

No. _____

In the
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,
INDIANA AND 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993, 29 U.S.C. 5 2601 et seq. ("FMLA"), gives employees up to 12 workweeks of unpaid leave in certain circumstances, but gives employers a corresponding right to require employees to use any contractual paid leave when taking leave under the Act, so as to avoid "stacking" of FMLA leave on top of existing contractual leave.

The question presented is whether pre-existing collective bargaining agreements must yield to the employees' new statutory right to 12 workweeks of unpaid leave, yet at the same time may nullify the corresponding statutory right of employers to require use of paid leave.

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Transportation Communications International Union
United Supervisors Council of America
United Transportation Union
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**RULE 29(6) CORPORATE DISCLOSURE
STATEMENT**

Petitioner CSX Transportation, Inc. is wholly owned by CSX Corporation.

Petitioner The Burlington Northern and Santa Fe Railway Company (now known as BNSF Railway Company) is wholly owned by Burlington Northern Santa Fe Corporation.

Petitioner Indiana Harbor Belt Railroad Company is owned by Consolidated Rail Corporation, which is owned by CSX Corporation and Norfolk Southern Corporation, and by the Soo Line Railroad Company, owned by and doing business as the Canadian Pacific Railway.

Petitioner Norfolk Southern Railway Company is wholly owned by Norfolk Southern Corporation.

Petitioner Union Pacific Railroad Company is wholly owned by Union Pacific Corporation.

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The opinion of the Court of Appeals (App. 1a-10a) is reported at 478 F.3d 814 (7th Cir. 2007). The April 30, 2007 order denying rehearing and rehearing *en banc* of that decision (App. 27a) is not reported. The decision of the District Court (App. 11a-26a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on March 2, 2007. A timely petition for rehearing and rehearing *en banc* was denied on April 30, 2007. App. 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 102(a) of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2612(a), entitles an eligible employee to up to 12 workweeks of unpaid leave a year (1) for the birth of a child, (2) for the placement of a child with the employee for adoption or foster care, (3) to care for a spouse, daughter, son, or parent with a serious health condition, and (4) for a serious health condition of the employee. (Set out in full at App. 29a.)

Section 102(d)(2) of the FMLA, 29 U.S.C. § 2612(d)(2), gives an employer the right to require the employees to use accrued paid leave when taking FMLA leave. (Set out in full at App. 29a-30a.)

Section 402(a) of the FMLA, 29 U.S.C. § 2652(a), entitled "Effect on existing employment benefits," provides that "[n]othing in this Act * * * shall be construed to diminish 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 * * * ." (Set out in full at App. 30a.)

Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, states that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions * * * ." (Set out in full at App. 30a-31a.)

Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, states that "[n]o carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in * * * this title." (Set out in full at App. 31a.)

STATEMENT

A. The Family and Medical Leave Act.

The FMLA expressly "balance[d] the demands of the workplace with the needs of families." 29 U.S.C. § 2601(b)(1). As for the needs of families, § 2612(a) of the Act gives eligible employees up to 12 workweeks of unpaid leave a year (1) for the birth of a child, (2) for the placement of a child with the employee for adoption or foster care, (3) to care for a spouse, daughter, son, or parent with a serious health condition, and (4) for a serious health condition of the employee. App. 29a.¹

¹ Before enactment of the FMLA, an employee who took leave not permitted under existing labor agreements would be subject to discipline, including termination.

As for the needs of the workplace, § 2612(d)(2)(A) gives employers the right to require employees to use accrued paid leave when taking leave under the Act. It provides:

An eligible employee may elect, *or an employer may require* the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under * * * subsection (a)(1) * * *. (Emphasis added.)

Congress was aware that the Act would override existing collective bargaining agreements, and expressly preserved certain labor agreement terms favorable to employees. Thus, § 2652, "Effect on existing employment benefits," provides that "[n]othing in this Act * * * shall be construed to diminish 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 * * *." In addition, § 2614(a)(4) allows employers to require returning employees to obtain fitness certifications, "except that nothing in this paragraph shall supersede a * * * collective bargaining agreement that governs the return to work of such employees."

B. The Proceedings Below.

After employees began exercising their new right to statutory leave under the Act, the petitioner rail carriers sought to exercise their corresponding FMLA right to require substitution of accrued paid leave for unpaid FMLA leave. The respondent labor unions challenged the employers' right to do so, asserting that the employers' exercise of their FMLA rights violated the terms of pre-existing collective bargaining agreements negotiated under the Railway Labor Act ("RLA"), which generally requires employers and employees to abide by their labor agreements. See 45 U.S.C.

