IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

TIM BOYLE, individually, and as representative of a class of similarly situated persons comprising The unincorporated labor organization, The International Brotherhood of Teamsters, Local 2727, 7711 Beulah Church Road Louisville, Kentucky 40228,	)	***Electronically Filed***
Plaintiff,	)	**Civil Action No. 3:21-cv-00135-CRS**
v.	)	
UNITED PARCEL SERVICE CO. (AIR), 1400 North Hurstbourne Parkway, Louisville, Kentucky 40223	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT
UNITED PARCEL SERVICE CO.'S MOTION TO DISMISS THE COMPLAINT

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I. INTRODUCTION

By filing this lawsuit, Plaintiff, the President of a Union of aircraft maintenance-related employees for United Parcel Service Co. (AIR) ("UPS"), who does not allege he or any of the putative class members he seeks to represent has suffered any actual COVID-19-related injury, attempts a trifecta of enforcement of his view of workplace safety in response to the ongoing COVID-19 pandemic. Plaintiff is currently pursuing his complaints about workplace conditions under the parties' Collective Bargaining Agreement ("CBA") that mandates certain dispute resolution procedures *and* through the process required by the Kentucky Division of Occupational Safety & Health Compliance ("KY OSHA"). And now, Plaintiff asks this Court to intervene and preempt both the CBA and the ongoing work of multiple agencies that are actively regulating UPS and other employers in response to the pandemic, while still maintaining the first two paths.

Plaintiff seeks to bypass the work of the very agencies whose purpose it is to address his issues—including KY OSHA, the FAA, CDC, the Commonwealth of Kentucky, and state and county health departments—using public nuisance and negligence claims to impose his own view of workplace safety. The Court should dismiss Plaintiff's Complaint pursuant to the primary jurisdiction doctrine, which exists to prevent precisely this sort of short-sighted end-run around the active regulation of expert government agencies, and defer to the rulemaking and enforcement authority of KY OSHA and other agencies in their ongoing efforts to regulate workplace safety during this national emergency. Appropriate, and legally mandated, deference enables the agencies to account for both workplace safety and the critical importance of delivering essential goods to millions of doorsteps throughout Kentucky and the nation, including the critical supply of COVID-19 vaccines.

Additionally, Plaintiff's Complaint must be dismissed because his claims require interpretation of the CBA and thus are preempted by the Railway Labor Act. Plaintiff's claims should also be dismissed because he seeks redress for workplace disease exposure, which is barred by the exclusivity rule of Kentucky's workers' compensation statute. Finally, Plaintiff fails to allege facts to sustain public nuisance or negligence claims under Kentucky law. To supplant the government and bring a private action for public nuisance, Plaintiff must allege a harm different in kind, as opposed to in degree, from that borne by the general public. Plaintiff's nuisance claim fails this basic test since he alleges only a vaguely increased risk of exposure to a disease already rampant throughout the community. Plaintiff also fails to allege a causal connection between UPS's conduct and his, the Union Class's, or the public's general risk of exposure to COVID-19, which is fatal to all of his claims, as is his failure to allege any injury.

Plaintiff's suit is but the latest in a series of lawsuits nationwide related to workplace conditions during the COVID-19 pandemic; this Court, like numerous others, should dismiss it.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

1. The Parties and the Complaint

Plaintiff is a current UPS employee and President of Local 2727 of the International Brotherhood of Teamsters (the "Union"), which is headquartered in Louisville, Kentucky. (Compl. ¶¶ 1, 34.) Plaintiff filed this lawsuit on behalf of the Union's members (Compl. ¶¶ 1, 34), who are primarily aviation and aircraft technicians, inspectors, and controllers at UPS facilities, including at a UPS gateway facility in Louisville, Kentucky (the "Louisville Gateway"). (Compl. ¶¶ 7–8.)

Plaintiff asserts three causes of action against UPS on behalf of a class of substantially all active Union members (the "Union Class"), related to alleged COVID-19 workplace safety deficiencies at the Louisville Gateway, including that the restrooms should be cleaned more frequently and that deep cleaning is needed at facilities and vehicles after reports of COVID-19. (Compl. ¶¶ 22, 31–32.)[1] Specifically, the Complaint seeks declaratory and injunctive relief for claims of: (1) public nuisance; (2) negligence; and (3) negligence *per se*. (Compl. ¶¶ 41–66.) The Complaint seeks a permanent injunction requiring UPS to institute workplace cleaning protocols that are acceptable to the Union, adjust communications to the Union about COVID-19 testing and cleaning plans, and provide paid time off for Union members during "Deep" cleaning. (Compl., Prayer for Relief, pp. 27–29.)

In support of his claims, Plaintiff alleges that UPS did not adequately consider guidance or follow regulations promulgated by state and federal entities including the Federal Aviation Administration (the "FAA"), Occupational Safety and Health Administration ("OSHA"), Centers for Disease Control and Prevention ("CDC"), and the Commonwealth of Kentucky. (Compl. ¶¶ 14–17, 56–57, 61–64.) The Complaint alleges that "[s]erial complaints have been filed by the Union" to address the alleged unsanitary conditions in the Louisville Gateway and "[t]he Union perpetually reported those and other deficiencies to the Company." (Compl. ¶¶ 22, 25.) Specifically, "at least fifteen Potential Hazard Reports (PHRs) had been filed [by the Union] . . . concerning unsafe, unsanitary,

[1] The Complaint's factual allegations and recitations in the three causes of action relate only to UPS's Louisville Gateway, but Plaintiff purports to bring claims and seek relief on behalf of a Union Class composed of personnel located not just at the Louisville Gateway, but at various UPS gateways throughout the United States.

and unhealthful conditions" and "the cleanliness had been a subject of monthly safety meetings the past three years." (Compl. Exh. A, PageID #47.)

