

CASE NOTE:

Northern District of Illinois Disposes of Two BIPA Claims Pursuant to Railway Labor Act

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Legal Framework for the Decisions

Transportation companies operating in Illinois likely are familiar with the threat posed by the Illinois Biometric Information Privacy Act ("BIPA"). BIPA governs "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." The broad statute strictly regulates, among other things, the use of biometric data, like fingerprints, for timekeeping purposes.

Recently, in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, the Illinois Supreme Court restricted previously successful defenses to biometric privacy claims, and the opinion has led to a wave of class action lawsuits against businesses in all industries, including rail, air, and transportation. Indeed, more than 50 BIPA class action lawsuits have been filed in Cook County, Illinois, alone since the opinion.

Two decisions from the Northern District of Illinois offer a glimpse into how railroads, airlines, and others in the transportation industry can defend against employee class actions under BIPA. In those cases, the courts dismissed claims against airlines on the ground that they were subject to mandatory arbitration under the federal Railway Labor Act ("RLA").

Congress passed the RLA to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes involving airlines and railroads. The RLA framework includes "major" and "minor" disputes. Major

disputes are those that create contractual rights, such as rates of pay, rules, or working conditions. Major disputes, ultimately, may be considered by the courts. Minor disputes, on the other hand, grow out of the interpretation or application of existing collective bargaining agreements ("CBA" or "CBAs"). When the resolution of a claim requires interpretation of a CBA, the claim is subject to mandatory and exclusive arbitration under the RLA. Embedded in the RLA is a strong preference for arbitration, as opposed to judicial resolution of disputes.

The two decisions, however, suggest that CBAs may provide fertile defensive grounds against employee statutory actions, even for industries where the collective bargaining process is not governed by the RLA.

Johnson v. United Air Lines

In *Johnson v. United Air Lines, Inc.*, 17-cv-08858, 2018 WL 3636556 (N.D. Ill. July 31, 2018), a union baggage handler at O'Hare International Airport filed a BIPA suit seeking statutory damages on behalf of himself and those similarly situated arising out of United's timekeeping practices. United, like many employers, utilized plaintiff's fingerprints to track when he signed in and out of work. In collecting the fingerprint data of its employees, United allegedly did not obtain employee consent before using and transmitting the biometric information, as required by BIPA. United moved to dismiss the claim pursuant to the RLA, arguing that the BIPA claim was a "minor dispute" under the plaintiff's CBA.

The court agreed. Citing rather boilerplate language in the CBA, the court ruled that "there is no way for the Plaintiff to pursue a BIPA claim without interpreting the existing CBA between United and [plaintiff's union]." Indeed, the applicable CBA provided United with the "sole and exclusive right to manage, operate, and maintain the efficiency of the business and working forces," including the ability to "maintain discipline and efficiency in the Company's facilities." In exercising these rights, United opted for a timekeeping system utilizing fingerprint technology. Thus, any challenge to the use of fingerprints as a means of managing the efficiency of its business and work forces would require interpretation of the CBA in arbitration proceedings as mandated by the RLA.

In a puzzling subsequent order, 2019 WL 1239723 (N.D. Ill. Mar. 18, 2019), the court dismissed and remanded the case to the Circuit Court of Cook County, Illinois because the baggage handler did not allege a "concrete injury" but sought only statutory damages. United appealed the court's remand order to the Seventh Circuit Court of Appeals. The court's order appears to be at odds with *Rosenbach*, in which it held that a plaintiff suffers a "real and significant" injury when "a private entity fails to adhere to the statutory procedures" in BIPA. Following

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Rosenbach, this is not likely to be an issue at the pleading stage in future cases.

Miller v. Southwest Airlines

In *Miller v. Southwest Airlines*, 18 C 86, 2018 WL 5249230 (N.D. Ill. Oct. 22, 2018), ramp and operations agents represented by a labor union filed a BIPA suit based on Southwest's biometric timekeeping and payroll system that required employees to scan their fingerprints to sign in and out of work each day. The employees also filed common law claims for intrusion upon seclusion, conversion, negligence, fraud, and breach of contract. In the face of allegations similar to those in *Johnson*, Southwest moved to dismiss, arguing that the claims were subject to mandatory arbitration under the relevant CBAs and the RLA. Notably, the court determined that the employees alleged a concrete injury, such that the court had jurisdiction over the claims.

Relying on case law including *Johnson* and broad, commonplace CBA language, the court determined that the employees' claims constituted minor disputes preempted by the RLA because they required

interpretation of and reference to the CBAs that governed the employees' rates of pay, rules, and working conditions. To resolve the claims, the court would have to:

- interpret the scope of the union's authority as the "sole and exclusive bargaining agent" to consent to the use of the timekeeping system on behalf of the employees;
- determine whether Southwest acted within its authority under the CBAs, including within its broad grants of authority to "manage and direct the work force" and to govern covered employees "by all reasonable Company rules and regulations";
- consider the parties' bargaining history with respect to wages and working conditions;
- interpret the CBAs' wage provisions; and
- interpret the CBAs' grievance system and arbitration procedure.

Accordingly, the court dismissed the BIPA and common law claims and ordered that the claims be submitted to arbitration. The court also denied the employees leave to file a second amended complaint asserting only a BIPA claim, reiterating that the claim remains preempted by the RLA.

The plaintiffs in *Miller v. Southwest*

appealed the district court's decision and the case is currently pending before the Seventh Circuit Court of Appeals.

BIPA Preemption May Not Be Limited to Airlines and Railroads

Significantly, BIPA preemption may not be limited to cases governed by the RLA. Implicit in the *Miller* and *Johnson* rulings is the principle that unions may bargain away their members' statutory rights under BIPA. This is in accord with other Illinois decisions. *e.g.*, *Matthews v. Chicago Transit Authority*, 2016 IL 117638 (2016), ¶168 (recognizing that "a union can waive statutory and economic rights on behalf of its members"). Whether unions can waive their members' BIPA rights through the relatively broad, boilerplate CBA provisions cited in *Miller* and *Johnson* is one of the issues that are likely to be addressed by the Seventh Circuit in *Miller*. This is a developing area of Illinois privacy law, but these decisions regarding the RLA and BIPA are encouraging for railroads, airlines, and others in the transportation industry where labor issues are governed by CBAs. 