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Jurisdiction over Intertwined Contract Violation and Fair Representation Claims under the Railway Labor Act: Richins v. Southern Pacific Co.

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Case Comment

Jurisdiction Over Intertwined Contract Violation and Fair Representation Claims Under the Railway Labor Act: *Richins v. Southern Pacific Co.*

A 1965 Memorandum of Agreement between the Southern Pacific Transportation Company (the Railroad) and the Brotherhood of Railway Carmen and System Federation No. 114 (the Union) governed the relative seniority of carmen apprentices and carmen helpers.[1] This agreement was modified when Southern Pacific merged with another railroad company in 1968 in order to dovetail the seniority rosters of the two companies.[2] Union members Richins and six other employees and former employees of the Railroad subsequently claimed a violation of the 1965 agreement, alleging that they were demoted and finally furloughed from their positions as "Upgraded Carmen Apprentices," while "Upgraded Carmen Helpers" were not demoted although they should have been demoted first under the 1965 agreement. The Upgraded Apprentices further alleged that the Union prevented them from filing a timely claim with the National Railroad Adjustment Board by consistently and maliciously misleading them as to their rights, and refusing to protest their furlough[3] in violation of the Union's duty of fair representation. The Railroad and the Union responded that the Upgraded Apprentices' claims were not meritorious under a 1968 modification to the original agreement. The Upgraded Apprentices' suit against the Railroad and the Union in federal district court was dismissed for lack of jurisdiction.[4] The Court

1. Richins v. Southern Pac. Co., No. 77-0038, slip op. at 2 (N.D. Utah Sept. 6, 1978).

2. Dovetailing is the procedure whereby employees of companies are merged on a seniority list which is based on the employees' original dates of hire with either of the merged companies. *See* Highway Truck Drivers & Helpers, Local 107 v. Motor Transp. Labor Relations, Inc., 232 F. Supp. 782, 783 (E.D. Pa. 1964).

3. Many of the Union members, former employees of the merging company, allegedly refused to protest plaintiffs' furlough. Richins v. Southern Pac. Co., No. 77-0038, slip op. at 2 (N.D. Utah Sept. 6, 1978).

4. *See* Richins v. Southern Pac. Co., No. 77-0038, slip op. at 7 (N.D. Utah Sept. 6, 1978). Though often loosely referred to as jurisdiction, the question ac-

of Appeals for the Tenth Circuit reversed, *holding* that a federal court has jurisdiction over intertwined contract violation and fair representation claims against a railroad employer and its employees' union. *Richins v. Southern Pacific Co.*, 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981).

Congress established the National Railroad Adjustment Board as the railroad industry's court of last resort.[5] Creation of the Board arose out of Congress's desire for an expert and impartial tribunal for settlement of labor disputes.[6] To this end, the Board is bipartisan, with management and union representatives each filling seventeen of the Board's thirty-four positions.[7]

Although it was at first unclear whether section 3 of the Railway Labor Act (RLA)[8] deprived state and federal courts of jurisdiction over so-called minor contract disputes,[9] the courts subsequently determined that the Board possessed exclusive original jurisdiction in such cases.[10] Minor disputes concern

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tually is whether the tribunal is competent to hear the suit. *See, e.g.*, Rumbaugh v. Winifrede R.R., 331 F.2d 530, 535 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); Cunningham v. Erie R.R., 266 F.2d 411, 415 (2d Cir. 1959). "Jurisdiction" is used in this sense throughout this Comment.

5. Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N.Y.U. L. REV. 41, 41 (1962).

6. *See* U.S. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, INQUIRY RELATING TO THE NATIONAL RAILROAD ADJUSTMENT BOARD, BOOK II, 106, 120, 151 (1939). *See also* 78 CONG. REC. 11,718 (1934). Unlike the strictly bipartisan boards which preceded it, the Board was to avoid the problem of deadlocks through the provision for appointment of a neutral referee in such situations. *See* 78 CONG. REC. 11,713, 11,715 (1934).

7. 45 U.S.C. § 153 First (a) (1976). The Board originally was comprised of thirty-six members; half were selected by the carriers and half by the labor organizations. Act of June 21, 1934, Pub. L. No. 89-456, ch. 691, § 3(a), 48 Stat. 1189. *See* Thompson v. New York Cent. R.R., 361 F.2d 137, 149 (2d Cir. 1966); Kroner, *supra* note 5, at 43. The membership of adjustment boards is designed to represent management and the union. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 93 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

8. Under section 3 of the RLA, when an adjustment cannot be reached by the usual procedures between railroad and employee,

> disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board.

45 U.S.C. § 153 First (i) (1976).

9. The Supreme Court in Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941), seemed to indicate that all three tribunals shared concurrent jurisdictions. Kroner, *supra* note 5, at 57. *See* Andrews v. Louisville & N.R.R., 406 U.S. 320, 321-22 (1972).