The Complaint further alleges that UPS did not address cleanliness and sanitation issues to the Union's satisfaction, forcing it to file a complaint with KY OSHA on May 13, 2020. (Compl. ¶ 25; Compl. Exh. A, PageID #46.) KY OSHA subsequently opened an investigation into the allegations raised by the Union, and a KY OSHA Compliance Safety and Health Officer conducted an inspection and maintained contact with the Union throughout the investigation to discuss the cleanliness and sanitation issues. (Compl. ¶ 25; Compl. Exh. A, PageID #47–48.) KY OSHA issued a Citation and Notice of Penalty against UPS on December 18, 2020 that explained UPS had a "Right to Contest" the citation and the proposed penalties by filing a written notice of contest with KY OSHA. (Compl. ¶ 25; Compl. Exh. A, PageID #41.) The Citation and Notice of Penalty provides that the KY OSHA proceedings become a "final order" *unless* UPS filed a notice of contest. (Compl. Exh. A, PageID #41.) *See* 803 KAR 2:120(5) (a citation does not constitute that a violation occurred unless there is a failure to contest or, if contested, the citation is affirmed by the Kentucky Occupational Safety and Health Review Commission).

UPS filed a Notice of Contest on January 13, 2021, informing the Kentucky Occupational Safety and Health Review Commission (the "KOSHRC") that it contested the Citation and Notice of Penalty issued by KOSH. MTD Exh. 1.[2] On January 22, 2021,

[2] The Court may consider documents in the KOSH proceeding in deciding the motion to dismiss because they are "matters of public record." *Bond v. CompuCom Sys.*, No. 3:18-cv-271-DJH-CHL, 2019 U.S. Dist. LEXIS 10460, at *5–7 (W.D. Ky. Jan. 22, 2019) (considering "public records pertaining to the proceedings before a state administrative agency to support" motion to dismiss without conversion to summary judgment) (citing *Solo v. UPS Co.*, 819 F.3d 788, 794 (6th Cir. 2016).

the Union filed a Petition for Leave to Intervene, which the KOSHRC granted on February 5, 2021, ordering that the Union was "granted party status as an intervenor." MTD Exh. 2. On February 2, 2021, consistent with applicable procedural rules, the Commissioner of Workplace Standards filed a Complaint to enforce the Citation and Notice of Penalty and sought a "hearing on all issues of law and fact" and "[a]ll other proper relief." MTD Exh. 3. On February 17, 2021, UPS filed an answer and KOSHRC forwarded the case to the office of the Attorney General, Division of Administrative Hearings for assignment to a hearing officer and scheduling of a hearing date.

2. The CBA

UPS and the Union, including the Plaintiff and putative class of Union members, are parties to a negotiated CBA that is effective from November 1, 2013 until October 31, 2023. MTD Exhibit 4. The CBA establishes terms for safety and health in the workplace in great detail, particularly in Article 20, "Safety and Health" (MTD Exh. 4 at 176–90), and Article 23, which covers "Injury and Illness" (*id*. at 225–30).

Importantly, Section 6 of Article 20 contains the "Complaint Procedure" that establishes a mandatory escalation process for Union members' safety and health complaints. (MTD Exh. 4 at 182.) Complaints must first be discussed with an immediate supervisor and "[i]f no satisfactory resolution can be reached . . . the employee shall electronically submit a potential hazard report to the Company." (*Id.*) The CBA provides that potential hazard reports are then processed at a safety committee meeting and, if still unresolved, escalated to the designated representatives of the Union and UPS. (*Id.*) The Union can then further escalate any unresolved complaints by submitting them as "grievances" pursuant to Article 6 of the CBA.

Article 6 of the CBA established a procedure to resolve a "grievance," defined as "any controversy, complaint, misunderstanding, or dispute arising as to interpretation, application, or observance of any of the provisions of [the CBA]." (*Id.* at 52.) Stated differently, the Union has contractually agreed that "there shall be no . . . legal proceedings without first using all possible means of a settlement as provided for in [the CBA] for any controversy which might arise under this [the CBA]." (*Id.*) Instead, the Union must follow the mandatory process in the CBA in compliance with the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, by addressing grievances via the System Board of Adjustment that has "jurisdiction over all disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement or Amendments thereto." (*Id.* at 58.)

B. Procedural History

Plaintiff filed his Complaint on February 5, 2021 in the Circuit Court of Jefferson County, Kentucky, and served process on UPS on February 9, 2021. (Dkt. 1-2.) On March 1, 2021, UPS properly removed the action to this Court pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446. (Dkt. 1.)

III. LEGAL STANDARDS

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570. (2007)). Allegations that "'are no more than conclusions[ ] are not entitled to the assumption of truth.'" *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020) (quoting *Iqbal*, 556 U.S. at 679). Rather, plaintiffs must include sufficient "factual enhancement" to cross "the line between possibility and plausibility." *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 572 (6th Cir. 2009) (quoting *Twombly*, 550 U.S.

at 557). Where a plaintiff fails to survive Rule 12(b)(6) scrutiny and the complaint "cannot be saved by an amendment," dismissal without leave to amend is proper. *Myers v. Norman*, No. 5:18-CV-165-TBR, 2019 U.S. Dist. LEXIS 139578, at *6 (W.D. Ky. Aug. 16, 2019). In addition, dismissal under 12(b)(1) is appropriate where a union employee fails to "utilize the RLA-mandated arbitral process before bringing a minor dispute to court." *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 788 (6th Cir. 2012).

