

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEANETTE M. WALLIS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

CASE NO. C08-1711JLR

ORDER RE: MOTION FOR
PROTECTIVE ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiff Jeanette M. Wallis's motion for protective order (Dkt. # 12). Ms. Wallis requests that the court enter a protective order preventing Defendant BNSF Railway Company ("BNSF") from requiring her to appear at an internal investigation. In the alternative, Ms. Wallis seeks a temporary restraining order. The court concludes that oral argument is unnecessary. Having considered the papers and for the following reasons, the court GRANTS the motion and enters a protective order on the terms specified in Part III(D).

II. BACKGROUND

At the heart of her complaint, Ms. Wallis alleges that on November 16, 2008, she was injured while working for BNSF. (Compl. (Dkt. # 1) ¶ 4.) She claims that, while riding point as a hostler on a train attempting to make a joint with another railcar, the train on which she

1 was riding approached the other at an unsafe speed. (*Id.*) Ms. Wallis was forced to leap to
2 safety or be trampled beneath the wheels. (*Id.*) She asserts that she sustained severe and
3 permanent injuries as a result. (*Id.*)

4 On November 17, 2008, Ms. Wallis filed an injury report with BNSF. (Mot. (Dkt. #
5 12) at 3 & Ex. 7.) Soon after, on November 25, 2008, she filed this complaint. (*Id.* at 3.)
6 Ms. Wallis brings suit against BNSF under the Federal Employers' Liability Act ("FELA"),
7 45 U.S.C. § 51 *et seq.*, which authorizes a cause of action for railroad employees who suffer
8 personal injuries or wrongful death. (Compl. ¶ 3.)

9 On December 1, 2008, BNSF sent Ms. Wallis notice of an internal investigation.¹
10 (Mot., Ex. 1.) The notice explains:

11 [The investigation is] for the purpose of ascertaining the facts and determining
12 your responsibility, if any, in connection with your alleged conduct and alleged
13 failure to be forthcoming with all information regarding personal injury that
14 occurred at Balmer yard at approximately 1030 hours on November 16, 2008 while
15 working as crew member on job Y-INB7121-16A on duty at 0701 hours on
16 November 16, 2008 at Seattle, Washington.

17 (*Id.*) Failure to be forthcoming with all of the facts is a firing offense per BNSF policy. (*Id.*
18 at 4 & Ex. 8.) The notice informs Ms. Wallis that she is to attend a hearing as part of the
19 investigation on January 22, 2009, and may bring an appropriate representative. (*Id.*) The
20 notice does not specifically request medical information. (*Id.*) Ms. Wallis emphasizes that
21 she will not have counsel available at the hearing, the hearing will not be governed by the
22 Federal Rules of Civil Procedure ("Rules"), and the conducting officers will be BNSF
23 managers. (*Id.* at 4.)

24 ¹ In her motion, Ms. Wallis states that BNSF sent her notice of two investigations. (Mot. at 3.)
25 By contrast, BNSF discusses only a single investigation. A review of the notice suggests that BNSF
scheduled only a single investigation.

1 Ms. Wallis believes that BNSF will use the investigation and its results to terminate
2 her employment and thereby minimize her claim for future wages under FELA. (*Id.*) She
3 also believes that BNSF will attempt to obtain information about the incident and her medical
4 condition. (*Id.*)

5 In light of these concerns, Ms. Wallis requests that the court enter a protective order
6 preventing BNSF from conducting the investigation. (*Id.* at 12.) At a minimum, Ms. Wallis
7 requests that she not be required to appear at the hearing. (*Id.*) She reasons that the court
8 may enter a protective order pursuant to Rule 26(c)(1) in order to enforce the discovery rules
9 that govern her FELA claim. (*Id.* at 5-9.) She characterizes the investigation as an improper
10 attempt to circumvent the protections of the Rules. (*Id.* at 6.) She also believes the
11 investigation raises ethical concerns under the Washington Rules of Professional Conduct.
12 (*Id.* at 7.)

13 In response, BNSF argues that the Railway Labor Act ("RLA"), 45 U.S.C § 151 *et*
14 *seq.*, preempts the court's jurisdiction over the investigation and thus prohibits the court from
15 enjoining or otherwise interfering with the investigation. (Resp. (Dkt. # 14) at 5.) BNSF
16 emphasizes that its investigation follows in line with the procedures established under a
17 collective bargaining agreement ("CBA"). (*Id.* at 10.) BNSF also notes that Ms. Wallis is not
18 required to attend the investigation and that, if she attends, she may be represented by her
19 union representative and appeal any result. (*Id.* at 3, 11.)