10. These cases repudiated *Moore*'s reasoning. *See* Andrews v. Louisville & N.R.R., 406 U.S. 320, 322 (1972); Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 328 (1969); Kroner, *supra* note 5, at 57-59. *See generally* 39 MARQ. L. REV. 67, 68-

the interpretation or application of pre-existing agreements,[11] in contrast to major disputes which arise out of the formation or change of collective bargaining agreements covering rates of pay, rules, or working conditions.[12] According to the United States Supreme Court in *Union Pacific Railroad v. Sheehan*,[13] "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts."[14] Congress believed that the Board would provide effective, efficient remedies in employee-railroad disputes involving the interpretation of collective bargaining agreements, thereby promoting stability in labor-management relations.[15] Moreover, the Third Circuit recently observed that the Board's expertise in construing railroad contracts enables it to secure prompt, orderly, and final resolution of everyday grievances involving rates of pay, rules, and working conditions.[16] In addition, the Board's bipartisan representation is well suited to resolving such disputes.[17]

In contrast to the Board's original jurisdiction in minor contractual disputes, the Supreme Court has held that the Board is incompetent to hear fair representation claims.[18] The Court's rationale for thus delineating the Board's jurisdiction was that section 3 of the RLA, by its express terms, applies only to suits between the railroad and its employees.[19] Later decisions elab-

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(1955). Reference of such disputes to the Board was a matter of compulsion, not option. *See* Andrews v. Louisville & N.R.R., 406 U.S. at 322. This compulsory character stems not from any contractual agreement of the parties but from the Act itself. *Id.* at 323.

11. *See* Bonin v. American Airlines, Inc., 621 F.2d 635, 637 (5th Cir. 1980); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 754 n.6 (3d Cir. 1978); Kroner, *supra* note 5, at 44.

12. *See* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755 n.11 (3d Cir. 1978). The difference between major and minor disputes divides the Board's jurisdiction and functions from those of the National Mediation Board. *See* Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 722 (1945). The National Mediation Board has jurisdiction over major disputes. *Id.* at 725.

13. 439 U.S. 89 (1978).

14. *Id.* at 94, *quoted in* Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). *See* Devita v. Burlington N., Inc., 494 F.2d 347, 349 (9th Cir.), *cert. denied*, 419 U.S. 869 (1974).

15. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978).

16. *See* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755 (3d Cir. 1977).

17. *See* notes 23-28 *infra* and accompanying text.

18. Conley v. Gibson, 355 U.S. 41, 44-45 (1957). In *Conley*, minorities allegedly were demoted or discharged and then replaced by whites, after the railroad told them that their jobs were being abolished. Plaintiffs further alleged that the union, acting according to plan, refused to protect them from discrimination despite their repeated pleas. *Id.* at 43.

19. *Id.* at 44. The RLA provides:

orate that in addition to the express statutory limitation of the Board's jurisdictional competence, by its very makeup the Board is institutionally incapable of the impartiality necessary to remedy breaches of the fair representation duty.[20] Because the RLA permits the national labor organization chosen by a majority of the crafts to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and "to select such members and designate the division on which each member shall serve," employees would be required to appear before a group largely made up of the union against whom they are complaining.[21] Original jurisdiction over major contractual disputes and unfair representation claims therefore rests in the district court.[22]

> The disputes between *an employee or group of employees and a carrier or carriers* growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153 First (i) (1976) (emphasis added). *See also* Jones v. Trans World Airlines, Inc., 495 F.2d 790, 796 (2d Cir. 1974); Brady v. Trans World Airlines, Inc., 401 F.2d 87, 93 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). This lack of reference to disputes between employees and their bargaining representatives means that section 153 First (i) gives no power to the Board to hear fair representation claims; nor do other provisions of the Act. *See* Conley v. Gibson, 355 U.S. 41, 44-45 (1957); Steele v. Louisville & N.R.R., 323 U.S. 192, 205 (1944); Rumbaugh v. Winifrede R.R., 331 F.2d 530, 536 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964).

20. At one time, the Board was thought to be incapable of remedying such claims. Since the Board declined to entertain grievance complaints by individual members of a craft represented by a union, *see* Steele v. Louisville & N.R.R., 323 U.S. 192, 205 (1944), the only way for the individual to prevail was to have the union carry his case to the Board. *Id.* (citing ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. No. 10, 77th Cong., 1st Sess. pt. 4 at 7 (1941)). Individual employees now have standing before the Board, irrespective of the union's position. Thompson v. New York Cent. R.R., 361 F.2d 137, 143, 149 (2d Cir. 1966).

21. Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 330 (1969); Steele v. Louisville & N.R.R., 323 U.S. 192, 206 (1944).