The Court can consider the CBA on this Motion to Dismiss without converting the motion to one for summary judgment because Plaintiff implicitly incorporates it by reference and relies upon its terms. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (plan documents could be considered even though the complaint referred only to the "plan" and not its associated documents); *see also Cain v. Thompson*, No. 3:19-CV-00181-GNS, 2020 U.S. Dist. LEXIS 806, at *8 (W.D. Ky. Jan. 2, 2020) (plaintiff "cannot rely on their own vagueness [] to avoid dismissal" and considering a document that Plaintiff did "not explicitly 'refer to'"). Despite Plaintiff's attempt to artfully plead around the CBA, the Complaint relies upon the terms and effects provided in the CBA, including its references to "complaints" and "Potential Hazard Reports (PHRs)" filed by the Union, which are creatures of the CBA's dispute resolution process under Article 20. (Compl. ¶ 22; Compl. Exh. A, PageID #47.)[3] *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir.

[3] In addition, the Court can take judicial notice of the CBA even though it is not attached to the Complaint or explicitly referenced in the Complaint. *Bowman v. Jack Cooper Transp. Co.*, 399 F. Supp. 3d 447, 451 (D. Md. 2019) (taking judicial notice of CBA in order to conduct preemption analysis); *Malobabich v. Norfolk S. Corp.*, No. 2:11-cv-112, 2011 U.S. Dist. LEXIS 50169, at *3 (W.D. Pa. May 10, 2011) (same); *Busey v. P.W. Supermarkets, Inc.*, 368 F. Supp. 2d 1045, 1049-50 (N.D. Cal. 2005) (same). Moreover, the CBA is public record as Plaintiff filed a copy of it in another lawsuit he filed against UPS on November 3, 2020. *See Boyle v. United Parcel Service, Inc.*, No. 3:20-cv-00541-DJH-LLK (W.D. Ky. Nov. 3, 2020), Dkt. 9-1.

2010) (Even "[w]here a document is not incorporated by reference, the court may never[the]less consider it where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint.").

IV. ARGUMENT

Plaintiff's Complaint must be dismissed for at least four independent reasons. First, the claims in Plaintiff's Complaint are barred by the primary jurisdiction doctrine because they should be resolved by the appropriate administrative agencies instead of a court. Second, the claims in Plaintiff's Complaint are preempted by the RLA because they involve interpretations of specific CBA provisions, and thus must be dismissed in favor of the mandatory grievance and arbitration processes contained in the CBA. Third, the claims in Plaintiff's complaint are barred by the exclusive remedy doctrine in Kentucky workers' compensation law, which provides that workers' compensation is the sole remedy for employees seeking redress for workplace injuries. Fourth, the claims in Plaintiff's complaint fail to meet the basic pleading requirements of *Twombly* and *Iqbal*. For each of these reasons, dismissal of Plaintiff's Complaint in its entirety is warranted.

A. Plaintiff's Claims Should Be Dismissed Pursuant to the Primary Jurisdiction Doctrine in Favor of Ongoing and Parallel Regulatory Efforts to Prevent the Spread of COVID-19 in the Workplace

Plaintiff challenges UPS's workplace response to the COVID-19 pandemic, but the responsibility to evaluate that is delegated in the first instance to KOSH—the agency with primary authority and expertise in workplace safety. Applying the factors identified by the Sixth Circuit in *Charvat* compels dismissing Plaintiff's claims and deferring to KOSH and other agencies under the primary jurisdiction doctrine, particularly in light of those agencies' active, ongoing regulatory efforts during the COVID-19 pandemic.

1. Plaintiff's Allegations are the Subject of an Ongoing Administrative Proceeding and Statewide Regulatory Efforts to Combat COVID-19

The Plaintiff readily admits that the issues raised in his Complaint are the subject of an ongoing administrative proceeding that the Union initiated last year, noting that the Union "perpetually reported these and other deficiencies to the Company," and then filed a complaint with KOSH when they allegedly were not adequately addressed. (Compl. ¶ 25.) The Complaint describes that proceeding up through December 2020, but omits the fact that the administrative process is ongoing. (*See* MTD Exhs. 1, 2, 3.)[4] That omission is particularly glaring given that the Union (of which Plaintiff is the President) became an intervening party to that administrative proceeding before the KOSHRC *just four days* before he filed this suit asking the Court to bypass KOSH and the KOSHRC and oversee the bathroom cleaning procedures and other related relief sought by the Union members. (*See* Dkt. 1-1; MTD Exh. 2.) Notably, the Union is represented in the administrative proceedings by the same counsel that represents Plaintiff and the putative Union Class here. (*Id.*) This Court should decline Plaintiff's invitation to intervene and allow state regulatory processes to proceed unimpeded.

2. Plaintiff's Issues Are Within KY OSHA's Jurisdiction and Expertise and Should Be Dismissed Under the Primary Jurisdiction Doctrine

Because the exact issues about which Plaintiff complains are the subject of ongoing regulatory efforts and an active administrative proceeding, this Court should defer to KY OSHA's expertise and dismiss Plaintiff's Complaint pursuant to the primary jurisdiction

[4] The citations reference multiple government agencies that are actively regulating UPS and other employers in response to the COVID-19 pandemic, including the Kentucky Governor's Executive Orders, OSHA guidelines, and Kentucky's "Healthy at Work Requirements," which is Kentucky's statewide effort to regulate COVID-19 preventative measures in the workplace. (Compl. Exh. A, PageID #38.)

doctrine, which "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). "Under the doctrine of primary jurisdiction, questions within the special competency of an administrative agency should be resolved by that agency." *Alltel Tenn. v. Tenn. Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). "The principal reasons for the doctrine [] are to obtain the benefit of the expertise and experience of the administrative agencies and the desirable uniformity which occurs when a specialized agency decides certain administrative questions." *Id.*

The Sixth Circuit considers three factors in determining whether claims should be resolved by an administrative agency pursuant to the primary jurisdiction doctrine. *See Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010) (borrowing from Supreme Court and Second Circuit precedent). The Court should defer to an agency's expertise if agency determination would: (1) "advance regulatory uniformity;" (2) "answer a 'question . . . within the agency's discretion,'" or (3) "benefit from 'technical or policy considerations within the agency's . . . expertise.'" *Id.* (ellipses in original). While the presence of a single factor can be sufficient, all three exist here.

