

No. 07-131

In The
Supreme Court of the United States

CSX TRANSPORTATION, INC., et al.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, et al.,

Respondents

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

**BRIEF IN OPPOSITION BY RESPONDENTS
ATDA, BLET, BMW, BRS, IBEW, NCFO,
SMWIA AND CERTAIN INDIVIDUALS**

CHARLES A. COLLINS
Labor and Professional
Centre
Suite 410
411 Main Street
St Paul, MN 55102
(651) 225-1125

MICHAEL S. WOLLY*
MARGO PAVE
ZWEDLING, PAUL, KAHN
& WOLLY, P.C.
1025 Connecticut Ave., N.W.
Washington, DC 20036-5420
(202) 857-5000

Counsel for Respondents
BMW, Herrera, Franco
McGill and Kocher

Counsel for Respondents
ATDA, BLET, BRS, IBEW
NCFO, SMWIA, and Losgren

*Counsel of Record

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QUESTION PRESENTED

Does Section 2612(d)(2) of the Family and Medical Leave Act (“FMLA”) supersede the Railway Labor Act (“RLA”) and permit railroad employers to override collectively-bargained seniority-based leave selection agreements in order to force employees to use paid leave in lieu of unpaid FMLA leave?

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

None of the Respondents filing this Brief in Opposition - C.R. Losgren; Rutilio G. Herrera; Joseph M. Franco; James T. McGill; Charles Kocher; American Train Dispatchers Association ("ATDA"); Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"); Brotherhood of Maintenance of Way Employees ("BMWE"); Brotherhood of Railway Signalmen ("BRS"); International Brotherhood of Electrical Workers ("IBEW"); National Conference of Firemen and Oilers ("NCFO"); and Sheet Metal Workers International Association ("SMWIA") — has a parent corporation or has stock owned by a publicly held company.

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STATEMENT OF THE CASE

This case speaks solely to how a highly specialized and unusual series of collectively-bargained agreements intersects with the Railway Labor Act and Family and Medical Leave Act. For 70 years, Petitioner rail carriers and Respondent labor unions representing their employees have operated pursuant to a complex and unique set of collective bargaining agreements and National Vacation Agreements (collectively "CBAs") that were formed under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* In addition to guaranteeing employees fixed amounts of paid leave, these agreements vest in employees a seniority-based right to determine when and how to use their paid leave. In 2003 and 2004, the carriers began forcing employees to surrender this right and substitute their collectively-bargained paid leave for otherwise unpaid leave that employees are entitled to take under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* The carriers asserted that Section 102(d)(2) of the FMLA, 29 U.S.C. § 2612(d)(2), entitled them unilaterally to impose substitution, regardless of the terms of the CBAs and without bargaining the change in contract terms as required by the RLA.

Both the district court and the Seventh Circuit held that the carriers actions were impermissible. The Seventh Circuit explained that the "essence of this case involves the intersection of the FMLA, which in some cases allows substitution of paid leave for FMLA leave; the RLA, which prohibits an employer from unilaterally changing working conditions

¹ The unanimous panel decision was written by Judge Evans and joined by Judges Kanne and Rovner.

except by following certain procedures; and the CBAs and the NVAs that set out with some care how vacation time is awarded. The issue is whether they can be reconciled." App.at 5a.²

The court below rejected the carriers' request that it treat the FMLA as an implied repeal or amendment of the RLA. In so doing, it followed this Court's admonition in *Branch v. Smith*, 538 U.S. 254 (2003), that implied repeals and amendments both are discouraged, as well as the Court's teaching that "when two statutes are capable of co-existence, it is the duty of the courts ...to regard each as effective." App. at 6a (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976)). Properly applying well-established principles of statutory construction and this Court's long-standing precedents, the court below concluded that the FMLA and the RLA were fully reconcilable with each other and with the parties' established CBA paid leave provisions because "while substitution is allowed [by the FMLA], the carriers cannot require substitution without complying with procedures set out in the RLA." App. at 7a.

The carriers' Petition for Rehearing and Rehearing En Banc was denied without an order for response or a dissent. App. at 27a-28a.

REASONS FOR DENYING THE PETITION

This case does not merit Supreme Court review because it addresses a parochial matter that impacts only the parties to the case. Moreover, the decision below does not create a conflict with other Circuits or with any decision of this Court.

² References to "App.—" are to the Appendices in the carriers' Petition.

1. The Seventh Circuits Decision Addresses a Matter of Purely Parochial Interest

The carriers are mistaken when they suggest that the decision below has broad importance beyond the parties to the case. In fact, it does not and as a result, the case is not one meriting a grant of certiorari. *Ticor Title v. Brown*, 511 U.S. 117, 122 (1994) (dismissing writ as improvidently granted because, while the question presented “would seem to be of great practical importance to these litigants [,] that is ordinarily not sufficient reason for our granting certiorari.”).