22. *See* Czosek v. O'Mara, 397 U.S. 25, 28 (1970). Nevertheless, some courts require exhaustion of administrative remedies before a fair representation claim is capable of judicial cognizance, notwithstanding *Czosek's* explicit statement that exhaustion is not required. *See, e.g.*, Mills v. Long Island R.R., 515 F.2d 181 (2d Cir. 1975) (major dispute); Conrad v. Delta Air Lines Inc., 494 F.2d 914, 917 (7th Cir. 1974) (contract violation and fair representation claims); Hill v. Southern Ry., 402 F. Supp. 414, 417-18 (W.D.N.C. 1975) (contract violation claim); Sensabaugh v. Railway Express Agency, Inc., 348 F. Supp. 1398, 1402 (W.D. Va. 1972) (fair representation claim). One may be excused from ex-

Given the division of jurisdiction between the Board and the courts, disputes involving intertwined allegations of minor contractual violations and unfair representation claims present two jurisdictional issues: the effect of joining parties and the effect of joining claims. Because the Board exercises exclusive original jurisdiction over minor contract disputes,[23] but the Board's personal jurisdiction extends only to the railroad and its employees,[24] situations in which the union was sought to be joined in minor contractual disputes created jurisdictional difficulties.[25] Suits in which employees alleged that the union was in collusion with the railroad typically raised this issue. The Supreme Court resolved this aspect of the jurisdictional problem by holding that under these circumstances, the district court may hear the suit, notwithstanding the Board's original jurisdiction.[26]

The more difficult problem involves the joining of claims of unfair representation and claims involving minor contractual disputes, since the Board's jurisdiction over the minor contractual dispute is exclusive,[27] but only the district court is competent to hear the unfair representation claim.[28] The Third Circuit resolved this dilemma by analogizing to the doctrine of pendent jurisdiction,[29] allowing the Board to hear claims which

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hausting administrative remedies, however, where pursuit of such remedies would be futile. Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 917 (7th Cir. 1974). *But see* Hill v. Southern Ry., 402 F. Supp. 414, 417 (W.D.N.C. 1975); Sensabaugh v. Railway Express Agency, Inc., 348 F. Supp. 1398, 1402 (W.D. Va. 1972).

23. *See* note 10 *supra* and accompanying text.

24. *See* note 19 *supra* and accompanying text.

25. *See* Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 328 (1969). *See also* note 10 *supra* and accompanying text.

26. *See* Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 325 (1969). In *Glover*, plaintiff alleged that the railroad and union tacitly agreed to cooperate in a plan to avoid promoting black employees. Although the railroad was joined to insure full relief, the Court characterized the dispute as one essentially between employees on one side and the employer and union on the other, rather than between "an employee or group of employees and a carrier or carriers." *Id.* at 329.

Although the allegations in *Glover* do not explicitly set forth claims of contract violation and breach of the duty of fair representation, the factual allegations appear to make out such claims, *see id.* at 325-27, and the Court's treatment of the case indicates that it viewed the allegations in this way, *see id.* at 328-29.

27. *See* note 10 *supra* and accompanying text.

28. *See* note 18 *supra* and accompanying text.

29. Actually, the Third Circuit's holding is more like the converse of pendent jurisdiction. Pendent jurisdiction is a doctrine that allows a federal court to take jurisdiction over a nonfederal claim when joined with a federal claim that is substantial, where both claims together make up a single cause of action. *See* Rumbaugh v. Winifrede R.R., 331 F.2d 530, 539 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); Annot., 5 A.L.R.3d 1040, 1047 (1966).

are "primarily" contractual.[30] For example, in *Roberts v. Lehigh & N.E. Ry.*,[31] the court held that the Board has exclusive jurisdiction over a dispute between railroad employees on the one hand and the railroad and union on the other, the resolution of which depends on contractual interpretation.[32] In *Roberts*, the plaintiffs alleged that they were involuntarily retired without severance pay and removed from seniority rosters contrary to memorandum agreements, and that the union refused to process their claims or appeal internally.[33] Similarly, in *Goclowski v. Penn Central Transportation Co.*,[34] the Third Circuit held that the employees' request to invalidate an allegedly unauthorized extension of the collective bargaining agreements affecting seniority required the Board's expertise in construing railroad labor contracts.[35] The *Goclowski* court adopted the *Roberts* test and noted that the claim required "close examination of the pertinent collective bargaining agreements."[36] The court further noted that the joinder of the union for alleged breach of the duty of fair representation did not destroy the Board's jurisdiction.[37]

Rejecting the Third Circuit's rationale allowing the Board to have pendent jurisdiction, the Tenth Circuit in *Richins* held that the district court properly had jurisdiction over intertwined breach of contract and fair representation claims.[38] Absent clearer guidance from the Supreme Court, the court was unwilling to bifurcate the proceeding with the claim against the Railroad presented to the Board and the fair representation claim heard in federal court.[39] The court believed that the Railroad should be made a party to the fair representation claim,

30. *See* Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981) (citing *e.g.*, Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755-56 (3d Cir. 1978)).