§ 152 First. In particular, the unions claimed that requiring railroad employees to use paid leave when they take FMLA leave violated collectively bargained rules pertaining to vacation scheduling such as the National Vacation Agreements of 1949.²

Suits brought by the unions and the carriers in various federal district courts were consolidated in the Northern District of Illinois. App. 2a & n.3. The District Court granted declaratory judgment to the unions, and the Court of Appeals affirmed.

The Court of Appeals began its analysis by rejecting the unions' principal argument that § 2652, the saving clause that specifies the contract terms that are not affected by the FMLA, extends to the contractual right to schedule a vacation. *Id.* at 5a. The court then acknowledged the principles that a later statute may limit the scope of an earlier one and that a specific statute takes precedence over a general one. *Id.* at 6a. It noted that the FMLA is more recent than the RLA, but was unable to say which was the more specific, stating that "[a]sking which is more specific is a little like asking whether an avocado is more specific than a kiwi." *Id.*

The court then turned away from these principles of statutory construction to the task of "reconciling important competing principles." *Id.* at 10a. After opining that "railroads have special characteristics" and that "[t]here are

² Collective bargaining agreements under the RLA typically do not have an expiration date but remain in force unless amended by the parties. See, e.g., *UTU v. South Carolina Pub. Ry. Comm'n*, 130 F.3d 627, 628 (4th Cir. 1997). Thus, for example, the rail industry's multiple National Vacation Agreements predate enactment of the FMLA by many years.

unique problems in running a railroad and in working for one" (*Id at 8a*), the court set out a lengthy exegesis on "why workers cherish their vacations" and why the "right to time one's vacation * * * is a hard-won right of railroad workers." *Id.*

The court decided that the employees' interest in preserving any contractual rights to schedule vacations under pre-existing agreements outweighs the employers' interest in preventing stacking of pre-existing leave. *Id. at 9a-10a*. It therefore held that the FMLA and the RLA should be reconciled by reading the RLA as "tell[ing] railroads what they must not do" - that is, act contrary to the terms of agreements - while reading the FMLA as "simply tell[ing] employers what they may do - require substitution." *Id at 7a*. Thus, "the carriers cannot require substitution without complying with procedures set out in the RLA," under which "the carriers can bargain for substitution provisions." *Id.* The court expressly acknowledged "that eliminating the policies against substitution may result in stacking." *Id. at 9a*.

The court did not explain why employees are permitted to take up to 12 workweeks of unpaid leave - or to elect to use paid leave - without likewise complying with the mandatory bargaining procedures of the RLA. Nor did the court address the carriers' arguments that federal legislation supersedes labor agreement terms and that, because Congress in §§ 2652 and 2614(a)(4) expressly stated which existing labor agreement terms were not to be superseded by the Act, the court was not permitted to add additional terms further constraining employers' rights.

REASONS FOR GRANTING THE WRIT

A. The Issue Is Important.

This case concerns a core compromise in an important labor statute. The FMLA's expressly stated purpose was "to balance the demands of the workplace with the needs of families." § 2601(b)(1). The Act was intended "to promote the stability and economic security of families" and "to entitle employees to take reasonable leave" for the prescribed reasons, but it was equally intended "to accomplish th[ose] purposes * * * in a manner that accommodates the legitimate interests of employers." 2601(b)(1)-(3).

This Court has recognized that the FMLA sought to accommodate both labor and management. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), it ruled that the 12-week figure "was the result of compromise." *Id.* at 93. In choosing that figure, Congress chose "a middle ground, a period considered long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" *Id.* at 94. The Court accordingly invalidated a Department of Labor regulation that would have effectively given employees more than 12 workweeks of leave, holding that "[c]ourts and agencies must respect and give effect to these sorts of compromises." *Id.*

The decision below ignores this Court's warning in *Ragsdale* and destroys Congress' carefully crafted statutory balance. It assumes that pre-existing labor agreements yield to the employees' new right to unpaid leave - thereby upholding the employee's side of the FMLA bargain - but nevertheless finds that such agreements will supersede the employers' corollary right to require substitution and prevent stacking. Thus, under the lower court's reasoning, a carrier must purchase from its employees, through collective bargaining, a right that has already been expressly conferred by new law. By this reasoning, only employers, not employees, remain bound by existing labor agreements when a new federal statute alters the context in which those labor agreements operate. Neither the FMLA, nor any decisional authority, nor any reasoned principle of law supports this disparate outcome.