The decision below has little impact on those not parties to this case because the right that unionized railroad employees have to determine when and in what manner to use paid leave does not generally exist in other industries. As the court below emphasized, the railroad industry has "special characteristics" wholly unlike those of other industries. App. at 8a. As a result of these special characteristics, the carriers and their unionized employees have, over 70 years, collectively bargained³ unique and detailed agreements that not only guarantee employees specific amounts of paid leave, but also establish an "elaborate process" based on seniority by which employees determine when and how to use their leave. *Id.* at 8a, 9a. It is this unique arrangement that is at the heart of the decision below. *Id.* at 5a (explaining that the “essence of this case” is the reconciliation of these specific agreements with the FMLA and the RLA).

³ Collective bargaining under the Railway Labor Act is a “virtually endless,” *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987), “almost interminable process.” *Detroit and Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969).

Because few employees outside the railroad industry have the contractual right to control when they take paid leave, non-carrier employers subject to the FMLA are in a wholly different posture than Petitioners. With just 12% of Americans covered by CBAs,⁴ the vast majority of employees work in settings where the employer has the sole authority to grant, withhold, or mandate use of leave, paid or unpaid. While some employees may be subject to benefit plans or established practices that entitle them to a certain amount of vacation, the authority to determine when and for what purposes those employees may take leave rests with the employer, not the employee. Moreover, even among employees covered by CBAs, most do not have control over the use of paid leave, either because their employer is entitled to deny their requests for leave or because the CBA provisions impose limitations on when such leave may be used.

The decision below applies only in the highly distinct circumstances where CBA provisions vest employees with the right to predetermine when they take paid leave and forbid the employer from altering that selection except under strictly limited conditions. Because those circumstances are peculiar to the railroads, the question that this case presents is not likely to recur in other industries. It therefore does not merit Supreme Court review.

⁴ January 25, 2007 News Release from United States Department of Labor, Bureau of Labor Statistics, found at <http://m.bls.gov/news.release/union2.nr0.htm>.

2. The Seventh Circuits Decision Does Not Conflict With Any Other Circuit or Any Decision of This Court

The decision below poses no conflict with any other Circuit, as it is the first case to address the proper accommodation of the RLA and the FMLA. The carriers therefore have tried to portray it as conflicting with this Court's precedents. But their assertions to that end are groundless.

As an initial matter, the carriers are wrong when they claim that the decision below departs from Supreme Court precedent by reconciling certain provisions of a statute - here FMLA §2612(d) - with the seniority-based requirements of the parties' collectively bargained agreements. In fact, as the court below noted, "it is not unusual for statutory provisions to be reconciled with seniority provisions in CBAs." App. at 8a. Indeed, that is precisely what this Court did in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), on which the Seventh Circuit expressly relied in reaching the decision below. See also *US Airways Inc. v. Barnett*, 535 U.S. 391 (2002) (ADA must be reconciled with employee seniority rights).

Under *Hardison* and, its progeny, "a seniority system in a CBA does not automatically give way even under anti-discrimination statutes." App. at 7a. Such statutes are mandatory in nature, requiring that employers act in a non-discriminatory manner. Given that this Court has long held that even those statutes' mandates do not trump seniority-based contract provisions, it was hardly surprising for the court below to hold that FMLA Section 2612(d) - which does not require any particular action by an employer, but merely permits it to substitute paid

leave for otherwise unpaid FMLA leave does not authorize the overriding of a seniority-based contract provision.⁵

⁵The cases cited by carriers on p. 8 of their petition do not counsel otherwise. Those cases stand for the proposition that certain statutory mandates may take precedence over CBA provisions with which they conflict. See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739-40 (1981) (Fair Labor Standards Act's mandatory provisions supercede conflicting CBA provisions). But that proposition has no application to the present case, since FMLA § 2612(d)(2) does not mandate employer substitution of paid leave and therefore does not conflict with the CBA provisions at issue.