20 III. DISCUSSION

21 The issue is whether the RLA strips district courts of jurisdiction to enforce the Rules
22 in connection with an investigation made pursuant to a CBA into the facts that give rise to a
23 plaintiff's FELA claim. A range of federal courts in this district and elsewhere have
24 considered this issue. Although the Court of Appeals for the Ninth Circuit has not yet
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1 resolved this issue, the emerging trend among the lower courts of the Ninth Circuit clearly
2 cuts against BNSF's arguments. Most courts analyzing the issue, including the district courts
3 located in the Ninth Circuit to address it, have concluded that the RLA does not divest district
4 courts of jurisdiction to enforce the Rules. *See, e.g., Partida v. Union Pacific R.R. Co.*, 221
5 F.R.D. 623, 629-631 (C.D. Cal. 2004) (medical examination); *Bernal v. S. Pacific Transp.*
6 *Co.*, 196 F.R.D. 371, 373-74 (E.D. Cal. 2000) (requests for medical information); *Riensch v.*
7 *Union Pacific R.R. Co.*, 12 F. Supp. 2d 1136, 1138-39 (D. Colo. 1998) (fitness for duty
8 examination); *Vicary v. Consol. Rail Corp.*, 942 F. Supp. 1146, 1150 (N.D. Ohio 1996)
9 (written questionnaires and medical examination); *Smith v. Union Pacific R.R. Co.*, 878 F.
10 Supp. 171, 172-73 (D. Colo. 1995) (medical examination); *Dodge v. BNSF Ry. Co.*, Case No.
11 C08-5542JKA (W.D. Wash. Oct. 7, 2008) (Dkt. # 18) (examination and interrogation); *Tridle*
12 *v. Union Pacific R.R. Co.*, Case No. 9:07cv213, 2007 WL 5659415, at *1 (E.D. Tex. Nov. 6,
13 2007) (investigation regarding failure to provide medical information); *Litowitz v. BNSF Ry.*
14 *Co.*, Case No. C07-993MJP, 2007 WL 1976986 (W.D. Wash. July 3, 2007) (investigation);
15 *see also Pratt v. Union Pacific R.R. Co.*, 85 Cal. Rptr. 4th 165, 177 (Cal. Ct. App. 2008)
16 (medical examination). By contrast, some courts have held that the RLA preempts the
17 jurisdiction of district courts to enter protective orders. *See, e.g., Schnelle v. Soo Line R.R.*
18 *Co.*, 976 F. Supp. 849, 851-52 (D. Minn. 1997); *Burlington N. R.R. Co.*, 173 F.R.D. 254,
19 257-58 (D. Minn. 1995); *see also Union Pacific R.R. Co. v. Dierker*, 961 S.W.2d 816, 820
20 (Mo. 1998).

21 Two courts in the Western District of Washington have already addressed this issue.
22 In *Litowitz*, the Honorable Marsha J. Pechman entered a protective order preventing BNSF
23 from seeking information from the plaintiff regarding his FELA claim except through the
24 procedures of the Rules. 2007 WL 1976986, at *2. Judge Pechman reasoned that the court
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1 had jurisdiction over the FELA claim, regardless of whether the court had jurisdiction over
2 any internal investigation under the RLA and the CBA. *See id.* at *1.

3 BNSF does not challenge this Court's jurisdiction over Plaintiff's FELA claim. It
4 is *that* jurisdiction that gives the Court authority to control interactions between the
5 parties that touch upon the issues raised in Plaintiff's FELA suit. The Court's
6 stewardship of Plaintiff's FELA claim includes supervision of all pretrial
7 discovery.

8 *Id.* Although Judge Pechman prohibited BNSF from requiring the plaintiff to appear at any
9 investigation absent compliance with the Rules, Judge Pechman allowed BNSF to proceed
10 with its investigation. *Id.* at *2. Similarly, in *Dodge*, the Honorable J. Kelley Arnold adopted
11 the reasoning of *Litowitz* in entering a protective order to prevent BNSF from seeking
12 information from the plaintiff regarding his FELA claim except through the procedures of the
13 Rules. *See Dodge*, Case No. C08-5542JKA (W.D. Wash. Oct. 7, 2008) (examination and
14 interrogation). The *Dodge* case involved two investigations, one of which appears to be
15 identical to the investigation in this matter.

