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BY E-MAIL

Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
United States Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

RE: Response to Request for Comments Related to the Family and Medical Leave Act
of 1993 (Published in Federal Register Vol. 71, No. 231, December 1, 2006)

Dear Mr. Brennan:

These comments regarding the Family and Medical Leave Act of 1993 ("FMLA") are submitted on behalf of the employees represented by six unions in the railroad industry: the American Train Dispatchers Association ("ATDA"); the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"); the Brotherhood of Railroad Signalmen ("BRS"); the International Brotherhood of Electrical Workers ("IBEW"); the National Conference of Fireman & Oilers ("NCFO") – Division of SEIU; and the Sheet Metal Workers International Association ("SMWIA"). Each of the unions is a collective bargaining representative, as defined in Section 1, Sixth of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 Sixth, of certain crafts or classes of employees employed by the nation's major rail carriers. The ATDA represents employees who control the movement of rail traffic; the BLET represents train and engine service employees who operate locomotives and trains; the BRS represents employees who maintain and repair signal equipment; the IBEW represents electricians who maintain and repair locomotives and equipment and telecommunications employees; the NCFO represents utility workers and shop laborers; and the SMWIA represents pipefitters and roadway mechanics. These unions are parties to long-standing collective bargaining agreements with the carriers, entered into pursuant to the requirements of

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the RLA. These comments address the relationship between collectively-bargained paid leave and unpaid FMLA leave.

Collective bargaining agreements (“CBAs” or “Agreements”) in the railroad industry establish for union-represented employees certain rights regarding the use of paid leave. The Agreements, including the established practices that have developed under them over time, describe the kinds and amounts of leave to which employees are entitled and the employees’ rights to decide when and how the various forms of leave to which they are entitled may be used. Under these Agreements, employees have the right to choose when and for what purposes to take paid leave. That choice is limited solely by their seniority (for example, the most senior employee has the first choice of when to take paid vacation leave, followed by the next senior and so on). Insofar as vacation leave is concerned, the employees generally make their choices for the next year in advance via a bidding process at the end of the current year. Union-represented employees historically have chosen how to use their collectively-bargained paid leave. For example, they often use vacation, sick, and personal leave to care for newborn or adopted children, for sick spouses, children and parents, as well as for themselves in times of illness. The CBAs do not permit the carrier to mandate that the employee use his paid leave at a time – or for a purpose – selected by the employer. Rather, once the employee has selected when he will take paid leave, the carrier may not override that selection and demand that the employee take his paid leave at some other time, unless the “requirements of service” justify it.

Notwithstanding the CBAs’ unequivocal mandate that employees are entitled to use their paid leave at the time they choose and not at a time chosen by the carriers, the carriers in 2004 began to, and now routinely, require employees to use their paid leave whenever they exercise their statutory right to FMLA leave – thus usurping the employees’ collectively-bargained right to choose when and for what purpose to use paid leave. The carriers assert that Section 2612(d) of the FMLA entitles them to override the collectively-bargained provisions that reserve to employees the right to choose whether and when to use their paid leave. It is the unions’ position that this is an incorrect interpretation of the FMLA and that the statute may not be used as a tool to avoid compliance with the parties’ collective bargaining provisions.

The unions’ position is the same one taken by the Secretary when the Department issued its FMLA Implementing Regulations in January 1995. The Department made clear that, as regards the forced substitution of paid leave for otherwise unpaid FMLA leave, employers such as the carriers are bound by their collective bargaining agreement obligations and are not allowed to use FMLA to escape those obligations. The preamble to the Regulations explained that “*in the absence of other limiting factors (such as a State law or an applicable collective bargaining agreement)*, where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer’s decision to require it, even where the employee would desire a different result.” 60 Fed. Reg. 2205 (January 6, 1995)(Emphasis added). Consistent with this explanation, it is the unions’ understanding that when CBA

provisions give the employee and not the employer the right to determine when and for what purposes to use paid leave, those provisions constitute a “limiting factor” that bars an employer’s attempt to force employees to use their paid leave in place of unpaid FMLA leave.