Applying essentially the same tests at *Charvat*, a number of other courts have recently dismissed similar lawsuits brought by employees asserting claims arising from alleged COVID-19 workplace safety deficiencies. *See, e.g.*, *Palmer v. Amazon.com, Inc.*, No. 20-CV-2468, 2020 U.S. Dist. LEXIS 203683, at *7, *13 (E.D.N.Y. Nov. 1, 2020) (dismissing COVID-19-related workplace-safety public nuisance and labor law claims under the primary jurisdiction doctrine); *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1240–41 (W.D. Mo. May 5, 2020) (holding that "the issues

raised in the case have been placed within the special competence of an administrative body" and the court's disposition of the case "could easily lead to inconsistent regulation of businesses in the same industry") (internal quotations omitted); *Brent v. AmazonFresh LLC*, No. CGC-20-584828, at 3 (Cal. Super. Ct. Sep. 15, 2020) (concluding that Plaintiff's claims "effectively invite[] this court to interfere with ongoing inspection, oversight, and enforcement activity by responsible regulatory agencies").[5]

The same logic adopted by those courts applies with even greater force here given that the exact issues raised in Plaintiff's Complaint are currently being litigated before KY OSHA in an administrative proceeding in which the Union is a participating party. For the sake of completeness, UPS discusses below how each *Charvat* factor is met here.

a. Agency Determination Will Advance Uniformity

Agency determination would advance regulatory uniformity in addressing workplace safety because KY OSHA (and other local, state, and federal agencies) is better suited to ensure consistent safety standards during a pandemic that is ongoing and constantly evolving. *Charvat*, 630 F.3d at 466. The court in *Amazon.com, Inc.* specifically explored this issue in the unique circumstances presented by the COVID-19 pandemic:

[5] This Court, and courts throughout the Sixth Circuit, have similarly applied the doctrine of primary jurisdiction to *dismiss* claims in favor of administrative agencies. *See Webster Cnty. Coal Corp. v. Tenn. Valley Auth.*, 476 F. Supp. 529, 535 (W.D. Ky. 1979) (dismissing claim against railroad company as within the primary jurisdiction of the Interstate Commerce Commission); *City Wide Cellular, Inc. v. Detroit Cellular Tel. Co.*, No. 1:98-CV-132, 1999 U.S. Dist. LEXIS 1350, at *5–6 (W.D. Mich. Jan. 12, 1999) (dismissing claim based on Federal Communications Commission (FCC) rules); *In re Long Distance Telecomms. Litig.*, 647 F. Supp. 78, 79 (E.D. Mich. 1986) ("The court has previously dismissed seventeen similar lawsuits in deference to the [FCC] under the doctrine of primary jurisdiction and finds such action appropriate in this case as well."); *Elgin Coal Co. v. Louisville & Nashville. R.R. Co.*, 277 F. Supp. 247, 249 (E.D. Tenn. 1967) (dismissing suit where Interstate Commerce Commission was better suited to resolve it).

> Regulating in the age of COVID-19 is a dynamic and fact-intensive matter fraught with medical and scientific uncertainty. There is room for significant disagreement as to the necessity or wisdom of any particular workplace policy or practice. Courts are particularly ill-suited to address this evolving situation and the risk of inconsistent rulings is high. Court-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis. A determination by OSHA, on the other hand, would be more flexible and could ensure uniformity.

2020 U.S. Dist. LEXIS 203683, at *18.

"[T]he possibility of conflicting decisions in different state and federal jurisdictions" and "the risk that individuals and companies will be subject to decisions pointing in opposite directions" will be realized if this Court does not dismiss the Complaint. *Charvat*, 630 F.3d at 466; *see also Ellis v. Tribune TV Co.*, 443 F.3d 71, 88 (2d Cir. 2006) (discussing the "danger of inconsistent rulings" and explaining that "[c]ourts should be especially solicitous in deferring to agencies that are simultaneously contemplating the same issues"). The same concerns are present here and, accordingly, this factor weighs in favor of applying the primary jurisdiction doctrine.

b. Workplace Safety Issues Are Within KY OSHA's Discretion

The workplace safety issues raised in Plaintiff's Complaint are squarely "within [KY OSHA's] discretion." *Charvat*, 630 F.3d at 466. In *Charvat*, the Sixth Circuit reasoned that Congress invested the relevant agency "with considerable authority to implement" one of its operating statutes, including providing the power to "prescribe regulations to implement" the legislation, "and to enforce the provisions of the Act and its accompanying regulations." *Id.* 630 F.3d at 466–67.

Congress has similarly invested OSHA and its state law counterparts, including KY OSHA, with considerable authority to implement the relevant statutes.[6] The Kentucky Occupational Safety and Health Act ("KOSHA"), Ky. Rev. Stat. §§ 338.010, *et seq.*, was enacted pursuant to the OSH Act to establish a comprehensive regulatory scheme "to promote the safety, health and general welfare of its people by preventing any detriment to the safety and health of all employees, both public and private." *Id.; see also Dep't of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 135 (Ky. Ct. App. 2011) (noting that KOSHA is "substantially identical to the Federal Act").