16 Neither *Litowitz* nor *Dodge* is binding on this court. Nonetheless, they offer potential
17 guidance in this matter. BNSF asks the court to break with *Litowitz* and *Dodge* by concluding
18 that the RLA preempts jurisdiction. BNSF cites case law that it did not cite in the pleadings
19 submitted to Judge Pechman and Magistrate Judge Arnold. (*See Resp.* at 6-8.) It argues in
20 addition that many of the cases cited by Ms. Wallis involve medical examinations and
21 requests for medical documents, which are not at issue in this case.

22 **A. Courts Must Enforce Compliance with the Federal Rules of Civil Procedure and**
23 **May Enter Protective Orders to Regulate the Discovery Process**

24 District courts possess both the power and the obligation to enforce compliance with
25 the Rules. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211-12
(9th Cir. 2002). A "trial court is in the best position to weigh fairly the competing needs and
interests of the parties affected by discovery. The unique character of the discovery process

1 requires that the trial court have substantial latitude to fashion protective orders.” *Seattle*
2 *Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see Phillips*, 207 F.3d at 1211-12. Rule
3 26(c) permits courts to issue protective orders for good cause “to protect a party or person
4 from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P.
5 26(c). Civil litigants in federal court are entitled to the protections of the Rules.

6 **B. The RLA Preempts District Court Jurisdiction for “Minor Disputes” But Does**
7 **Not Preclude Jurisdiction over FELA Claims**

8 The RLA subjects certain disputes between railroads and employees to mandatory
9 arbitration before the National Railroad Adjustment Board (“NRAB”). The act distinguishes
10 between “major disputes” and “minor disputes.” A major dispute is one arising “out of the
11 formation or change of collective bargaining agreements covering rates of pay, rules, or
12 working conditions.” *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563
13 (1987), *citing Detroit & T.S.L.R. Co. v. Transp. Union*, 396 U.S. 142, 145 n.5 (1969). In
14 contrast, a minor dispute is one “growing out of grievances or out of the interpretation or
15 application of agreements concerning rates of pay, rules, or working conditions.” 45 U.S.C. §
16 153(i). Minor disputes must be addressed through the relevant internal dispute resolution
17 process and then submitted to the NRAB. *See Buell*, 480 U.S. at 563.

18 The RLA does not bar a plaintiff from bringing an independent FELA claim. *See id.* at
19 564-65. Rather, the RLA only preempts those causes of action that involve rights and
20 obligations dependent on a CBA. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260
21 (1994). These actions are “minor disputes” within the meaning of the RLA and must be
22 resolved through its processes. FELA claims, however, may proceed in federal court. As the
23 Supreme Court emphasized:

24 The FELA not only provides railroad workers with substantive protection against
25 negligent conduct that is independent of the employer’s obligations under its
collective-bargaining agreement, but also affords injured workers a remedy suited

to their needs, unlike the limited relief that seems to be available through the [NRAB]. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion.

Buell, 480 U.S. at 565.

C. This Court Has Jurisdiction Over the FELA Claim and Has a Responsibility to Enforce the Federal Rules of Civil Procedure in Connection with the FELA Claim

As a preliminary matter, the court possesses jurisdiction over Ms. Wallis's FELA claim. BNSF does not dispute this proposition. Under *Hawaiian Airlines*, Ms. Wallis's FELA claim is distinct from a grievance claim under the RLA and the CBA. *See id.* It is likewise evident that Ms. Wallis's FELA claim is neither a major dispute nor a minor dispute within the meaning of the RLA because this claim is legally independent—although factually intertwined—from a grievance claim.

As an incident of its jurisdiction, the court has an obligation to supervise the interactions of the parties and to enforce compliance with the Rules in connection with Ms. Wallis's FELA claim. *Bernal*, 196 F.R.D. at 373. Again, BNSF does not dispute this proposition. Just as it is inconceivable that Congress intended the RLA to bar a plaintiff from recovering under an independent FELA claim, *Buell*, 480 U.S. at 565, so too it is inconceivable that the RLA strips a FELA plaintiff of the protections afforded to all federal litigants by the Rules.

The fact that the CBA permits BNSF's investigation does not render this matter a "minor dispute." The court has no need to interpret or apply the CBA in determining whether it has jurisdiction to enforce the Rules. *See Partida*, 221 F.R.D. at 629; *Bernal*, 196 F.R.D. at 373. BNSF argues that the court risks interfering with the framework of the RLA by enforcing the Rules. (Resp. at 6.) The court views the matter differently. To the extent BNSF believes the RLA divests the court of jurisdiction to enforce the Rules, it is BNSF that

1 seeks to extend the RLA beyond its given sphere and interfere with the discovery rules that
2 govern all FELA claims.