Of course, given the purpose of the FMLA it is no surprise that Congress preserved CBA provisions that are more protective of employees than is the FMLA itself. As both the House and Senate Reports on the FMLA legislation noted, “the purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, *and not to limit already existing rights and protection.*” Emphasis added. Through the FMLA, Congress provided all American workers – whether covered by CBAs or not – a “minimum labor standard” of leave rights, while protecting greater leave rights employees obtained through collective bargaining. One of the rights established under the FMLA is the right related to employee use of paid leave for FMLA-covered purposes. The statute provides an employee only a limited right as regards whether to use paid leave for such purposes in the absence of “already existing rights and protection”: an employee can elect to take paid leave as FMLA-leave, but if an employee chooses not to take paid leave, the employer can override that choice by forcing the employee to substitute paid leave for otherwise unpaid FMLA leave. The contractual provisions and established practices governing union-represented employees of rail carriers address this very same issue. In sharp contrast to FMLA, however, under the CBAs it is the *employee*, not the employer, who is entitled to make the choice of whether to use paid leave for FMLA-covered purposes; the rail carrier employer does not have the right to override that choice - it can *not* force the employee to use paid leave for such purposes when the employee does not want to. It is stating the obvious to say that the right to decide for oneself whether or not to use paid leave for family and medical purposes is greater than the “right” to have that choice overridden by one’s employer.

The rail carriers began forcing employees to use their paid leave in place of unpaid FMLA leave in 2004. With this change in attitude, the employees’ fate turns not on the established terms of the governing CBAs, but instead on the happenstance of the calendar and the whims of the carrier. Take the case of an employee who, pursuant to his entitlement under the CBA, has chosen long in advance to use vacation leave in July, when his family intends to take a trip together. But when he and his wife adopt a baby in March and request time off under the FMLA, he is forced by the employing carrier to use his vacation leave then, instead of unpaid FMLA leave. When July comes around, the employee no longer has any contractual vacation time left. He may request unpaid leave to take the family trip in July, but – unlike with vacation leave – the carrier is not obligated to honor his request. The employee’s ability to take a family vacation is thus in jeopardy; it depends solely upon the unfettered discretion of the carrier. Meanwhile, a fellow employee who also has exercised his contractual right to use vacation leave in July adopts a baby in September. Unlike his cohort, this otherwise similarly-situated employee will get to take his vacation leave at his chosen time (July), as he is entitled to under the contract, and will also get to take 12 weeks additional unpaid leave for the adoption of his

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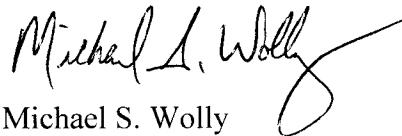
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child. Thus, the second employee will get his full contractual complement of paid leave plus a full 12 weeks of FMLA leave without question, while the first will receive only the 12 weeks of FMLA leave, with any subsequent request for leave solely in the discretion of the carrier.

Congress's decision to establish in the FMLA a "floor" for employee leave rights while protecting collective bargaining provisions that provide employees greater such rights was consistent with the approach it has taken in other statutes establishing a minimum labor standard, such as the child labor laws, the minimum wage, Social Security, the safety and health laws, and the pension and welfare benefits laws. Like these analogous laws, the FMLA mandates a minimum standard with which an employer must comply but does not provide an excuse for an employer to disavow CBA provisions that provide rights greater than the Act. For example, it is well-established that an employer who is party to a collective bargaining agreement that entitles its employees to a wage rate higher than that mandated by the Fair Labor Standards Act ("FLSA") cannot refuse to pay the wages required by the CBA on the ground that federal law establishes a lower minimum standard regarding the rate the employees are due. The Department should confirm that the same principle applies under the FMLA. Like the FLSA, the FMLA created a *minimum* standard applicable to those employees who are unable to achieve a higher level of employee benefits through other means, such as collective bargaining. Compliance with the FMLA does not excuse or justify non-compliance with CBA provisions that give covered employees – and not the carrier – the right to decide when and for what purposes to use their paid leave simply because the FMLA establishes a lower minimum standard regarding employees' ability to control their use of paid leave.

In summary, we ask that the Department confirm (a) that an employer's ability to force employees to substitute paid leave for otherwise unpaid FMLA leave is limited by applicable collective bargaining agreements, and (b) that where, as here, CBAs give employees the right to choose when and for what purpose to utilize paid leave, the FMLA does not authorize the employer to override the employees' choices and force them to substitute paid leave for unpaid FMLA leave.

Respectfully submitted,



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