Plaintiff's claims are squarely within KY OSHA's discretion, as evidenced by the ongoing KY OSHA proceeding discussed above, because they pertain to workplace safety. In fact, the Complaint explicitly asks the Court to consider the application of KOSHA in order to grant injunctive relief. Specifically:

- Plaintiff asks this Court to declare that "UPS's policies and practices at its Louisville, Kentucky Gateway run afoul of KOSHA and the Healthy at Work requirements" and requests "injunctive relief to compel UPS to comply therewith." (Compl. ¶ 66.)

- Plaintiff also asserts that the Court must resolve "whether or not UPS has a duty under the Kentucky Occupational Safety and Health Act, KRS 338.031; *et seq.* ("KOSHA"), to furnish its employees, including the Union Class, a place of employment that is reasonably free from COVID-19." (Compl. ¶ 35.)

KY OSHA is unquestionably best suited to resolve the questions raised here of whether UPS is following the very regulations that KY OSHA and other agencies have enacted. Moreover, the science of disease transmission and risk mitigation is constantly evolving, and KY OSHA has the expertise to determine the different needs of different

[6] The federal Occupational Safety and Health Act of 1970, 29 USC § 651, *et seq.* ("OSH Act"), preempts state laws governing occupational safety and health, but permits states like Kentucky to submit plans for approval that are "at least as effective." 29 USC § 667(c)(2).

localities and workplace environments in which individual employers operate. As the court noted in *Smithfield Foods*, the judicial system's intervention into this quickly-evolving regulatory realm "would only risk haphazard application" of the latest COVID-19 guidelines. 459 F. Supp. 3d at 1241. Accordingly, this factor weighs in favor of applying the primary jurisdiction doctrine in favor of agency determination.

c. KY OSHA Has Expertise in Workplace Safety Technical and Policy Considerations

The third *Charvat* factor also weighs strongly in favor of agency enforcement because there is a "benefit from 'technical or policy considerations within the agency's . . . expertise.'" *Charvat*, 630 F.3d at 466 (ellipses in original). In particular, *Charvat* recognized that not only is an agency "familiar with the regulations *it* prescribe[s]" and "possesses expertise over the statute *it* implements," but "that expertise comes in the form of technical experts, agency lawyers or agency staff in a position to obtain input from the relevant stakeholders." *Id.* at 467 (emphasis in original). The need for expertise is especially pronounced in the context of COVID-19 because regulatory guidance is quickly evolving during the pandemic based on scientific discovery, medical advancements, and levels of community spread. *See Amazon.com, Inc.*, 2020 U.S. Dist. LEXIS 203683, at *17 (explaining that that Plaintiffs' public nuisance claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion). KY OSHA and other administrative agencies are better suited than the judicial system to process and implement such new information through rulemaking, enforcement, or other agency action.

Accordingly, all three *Charvat* factors weigh in favor of applying the primary jurisdiction doctrine in favor of determination by KY OSHA and the multiple other agencies who are actively investigating and enforcing COVID-19 workplace safety issues

across Kentucky. The Court should decline Plaintiff's invitation to intervene into the heart of KY OSHA's expertise, dismiss the claims in the Complaint, and permit KY OSHA and other regulators and agencies to fulfill their missions unimpeded.

B. Plaintiff's Claims Are Preempted by the RLA

Plaintiff's Complaint must also be dismissed because the RLA preempts Plaintiff's claims and provides exclusive jurisdiction to resolve this minor workplace dispute to the applicable System Board of Adjustment. Although Plaintiff's artful pleading attempts to ground the relief he seeks in the common law of negligence and public nuisance, any duty he is owed (and any alleged breach) sounds in contract because it is the subject of the CBA and its contractually agreed dispute resolution procedures.

Courts classify labor disputes either "major" or "minor" under the RLA, based on the source of the dispute. *See Elgin, Joliet. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945); *Airline Pros. Ass'n of the Int'l Bhd. of Teamsters, Loc. Union No. 1224 v. ABX Air, Inc.*, 274 F.3d 1023, 1027 (6th Cir. 2001). Claims that require interpretation or application of collectively bargained agreements between an employer and a union are "minor disputes" over which courts (both state and federal) lack jurisdiction. *See Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 36–38 (1963); *cf. Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 302 (1989) ("*Conrail*") (explaining that major disputes relate to "the formation of collective agreements" for contract formation or amendment). The RLA mandates that all minor disputes be submitted to final and binding arbitration before a panel known as a board of adjustment which have "mandatory, exclusive and comprehensive" jurisdiction over minor disputes. *Bhd. of Locomotive Eng'rs*, 373 U.S. at 38; *see also Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 789 (6th Cir. 2012) ("[T]he RLA clearly precludes the federal courts from

granting relief on minor disputes that have not first been brought through the RLA arbitral process."); *ABX Air, Inc. v. Int'l Bhd. of Teamsters*, 219 F. Supp. 3d 665, 670 (S.D. Ohio 2016) ("[M]inor disputes must be submitted to binding arbitration.") (citing *Burley*).

"A party to a dispute under the RLA bears a 'relatively light burden' to demonstrate that a dispute is covered by an existing agreement, making it minor." *Flight Options, LLC v. Int'l Bhd. of Teamsters, Loc. 1108*, 863 F.3d 529, 539 (6th Cir. 2017). "[I]f there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor." *Airline Pros. Ass'n v. ABX Air, Inc.*, 400 F.3d 411, 414–15 (6th Cir. 2005). In determining whether a dispute is "minor," courts "look[] to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action" and it "is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Flight Options, LLC*, 863 F.3d at 539.

