLA leave interfere with, restrain, and deny the exercise of rights provided under the FMLA;

B. Enter a judgment declaring that defendants have violated their statutory duty under Section 2, Seventh and Section 6 of the RLA, 45 U.S.C. §§ 152, Seventh and 156, to maintain the status quo as set forth in collective bargaining agreements between defendants and plaintiff unions;

C. Enter a judgment declaring that defendants have violated their statutory duty under Section 2 First of the RLA, 45 U.S.C. § 152 First, to maintain their agreements with plaintiff unions;

D. Enter an order granting plaintiffs injunctive relief compelling defendants to cease from interfering with, restraining, and denying the exercise of rights provided under the FMLA;

E. Enter an order granting plaintiff unions injunctive relief compelling defendants to comply with their statutory duty under Section 2, Seventh and Section 6 of the RLA, 45 U.S.C. §§ 152, Seventh and 156, and refrain from any further unilateral actions in abrogation of existing collective bargaining agreements with plaintiff unions until they have followed and exhausted the procedures for amending agreements as set forth in the RLA;

F. Enter an order requiring defendants to make whole all employees represented by plaintiff unions for any losses they have suffered as a result of defendants' unlawful actions;

G. Enter an order awarding plaintiffs their attorneys' fees and other costs associated with this action;

H. Enter an order granting further relief as the Court may deem proper.

Plaintiffs hereby demand a trial by jury on all issues triable to a jury.

Respectfully submitted,

Michael S. Wolly
N.D. Bar No. 90785827
Margo Pave
N.D. Bar No. 90785829
Zwerdling, Paul, Kahn
& Wolly, P.C.
1025 Connecticut Ave., N.W.
Suite 712
Washington, DC 20036
202-857-5000
Fax: 202-223-8417

William L. Phillips
601 West Golf Road
Mt. Prospect, IL 60056
847-439-3732
Fax: 847-439-3743

Counsel for Plaintiffs BLE and C.R. Losgren

John A. Edmond
Carmen R. Parcelli
Guerrieri, Edmond &
Clayman, P.C.
1625 Massachusetts Ave., N.W.
Suite 700
Washington, DC 20036
202-624-7400
Fax: 202-624-7420

Dale D. Pierson
Bar No. 6183882
Elizabeth LaRose
Bar No. 6229653
6140 Joliet Road
Countryside, IL 60525
708-579-6663
Fax: 708-588-1647

Counsel for Plaintiffs IAM, TWU, TCU, USCA, UTU, and Individual Plaintiffs Reginald Baker, Peggy J. Bricker, Michael S. Cheeks, Tyrone Minor, Thomas Richard, and Robert Sullivan

Dated: June 3, 2004

CERTIFICATE OF SERVICE

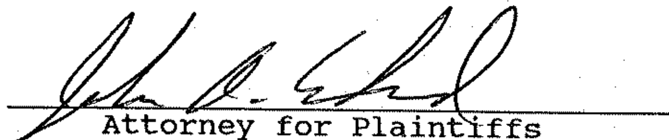
The undersigned, an attorney of record, hereby certifies that he caused a copy of the foregoing Second Amended Complaint Of BLE, IAM, TWU, TCU, USCA, UTU, And Individual Plaintiffs to be served via first-class mail, postage prepaid, on or before the hour of 5:00 p.m. this 3rd day of June, 2004, upon the following:

Donald J. Munro
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, DC 20036

Marvin Gittler
Librado Arreola
Asher, Gittler, Greenfield,
Cohen & D'Alba
200 West Jackson Boulevard,
Suite 1900
Chicago, IL 60606

Charles A. Collins
Charles A. Collins, P.A.
Labor and Professional Centre
411 Main Street
Suite 410
St. Paul, MN 55102

Daniel J. Mohan
Daley & Mohan, P.C.
150 North Wacker Drive
Suite 1550
Chicago, IL 60606



Attorney for Plaintiffs