United Transportation Union v. Consolidated Rail Corp., 535 F. Supp. 697 (Reg'l Rail Reorg. Ct. 1982) is equally inapposite. *UTU v. Conrail* addressed highly specialized emergency rail legislation that created Conrail out of the bankrupt Penn Central Railroad's former properties and mandated that it become profitable within a defined period of time or be broken up and sold. The provision there under review — creating specific authority to reduce Penn Central's "overmanned" workforce conditioned on the payment of fixed monthly severance benefits to the employees whose jobs were to be eliminated — was deemed by Congress critical to the success of the newly-created carrier. In fact, that was the statutory provision's sole purpose. *Id.* at 704. As the Reorganization Court explained, Congress resolved the long-standing labor dispute over contractual obligations to retain obsolete positions by expressly enabling the carrier to eliminate those positions in a manner otherwise impermissible under its CBAs. *Id.* at 703, 705 ("[T]he principal concern reflected in the [House and Senate conference] reports is ensuring that Conrail actually is able to eliminate the excess positions in question prior to the end of 1982, an outcome that UTU's reading of the provision would be unlikely to permit."). In contrast, the FMLA is a minimum-standard employment statute of general applicability that does not purport to alter existing CBAs, except to the extent that they would diminish the rights of employees under the FMLA. 29 U.S.C. § 2652(b). See *infra*, at 8.

The carriers' contention that the decision below conflicts with cases such as *United States v. Johnson*, 529 U.S. 53 (2000), and *JAMA v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005), is equally flawed, relying as it does on the false premise that the Seventh Circuit "create[d] additional exceptions" to the FMLA. Their argument disregards that the decision below was rooted squarely in the language of the two statutes implicated by the parties' dispute — the FMLA and the RLA — and that it added nothing to either Act. As the court below noted, Section 152, Seventh of the RLA "tells railroads what they must not do" — make unilateral changes to existing agreements and working conditions. App. at 7a. Section 2612(d) of the FMLA, in contrast, "simply tells employers what they may do — require substitution — not what they must do." *Id.* Congressional passage of the FMLA did not *sub silentio* effect either a repeal or amendment of the RLA's long-established bargaining requirements. *National Ass'n of Home Builders v. Defenders of Wildlife*, — U.S. —, 127 S.Ct. 2518, 2533, n. 8 (2007) ("[W]e have repeatedly recognized that implied amendments are no more favored than implied repeals."). Recognizing that these "two statutes are capable of co-existence," the court fulfilled its "duty ... to regard each as effective." *Radzanower*, 426 U.S. at 155. It properly reconciled the permissive text of FMLA §2612(d) with the mandatory text of the RLA's bargaining requirement, which requires carriers to negotiate any changes to existing "working conditions of its employees . . . as embodied in agreements." 45 U.S.C. § 157.

It is the carriers — not the court below — who seek to create a new statutory provision. Congress explicitly provided that the FMLA supercedes CBA provisions *only* to the extent that those provisions provide

lesser rights to employees than the Act. 29 U.S.C. § 2652(b) ("The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan."). "Enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Had Congress intended the FMLA to override the bargaining obligations placed on the carriers³ by the RLA, it would have said so. *Cf. Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 131-32 (1991) (Interstate Commerce Act overrode the bargaining requirements of the RLA by stating that a carrier "is exempt from the antitrust laws and from all other law, including the State and municipal law, as necessary to let [it] carry out the transaction...."). Congress did not anywhere in the FMLA confer on employers a general authority to override CBAs, as the carriers would have it. In contending that the FMLA supercedes CBA provisions beyond those identified in Section 2652(b), they seek to add to the statute a provision that simply does not exist.⁶

⁶ The carriers argue that they should be entitled to override the CBAs' paid leave provisions by forcing employees to use such leave for FMLA leave because, they contend, an employee overrides those same provisions if he elects to use paid leave in place of otherwise unpaid FMLA leave. But the carriers are positing a false symmetry. The employee who has a right under the CBAs to take a paid vacation at the particular time he previously selected for that purpose and instead elects to utilize that paid leave for FMLA purposes is not overriding the agreement. He is relinquishing a contractual right - the right to take vacation at a preselected time - in order to exercise an option under the FMLA to be paid for otherwise unpaid time

The carriers fare no better with their reliance on *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). The only question at issue in *Ragsdale* was whether the Secretary of Labor could require an employer to grant more than 12 weeks of FMLA leave as a penalty for failing to give proper notice to an employee. That case did not address in any way the relationship between the FMLA and those collectively-bargained provisions that give employees the right to determine when and for what purpose to use paid leave.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. COLLINS
Labor and Professional
Centre
Suite 410
411 Main Street
St Paul, MN 55102
(651) 225-1125

MICHAEL S. WOLLY*
MARGO PAVE
ZWEDLING, PAUL, KAHN
& WOLLY, P.C.
1025 Connecticut Ave., N.W.
Washington, DC 20036-5420
(202) 857-5000

Counsel for Respondents
BMW, Herrara, Franco
McGill and Kocher

Counsel for Respondents
ATDA, BLET, BRS, IBEW
NCFO, SMWIA, and Loggren

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