In this case, the claims asserted by Plaintiff on behalf of the Union members are minor disputes because they are both covered by the existing CBA between UPS and the Union and cannot be resolved without an interpretation of the terms of the CBA. The gravamen of Plaintiff's Complaint is that UPS has maintained an unsafe working environment during the COVID-19 pandemic by failing to adhere to health and sanitation standards, particularly in restrooms. (Compl. ¶ 22.) Plaintiff also alleges improper cleaning in other common areas and vehicles, insufficient hand sanitizer, and failures in communications regarding co-workers testing positive for COVID-19. (Compl. ¶ 24.) To address those grievances, Plaintiff seeks injunctive relief requiring UPS to institute certain workplace cleaning protocols that are acceptable to the Union, provide additional communication with the Union about COVID-19 testing and cleaning plans, and modify

the paid time off compensation structure for Union members. (Compl., Prayer for Relief, pp. 27–29.) UPS has already negotiated with the Plaintiff, as President of the Union, on these issues on behalf of the Union's membership. This Court cannot resolve Plaintiff's claims without interpreting the resulting contractual provisions of the CBA.

Each of these concerns, and Plaintiff's proposed injunctive relief, is already addressed in the CBA and thus is a matter of interpretation of the rights and obligations provided in that contract. Most significantly, the CBA contains a multi-page Article 20 addressing "Safety and Health" of Union members in the workplace and provides that UPS "agrees to maintain safe, sanitary, and healthful conditions in all work center facilities." (MTD Exh. 4 at 176–90.) Numerous provisions of that and Article 23, which covers "Injury and Illness" (*id.* at 225–30), must be interpreted to address the workplace health and safety issues raised in Plaintiff's Complaint, including at least the following:

Article 20 - Safety and Health	
Article 20, Section 1(a)	"[N]o employee will be required, expected or asked to work in or under unsafe or unhealthful conditions as outlined by the applicable OSHA, FAA, and Company regulations."
Article 20, Section 1(d)	"No employee will be required or assigned to engage in any activity which a reasonable person would in good faith believe constitutes a real threat of danger to a person or property."
Article 20, Section 6(a)	"All complaints by employees regarding unsafe, unsanitary, or unhealthy working conditions shall first be discussed by the employee with his immediate supervisor. If no satisfactory resolution can be reached within seven (7) calendar days the employee shall electronically submit a potential hazard report to the Company."
Article 20, Section 2(d)	"The Company agrees clean, healthy drinking water or sanitary fountains will be provided at all work centers."
Article 20, Section 2(e)	"The floors of the toilets, washrooms and other break or lunch areas will be kept in good repair and in a clean, dry, and sanitary condition. Washrooms will be serviced and cleaned *on a scheduled basis in order to insure compliance with this paragraph.*" (emphasis added)

Article 20, Section 2(f)	"Shops and washrooms will be lighted, heated, and ventilated in the best manner possible consistent with the source of heat, ventilation, and light available. Applicable legal requirements will be met."
Article 20, Section 3(b)	"Wherever it is necessary, by reason of hazard of processes or environment . . . the Company will provide personal protective equipment (PPE) . . . including protective clothing, respiratory devices, and protective shields and barriers."
Article 20, Section 4(b)–(c)	"Safety committees consisting of both UPS Co. and Local 2727 representatives will be established . . . [and] will meet on a regular basis, ... During the meetings such committees will . . . resolve safety issues or complaints that may exist, discuss ergonomic issues, and conduct periodic on-site inspections as deemed necessary by the Safety Committee within that gateway."
Article 20, Section 8(c)	"The Employer agrees to comply with all applicable State and Federal OSHA regulations regarding Hazardous materials."
Article 23 - Injury and Illness	
Article 23, Section 1(a)	"No employee will be reprimanded for the legitimate use of sick leave. When it is necessary for an employee to be absent from work because of a non-occupational illness or injury, he will be granted time off without loss of seniority up to the period specified in Article 3."
Article 23, Section 2(e)	"An employee . . . will receive pay and benefits in accordance with this Article and Article 30 while unable to perform his regular duties as a result of an on-the-job injury or illness."

Plaintiff's attempt to plead around the CBA in the Complaint fails because it seeks the same relief that the Union is seeking through the CBA's complaint procedure contained in Section 6 of Article 20, clearly establishing that the CBA governs the rights of this dispute. It is well established that plaintiffs may not use artful pleading to 'evade the requirements' applicable to interpretation of collective bargaining agreements." *Wilder*, 2020 U.S. Dist. LEXIS 179270, at *10 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

A recent Sixth Circuit decision articulated the two-step test for assessing whether a CBA preempts a claim. *Stanley v. ExpressJet Airlines, Inc.*, 808 F. App'x 351 (6th Cir. 2020) (evaluating whether a Title VII religious discrimination claim was preempted the RLA's exclusive System Board of Adjustment procedure):

> First, the [] court must examine whether proof of the [] claim requires interpretation of collective-bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state [or federal] law. If the right is created by the CBA *or* if the interpretation of the CBA is necessary determine the proof of the claim then the claim is preempted.

Id. at 355 (emphasis in original, internal citation omitted). The Sixth Circuit is not alone in finding that the minor dispute resolution procedures govern whenever the resolution of a federal or state law claim require the interpretation of the CBA. *See Gore v. TWA*, 210 F.3d 944, 947–48 (8th Cir. 2000) (negligence and other state law claims preempted where resolution required interpretation of the CBA provisions that imposed obligations on TWA to provide safe working conditions and protect the safety of its employees); *Monroe v. Mo. Pac. R.R.*., 115 F.3d 514, 518–19 (7th Cir. 1997) (wrongful discharge claim preempted).