The Court of Appeals itself acknowledged both that "important competing principles" are at stake here, and that its decision will contravene congressional intent by permitting stacking. Its decision will dramatically increase

the burdens of the FMLA because, without the right to require substitution, the carriers could be forced to provide 12 workweeks of FMLA leave *plus* additional weeks of accrued paid leave, such as vacation leave, which "would unduly and unfairly burden employers." *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1205-06 (11th Cir. 2001).

The decision below affects not only the railroad and airline industries (both covered by the RLA), but also all employers whose collective bargaining agreements contain provisions that predate the FMLA, for the Labor Management Relations Act, just like the RLA, restricts employers from unilaterally changing the terms of existing agreements.³

Moreover, in frustrating Congress' careful compromise, the lower court misunderstood the effect of new federal legislation on existing labor agreements, and flouted key teachings of this Court about the construction of federal statutes, independently and in relation to each other.

³ See *Groves v. Ring Screw Works*, 498 U.S. 168, 172 (1990) ("Section 301(a) of the LMRA provides a federal remedy for breach of a collective-bargaining agreement.").

**B. The Decision Below Conflicts With Decisions Of
This Court Holding That New Statutory Rights Are
Not Trumped By Pre-existing Labor Agreements.**

Many decisions of this Court establish that, unless a savings clause provides otherwise, a federal law will generally supersede any inconsistent pre-existing labor agreements. Thus, for example, in *NLRB v. Bildisco*, 465 U.S. 513, 521-22 (1984), the Court held that collective bargaining agreements subject to the National Labor Relations Act ("NLRA") were "executory contracts" under § 365 of the Bankruptcy Code that a debtor in possession may reject without committing an unfair labor practice under the NLRA. See also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981) (congressionally granted rights "take precedence over conflicting provisions in a collectively bargained * * * arrangement"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 16 (1976) (noting "the competence of Congress to allocate the interlocking economic rights and duties of employers and employees * * * regardless of contravening arrangements between employer and employee" and that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations").

The court below ignored these authorities in holding that pre-existing labor agreements may hump the carriers' new rights under the FMLA. Exercising a new federal statutory right is not an unlawful unilateral change in collective bargaining agreement terms. When the carriers exercised their FMLA right of substitution, they were no more violating their labor agreements or the RLA than the employees were when they exercised their new FMLA right to extended leave.

Prior to the decision below, the RLA had never been construed in its 80-year history as prohibiting either carriers or employees from exercising rights under subsequently enacted federal statutes. Indeed, the principle that the RLA does *not* bar the exercise of new statutory rights was recognized and applied by the Regional Rail Reorganization Court in *United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. 697 (Reg'l Rail Reorg. Ct. 1982) (Friendly, J.). That case involved a statute providing that a railroad "may terminate the employment" of certain employees. The court rejected the unions' argument that the carrier could not exercise that authority if doing so was inconsistent with the existing collective bargaining agreements negotiated under the RLA:

We look first at the words of the statute and it is hardly necessary to do more. The very first sentence of § 702 says that Conrail "may terminate the employment of certain employees, in accordance with this section", not that Conrail may do so if permitted by agreement. * * * No qualification is made on the score of existing agreements.

Id. at 703 (citations omitted). That is precisely the situation here. Section § 2612 provides a new statutory right to take leave, expressly qualified by the power of the employer to require substitution, and the RLA does not prohibit either employees or employers from exercising statutory rights.

C. The Decision Below Conflicts With Decisions Of This Court Holding That, When Congress Provides Exceptions In A Statute, A Court May Not Create Additional Exceptions.

The Court of Appeals misperceived its proper function when it said that "we see our role as reconciling important

competing principles." App. 10a. Congress had already reconciled the issues at stake when it gave employees and employers distinct rights in the FMLA and expressly specified which types of labor agreement terms survive the statute's enactment - *i.e.*, terms that "provide[] greater family or medical leave rights to employees." § 2652; see also § 2614(a)(4) (carrier's right to require returning employees to obtain fitness certifications does not "supersede a * * * collective bargaining agreement that governs the return to work of such employees"). When the court below construed § 2612(d)(2) to mean that an employer "may require the employee[] to substitute" paid leave except when contractually forbidden from doing so, it erroneously created a new and broader savings clause, disabling employers from preventing stacking and failing to respect a policy decision that Congress had already made.

This Court has ruled that "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). *Bildisco* provides a perfect illustration of that rule. There the Court noted that § 1167 of the Bankruptcy Code expressly exempts collective-bargaining agreements subject to the Railway Labor Act, but grants no similar exemption to agreements subject to the NLRA. Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.