3 BNSF also argues that much of the case law is inapposite because those courts were
4 confronted with situations involving requests for medical examinations and medical
5 information instead of an investigation into the causes of an accident. (Resp. to Supp. (Dkt. #
6 17) at 2 n.2.) This is a distinction without a difference. The Rules regulate medical
7 examinations and depositions alike, as well as a host of other discovery mechanisms.
8 Although medical examinations may be more intrusive and subject to different standards than
9 party depositions, the Rules apply to each situation with equal force. *See Dodge*, Case No.
10 C08-5542JKA (W.D. Wash. Oct. 7, 2008). BNSF's investigation of Ms. Wallis "in
11 connection with [her] alleged conduct and alleged failure to be forthcoming with all
12 information regarding [her] personal injury" involves inquiry into the core facts of her FELA
13 claim. Furthermore, it is not evident that BNSF does not seek medical information pursuant
14 to its investigation. The broad scope of the investigation suggests that BNSF may seek to
15 question Ms. Wallis about the extent of her alleged injury.

16 In light of these considerations, the court concludes that it has jurisdiction in this
17 matter.

18 **D. BNSF's Failure to Comply with the Federal Rules of Civil Procedure in**
19 **Connection with an Investigation into the Facts Underlying the FELA Claim**
20 **Constitutes Good Cause for Entry of a Protective Order**

21 Having concluded that the court has jurisdiction, the court must next determine
22 whether entry of a protective order is warranted. Rule 26 permits the court to enter a
23 protective order on a showing of good cause "to protect a party or person from annoyance,
24 embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The
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1 decision to enter a protective order, and to determine its appropriate scope, is entrusted to the
2 district courts. *See Seattle Times Co.*, 467 U.S. at 36.

3 The court finds that entry of a protective order is appropriate in this matter. Good
4 cause exists under Rule 26(c) because BNSF's investigation threatens to circumvent the
5 procedures and protections of the Rules. BNSF's investigation relates directly to the facts
6 giving rise to Ms. Wallis's FELA claim. The court accepts BNSF's representations that it
7 does not seek an unfair advantage in this litigation. Nonetheless, the Rules apply even to
8 those parties with noble intentions, and they apply in this case. Although BNSF may be
9 entitled to inquire into the facts underlying Ms. Wallis's alleged injury and seek discovery
10 from her, it must do so pursuant to the Rules. Failure to follow the Rules in connection with
11 discovery matters relevant to a FELA claim is good cause for a protective order.

12 Therefore, the court enters a protective order pursuant to Rule 26(c) on the following
13 terms:

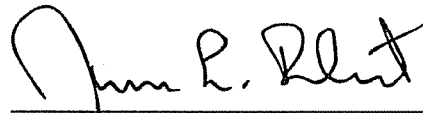
- 14 (1) BNSF may not seek information from Ms. Wallis regarding her FELA claim
15 except through the procedures outlined in the Federal Rules of Civil Procedure.
- 16 (2) BNSF may not conduct any form of examination or interrogation of Ms. Wallis
17 outside the presence of her attorney.
- 18 (3) BNSF may conduct its scheduled investigation, but may not have access to Ms.
19 Wallis in doing so. BNSF may not require Ms. Wallis to appear, testify, or
20 submit to cross-examination at an internal investigation, currently scheduled for
21 January 22, 2009, or at any time thereafter, during the pendency of this
22 litigation.
- 23 (4) BNSF may not terminate Ms. Wallis's employment for failure to appear at any
24 investigation.

1 Ms. Wallis further requests that the court prevent BNSF from conducting any
2 investigation, with or without her presence, and argues that BNSF has terminated plaintiffs in
3 other cases, including *Litowitz* and *Dodge*. The court agrees with BNSF that the disciplinary
4 results in other matters have little weight here. Although BNSF must comply with the Rules
5 in connection with any investigation of Ms. Wallis and her FELA claim, it does not follow
6 that BNSF must cease all investigation of her actions, her statements, or the facts related to
7 the claim. If BNSF terminates Ms. Wallis's employment for an improper reason, then she
8 must pursue her available remedies at that time.

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10 **IV. CONCLUSION**

11 For the reasons stated above, the court GRANTS the motion for protective order.

12 Dated this 16th day of January, 2009.

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15 JAMES L. ROBART
16 United States District Judge
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