Here, Plaintiff's assertion that UPS has a common law duty to protect a safe work place, to take reasonable and ordinary care, and to comply with safety requirements cannot be determined without an interpretation of what the parties have already negotiated and embodied in their CBA on these issues. For example, the parties have established processes for ensuring compliance with these contractual safety obligations, which are articulated in the CBA and directly relevant here. And there is no possibility of evaluating Plaintiff's requested remedies without interpreting the parties' CBA: Plaintiff requests this Court to require the establishment of bathroom cleaning schedules and pay for employee time off during deep cleaning, and seeks a provision requiring notice to the Union in certain

circumstances.[7] UPS has already negotiated such terms with Local 2727—they are in the contract.

Accordingly, the parties' dispute involves a question of contract interpretation that is preempted by the RLA and must be dismissed as a minor dispute over which the Board of Adjustment has exclusive jurisdiction. *See Airline Pros. Ass'n of the Int'l Bhd. of Teamsters, Loc. Union No. 1224 v. ABX Air, Inc.*, No. 00-4109, 2001 U.S. App. LEXIS 26911, at *7 (6th Cir. Dec. 13, 2001).[8]

C. Kentucky's Workers' Compensation Act Bars Plaintiff's Claims

Plaintiff's claims are also an improper attempt to circumvent Kentucky's Workers' Compensation Act, which covers employee claims, such as Plaintiff's, that arise out of alleged occupational exposure to COVID-19. *See* Letter re Executive Order 2020-277 from Robert L. Swift, Department of Workers' Claims Commissioner, dated April 15, 2020.[9] As in most states, the Kentucky legislature has designated the statutorily prescribed remedies under the Workers' Compensation Act as the exclusive source of liability of employers to their employees for alleged workplace injuries. Under this statutory scheme, the "liability of such employer under this chapter *shall be exclusive and in place of all other liability* of such employer to the employee . . .." KRS § 342.690 (emphasis added).

[7] Plaintiff's request for this Court to establish terms and conditions of employment different than what the parties have already negotiated, is in effect a request for this Court to impose on UPS a duty to bargain with Local 2727 pursuant to Section 152, First of the RLA. Such a request is barred by Plaintiff's failure (and indeed inability) to satisfy the procedures of Section 156 of the RLA.

[8] Attempts to plead around the exclusive jurisdiction of the RLA is not new to Local 2727. *See, e.g., Int'l Bhd. of Teamsters, AFL-CIO & Teamsters Loc. Union No. 2727 v. UPS Co.*, 447 F.3d. 491, 503 (6th Cir. 2006) (upholding dismissal of union's claims as preempted by the RLA minor dispute resolution procedures).

[9] https://labor.ky.gov/Documents/COVID-19%20Executive%20Order%202020-277.pdf.

"Essentially, the exclusive remedy provision grants immunity for liability arising from common law and statutory claims, meaning such claims cannot be pursued in the courts of this Commonwealth." *Ky. Emps. Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007).

Based on the plain language of the statute, any workplace injury claims that seek to impose liability on a plaintiff's employer are barred from court. Black's Law Dictionary has defined "liability" as "a broad legal term [that] has been referred to as the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." Black's Law Dictionary (4th ed. 1968); *see also Mercer-Lincoln Pine Knob Oil Co. v. Payne*, 206 Ky. 848, 851 (1925) (stating that "[l]iability is a very broad word" that has been defined as "the state of one who is bound *in law and justice* to do something which may be enforced by action.") (emphasis added). A recent decision out of the Eastern District of New York is instructive on this point. In *Amazon.com, Inc.*, 2020 U.S. Dist. LEXIS 203683, the court held that New York's exclusive remedy provision—which includes language similar to Kentucky's Act—barred an Amazon employee's claim for injunctive relief related to COVID-19 prevention measures in the workplace.[10] *See id.* at 28–29 ("If 'liability' was not intended to include injunctive relief, as plaintiffs argue, then the statute easily could have substituted that word with 'monetary damages,' 'payment of compensation' or some other phrase.").

The same logic applies here as Plaintiff plainly seeks to impose liability on UPS by bringing tort claims that seek permanent injunctive relief in addition to paid time off and attorneys' fees as the result of alleged COVID-19 exposure in the workplace. (Compl.

[10] NY CLS Work Comp § 11 states that "[t]he liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever…."

Prayer for Relief, pp. 27–29.) Such workplace tort claims are expressly barred by the exclusive liability provision of Kentucky's Workers' Compensation Act, and the Complaint should therefore be dismissed in its entirety.

D. Plaintiff's Complaint Must be Dismissed Because He Fails to State a Claim Upon Which Relief Can be Granted

Plaintiff's Complaint must also be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because it fails to state a claim upon which relief can be granted. Plaintiff does not allege any unique injury that would allow him to bring his public nuisance claim, which right to pursue normally belongs only to the government. Plaintiff also fails to plausibly allege that UPS's supposed noncompliance with regulatory guidance is the actual or proximate cause of his, the Union Class's, or the public's risk of exposure to COVID-19, rendering his claims subject to dismissal.

1. Plaintiff's Public Nuisance Claim Fails Because He Does Not Adequately Allege the Existence of a Public Nuisance, Special Harm, or Causation

Plaintiff's public nuisance claim should also be dismissed because he has failed to plead the existence of a public nuisance, special damages, and causation. "Public nuisances are generally redressed by an action in the name of the governing body, or its authorized representative to restrain or abate the nuisance." *Reg'l Airport Auth. v. LFG, LLC.*, 255 F. Supp. 2d 688, 692 (W.D. Ky. 2003). "For a private party to recover for a public nuisance, it must allege and show unusual or special damages, differing from those sustained by the community at large." *Id.* Moreover, "a nuisance is not a public one if it occurs in a place of business to which an invitee has no public right to go." *Id.* at 692–93.