465 U.S. at 522-23.⁴ See also, e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply."); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general [provision], additional exceptions are not to be implied, in the absence of contrary legislative intent."); *United States v. Rodgers*, 461 U.S. 677, 701 (1983) ("No exception of the sort carved out by the Court of Appeals appears on the face of the statute, and we decline to frustrate the policy of the statute by reading such an exception into it.").

The court below (which never addressed this argument) ignored the teaching of these decisions, as well as that of *Ragsdale, supra*, which explained that the FMLA was the product of tradeoffs between employee and management interests, and ruled that "[c]ourts * * * must respect and give effect to these sorts of compromises." 535 U.S. at 94.

D. The Court Below Erred In Reconciling The FMLA And The RLA.

Because federal legislation overrides the terms of conflicting labor agreements, the Court of Appeals erred in believing that the FMLA had to be "reconciled with the RLA. If there was any reconciling to be done, the court should simply have held that the FMLA's affirmative grant of authority to employers to require substitution falls outside

⁴ In a footnote to that passage, citing H.R. Rep. No. 95-595, at 423 (1977), the Court noted that Congress had "determined that 'the subject of railway labor is too delicate * * * for this code to upset established relationships.'" 465 U.S. at 523 n.8. Congress made no such determination in the FMLA.

of, and is not nullified by, the RLA's prohibition against unilateral changes in collective bargaining agreements.

The lower court's contrary decision starts from the mistaken premise that a carrier's exercise of its FMLA right to require substitution could be a "unilateral" change in existing agreements forbidden by the RLA. *See* App 9a. The court failed to recognize that the FMLA's grant of the employee's right to unpaid leave is itself conditioned by the statute's grant to employers of the right to require substitution. Substitution becomes a possibility only when an employee wants to exercise his new obtained right to take time off from work without his employer's permission. Neither side, in exercising its newly granted statutory rights, is unilaterally changing the terms of existing labor agreements.

But even assuming that a "reconciliation" of the FMLA and the RLA was required, the court erred in ruling that the two statutes can be reconciled by construing § 2612(d)(2) - which states that employers "may require" employees to substitute — as merely "a statement that substitution is not forbidden." App. 10a. Extensive precedent makes clear that § 2612(d)(2) constitutes an affirmative grant of authority to require substitution. *E.g.*, *Barnett Bank v. Nelson*, 517 U.S. 25, 34-35 (1996) (federal statute stating that a national bank "may" act as an agent for an insurance company "explicitly grants a national bank an authorization, permission, or power" not subject to local restriction); *Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-96 (7th Cir. 1998) ("[t]he word "may" means just what it says: that [the entity] has discretion" to take the specified action) (citation omitted).⁵

⁵ *See also, e.g.*, *State v. Wallace*, 124 P.3d 259, 264 (Utah Ct. App. 2005); *Nibler v. Oregon Dep't of Transp.*, 105 P.3d 360, 363 (Or. 2005); *State ex rel. Michael A.P. v. Miller*, 529 S.E.2d 354,

(continued next page)

Thus, § 2612(d)(2) is considerably more than "a statement that substitution is not forbidden"; rather, it constitutes an unqualified grant of statutory authority, the exercise of which the RLA simply does not prohibit.

This conclusion is reinforced by a consideration of the employees' FMLA rights. Employees are not required to take FMLA leave: § 2612(a)(1) merely says that they are "entitled" to do so. There is no meaningful difference between an employee who is "entitled" to extended leave and an employer who "may" require substitution — both are affirmative grants of discretionary authority.⁶ The FMLA rights of employees and employers — to take leave and to require substitution — are two halves of a unitary provision of law. In either case, when exercising rights expressly granted by the FMLA, the party is not making a unilateral change in labor agreements forbidden by the RLA.

In short, if the two statutes need reconciling, § 2612(d)(2) should be construed as granting an affirmative statutory right of substitution and the RLA should be construed as not prohibiting either employers or employees from exercising new statutory rights.

359 (W. Va. 2000); *Randolph County v. Bantz*, 508 S.E.2d 169, 170 (Ga. 1998); *Edge v. State Farm Ins. Co.*, 546 S.E.2d 647, 648-49 (S.C. 2001).

⁶ The same is true with respect to the employee's right to "elect" substitution of paid leave under § 2612(d)(2). No one suggests that the employee's right to elect substitution is less than absolute — i.e., that it is limited by or subject to pre-existing labor agreements. Thus, an employee may alter the timing of his paid vacation days, notwithstanding the contractual mechanisms for scheduling leave, on the sole justification that he is taking FMLA leave and wishes to be paid for his time off.

CONCLUSION

The petition for a writ of certiorari should be granted,

Respectfully submitted,

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