No. 07-131

In the

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *ETAL..,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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December 26, 2007

1. Respondents downplay the importance of this case, saying that it affects "only" the railroad industry and thus does not warrant the Court's attention. But the railroad industry alone consists of dozens of companies and well over 100,000 unionized employees, the vast majority of whom are directly affected by the outcome of this case.

Moreover, every industry and every company that is subject to collective bargaining obligations shares an interest in resolution of the question whether pre-existing collective bargaining agreements may be used to selectively block statutory rights granted to employers, but not employees, in new federal legislation. The decision below takes away rights granted by Congress to employers under the FMLA while maintaining the corresponding FMLA rights granted to employees. The harm to the employers, the frustration of Congress' express intent, and a decision reflecting a freewheeling judicial philosophy - under which courts rebalance issues of social and economic concern that Congress has already balanced - take this case beyond the bounds of the "parochial" and make it worthy of the Court's review.

2. One of the fundamental issues presented in this case - which Respondents fail to address - is whether the exercise of new statutory rights can ever constitute a prohibited "change" in existing collective bargaining agreements. The court below failed to recognize that an employer's exercise of its FMLA-granted right to require substitution of paid leave - just as an employee's exercise of FMLA-granted rights to take leave - is *not* a unilateral change in labor agreements barred by the RLA. So viewed,

there is no tension between the FMLA and the RLA, and so no need for a court to "reconcile" them.

But even if the exercise of new statutory rights did constitute a "change" in existing agreements, it cannot be that the archaistic prohibitions on such changes prohibit the exercise of some, but not all, of those new rights. Congress created a finely balanced set of privileges and obligations in the FMLA, granting new rights to employees that are limited by corresponding rights for employers. The lower court cherry-picked, finding that some of these provisions survive and others do not. That is not a viable approach to the reconciliation of the new and the old.

3. If there is any need to reconcile the FMLA and the RLA, then the FMLA should be construed as displaying the "clearly expressed congressional intention"[1] that the rights granted thereunder may be exercised by both employees and employers without the need to exhaust the extensive procedures for changing agreements under the RLA.

That "clearly expressed intention" can be found in § 2652, which provides that the Act preserves "the obligation of an employer to comply with any collective bargaining agreement * * * that provides greater family or medical leave rights to employees than the rights established under this Act." Similarly, § 2614(a)(4) provides that the employer's statutory power to require returning employees to obtain fitness certificates is subordinate to any labor

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[1] *Branch v. Smith, 538* U.S. 2454. 273 (2003)

agreement "that governs the return to work of such employees." Respondents insist that these provisions do not "sweep aside" all other pre-existing agreement terms, but that misses the point. These provisions demonstrate that Congress knew how to preserve pre-existing labor agreements when it wanted to do so. The plain implication is that other rights conferred on employers by the Act may be exercised notwithstanding any preexisting labor agreements.

The lower court's rationale - that the RLA is an absolute prohibition on changes whereas the FMLA only provides that employers "may" require employees to substitute paid leave for FMLA leave - misconstrues the word "may," which is an affirmative grant of authority. Unlike § 2614(a)(4), the right of employers to "require" substitution under § 2612(d)(2) is unqualified." [2]

4. Contrary to Respondents' view, § 2652(b) of the FMLA does not support the decision below. That section provides that the rights established for employees under the Act "shall not be diminished by any collective bargaining agreement." As the court of appeals recognized, that means only that employers may not bargain for diminished rights.

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[2] Respondents IAM *et al.* say (Opp. p. 8) that the Department of Labor has construed § 2612(d)(2) to yield to pre-existing labor agreements, but the passage cited merely stands for the unremarkable proposition that if an employer bargains away its right to substitute under the FMLA, it cannot thereafter insist on substitution. That has no relevance to the debate over whether *pre-existing* contracts trump the employer's statutory rights.

Pet. App. 7a n.5. A carrier exercising its rights under the FMLA is not seeking to bargain away an employee's FMLA rights.

5. Respondents also deny that the decision below is inconsistent with precedent, arguing that this Court "has long held that statutory mandates do not trump "seniority-based contract provisions." ATDA Opp. p. 5 (citing *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), and *US Airways v. Barnett.* 535 U.S.391 (2002)). But *Barnett* did not even involve a collective bargaining agreement (535 U.S. at 404) and *Hardison* held only that an employee's statutory Title VII rights do not automatically require override of other employees' contractual seniority rights. 432 U.S. at 85. Neither case suggests that new statutory rights do not or cannot supersede inconsistent pre-existing labor agreements. Rather, as we have shown, the relevant decisions of this Court are *NLRB v. Bildisco,* 465 U.S. 513, 521-22 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740-741 (1981); and *Usery v. Turner Elkhorn Mining Company,* 428 U.S. 1, 15, 16 (1976).

6. Respondents offer no logical justification for the different treatment of employers' and employees' statutory rights in the decision below. It is undisputed that, prior to the FMLA, employees had no right to take 12 weeks of unpaid leave at a time of their choosing. Nor do Respondents deny that pre-existing agreements would not give employees the right to unilaterally decide to accelerate their paid leave, substituting it for unpaid FMLA leave. If Respondents' view of the effect of the RLA were

correct, then employees could not exercise these new FMLA rights without first amending their collective bargaining agreements.

There is no reason in law or logic why employers' new FMLA rights are trumped by pre-existing labor agreements while employees' new FMLA rights are not. If the court below had held that employee's statutory rights could be exercised only if consistent with pre-existing collective bargaining agreements, Respondents would be the first to deny that the decision addressed only "parochial" interests. ATDA Opp. p. 3; IAM Opp. p. 9.

CONCLUSION

The petition for a writ of certiorari should be granted,

Respectfully submitted,

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