As a threshold matter, Plaintiff's claim fails because working conditions at the Louisville Gateway—a facility that is closed to the general public—cannot constitute a

public nuisance as a matter of law. *See id.* (dismissing public nuisance claim under 12(b)(6) standard because hazardous dumping at a private business could not constitute a public nuisance). And even assuming, *arguendo*, that conditions at a private facility could constitute a public nuisance, Plaintiff has failed to allege that he suffered a special harm. In fact, he has not plead that he suffered any harm at all.

Plaintiff attempts to overcome these clear deficiencies by asserting two generalized harms: (1) that "some of" the Union Class are directly exposed to dangerous working conditions; and (2) that "Plaintiff and the Union Class" have "fear of contracting COVID-19 and infecting a family member." (Compl. ¶ 47–48.) But neither of these threadbare allegations are sufficient to demonstrate that working conditions at the Louisville Gateway have any impact on the general public's health, or that Plaintiff has suffered unusual or special damages, differing from those sustained by the community at large. Moreover, the allegations are directly contradicted by Plaintiff's allegations elsewhere in the Complaint. Notably, immediately before paying lip service to "special harm," Plaintiff alleges a risk of COVID-19 exposure through "community spread" (Compl. ¶¶ 43–45), which – by definition – is a risk to an entire community, not just to Plaintiff or the Union Class.[11] Simply put, the Complaint fails to plausibly allege that Plaintiff's risk of potential exposure (or fear of infecting family members) is meaningfully different for him than it is for other workers in Kentucky, or the rest of the world for that matter. (*See* Compl. ¶ 20.)

Finally, Plaintiff's claim also fails because he has not plausibly alleged that UPS caused his alleged injury. *See Modern Holdings v. Corning Inc.*, No. 13-405-GFVT, 2015

[11] To be clear, Plaintiff has also failed to plausibly allege that working conditions at the Louisville Gateway have contributed to "community spread."

U.S. Dist. LEXIS 41134, at *11 (E.D. Ky. Mar. 31, 2015) ("A plaintiff must also show that the private nuisance caused her damages."). Instead, Plaintiff merely alleges that he and the Union Class are experiencing emotional distress because their work "*may* expose their loved ones" to COVID-19. (Compl. ¶ 48 (emphasis added).) This is plainly insufficient to plead causation under Rule 12(b)(6).

For all of the above reasons, Plaintiff's public nuisance claim should be dismissed with prejudice. *Reg'l Airport Auth.*, 255 F. Supp. 2d at 694.

2. Plaintiff's Negligence Claims Fail Because He Does Not Allege Causation or Injury

Plaintiff's claims for common law negligence and negligence *per se* must also be dismissed because the Complaint does not plead sufficient facts to establish that UPS actually or proximately caused any injury to him. "A common law negligence claim requires proof of a duty of care, a breach of the duty, an injury, and legal causation between the breach and injury." *Bowen v. Olhmann Props.*, No. 2020-CA-0036-MR, 2021 Ky. App. Unpub. LEXIS 85, at *4 (Ky. Ct. App. Feb. 5, 2021) (affirming dismissal of negligence claim); *Readnour v. Gibson*, 452 S.W.3d 617, 621 (Ky. Ct. App. 2014) ("Negligence *per se* is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.") (internal quotation marks omitted).

Plaintiff's allegations fail to meet these requirements because Plaintiff does not allege that he was actually exposed to COVID-19 at UPS, and thus cannot adequately connect UPS's workplace policies to any exposure to the virus that can support his own claim. Plaintiff does not even attempt to allege causation or injury in his negligence claim (Count II), and his conclusory allegation in his negligence *per se* claim (Count III) that COVID-19 is "likely to cause additional death or serious physical harm to other employees,

including Plaintiff and the members of the Union Class" cannot satisfy his burden under Rule 12(b)(6).[12]

Accordingly, even if Plaintiff's claims could overcome KY OSHA's primary jurisdiction, preemption pursuant to the RLA, and the bar of workers' compensation exclusivity discussed previously (which they cannot), the claims still fail on the face of the Complaint. Plaintiff's general allegations of increased risk of exposure to a virus endemic throughout the community cannot constitute the requisite harm that is different "in kind" from the rest of the community. Nor does Plaintiff allege—as he must—that UPS was the cause of any actual exposure to him of COVID-19.

V. CONCLUSION

For the reasons set forth above, UPS respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted this 8th day of March, 2021.

[*signature on following page*]

[12] Plaintiff also cannot use the injuries of absent class members to plead this element of his claim, since named plaintiffs must "state a claim in themselves." *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974) (dismissal "is the proper course to follow where the named plaintiffs have failed to state a claim in themselves for the relief they seek"); *see Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163,1169-70 (3d Cir. 1987) (affirming the dismissal of a cause of action due to the named plaintiff's failure to state a claim, because "to be a class representative on a particular claim, the plaintiff must himself have a cause of action on that claim").

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

TIM BOYLE, individually, and as representative of a class of similarly situated persons comprising The unincorporated labor organization, The International Brotherhood of Teamsters, Local 2727, 7711 Beulah Church Road Louisville, Kentucky 40228,	)	***Electronically Filed***
Plaintiff,	)	**Civil Action No. 3:21-cv-00135-CRS**
v.	)	
UNITED PARCEL SERVICE CO. (AIR), 1400 North Hurstbourne Parkway, Louisville, Kentucky 40223	)	
Defendant.	)	

This is to certify that I have this date electronically filed the foregoing Brief in Support of UPS's Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will automatically serve and send notification of the filing to all counsel of record.

This 8th day of March, 2021.

By: */s/ Meredith Kingsley*
Meredith Kingsley