31. 323 F.2d 219 (3d Cir. 1963).

32. *Id.* at 224.

33. *Id.* at 222.

34. 571 F.2d 747 (3d Cir. 1977).

35. *Id.* at 755.

36. *Id.*

37. *Id.* at 756. *Cf.* Conley v. Gibson, 355 U.S. 41, 45 (1957) (in suit by employees against union, joinder of railroad may be requested if necessary); Cunningham v. Erie R.R., 266 F.2d 411, 414-16 (2d Cir. 1959) (district court had power to adjudicate claim against railroad as well as union because exclusive Adjustment Board jurisdiction extended only to employee—employer disputes). *See also* Rumbaugh v. Winifrede R.R., 331 F.2d 530, 537 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964).

38. Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981).

39. *Id.* at 762.

since full recovery could not be had in its absence due to the claim for reinstatement with seniority,[40] and duplication of effort and inconsistent results could arise if two forums were required to interpret the contract.[41]

The *Richins* court acknowledged the Supreme Court's statement that it is "essential to keep . . . minor disputes" before the Board,[42] yet it found no support for extending the jurisdiction of the Board over intertwined fair representation claims based primarily on interpretation of a collective bargaining agreement.[43] The court was unwilling to adopt the *Roberts* "primarily" contractual test, because it believed that the burden of determining whether resolution of the dispute turns primarily on contract interpretation would perhaps be impossible at such an early stage in the proceeding,[44] and few fair representation claims would not have elements of contract interpretation.[45] Instead, the *Richins* court chose to follow the Supreme Court's mandate[46] that the courts rather than the Board should exercise jurisdiction over fair representation claims.[47]

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40. *Id.*

41. *Id.* at 762-63. *Accord*, Rumbaugh v. Winifrede R.R., 331 F.2d 530, 537 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964).

42. Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981) (quoting Union Pacific R.R. v. Sheehan, 439 U.S. 89, 94 (1978)).

43. *See* Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981) (citing Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 756 n.13 (3d Cir. 1977) (*Glover* inapplicable when basis of claim is primarily construction of existing agreement). Even if the Board had jurisdiction over some fair representation claims, the alleged facts in *Richins* are very similar to *Czosek*, according to the *Richins* court, where the federal court's jurisdiction was said to be beyond doubt. 620 F.2d at 763. In *Czosek*, plaintiff employees were furloughed and never recalled by the railroad. Plaintiffs alleged that they were wrongfully discharged by the railroad and that the union arbitrarily and capriciously refused to process their claims. Czosek v. O'Mara, 397 U.S. 25, 26 (1970).

44. Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). The court reasoned that the malicious discrimination charge may create a fair representation claim not dependent primarily on contract interpretation. *See id.* (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976); Foust v. IBEW, 572 F.2d 710, 715 (10th Cir. 1978)).

45. Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981).

46. *See* notes 21, 22, 26 *supra* and accompanying text.

47. Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). The court reasoned that "[a]lthough the Supreme Court did not decide whether the employer may *always* be sued with the union . . . for breach of the duty of fair representation," *id.* (emphasis in original) (quoting Czosek v. O'Mara, 397 U.S. 25, 30 (1970)), such a suit is the only one approved by the Supreme Court. 620 F.2d at 763 (citing Glover v. St. Louis-S.F. Ry., 393 U.S. 324 (1969)). In addition, the *Richins* court observed that *Czosek*'s

Considerations of adjudicative efficiency and institutional competency are at the core of the *Richins* decision to place jurisdiction over intertwined fair representation and contract interpretation claims in the district court. Where the two claims are truly intertwined, it would be inefficient to bifurcate the suit, relegating the contractual issues to the Board while allowing the district court to hear only the fair representation claim, because the evidentiary showing before either tribunal is likely to be similar. Moreover, by severing the two issues, the parties run the risk of inconsistent results. Inconsistent results are especially unfortunate where plaintiffs allege collusion between the union and the employer.[48] These pitfalls can be avoided, however, by trying the contractual claim pendent to the district court's jurisdiction over the unfair representation claim.[49] This would prevent piecemeal litigation,[50] promote judicial economy, and create more expeditious disposition of controversies.[51]

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strong statement that the Board has no jurisdiction over fair representation claims is not repudiated by language in Union Pac. R.R. v. Sheehan, 439 U.S. 89 (1978), giving the Board jurisdiction over minor disputes. *See* 620 F.2d at 763.

48. *See* Richins v. Southern Pac. Co., 620 F.2d 761, 762-63 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981).

49. Where there is federal jurisdiction over the claim against one party, a closely related nonfederal claim may be brought in under pendent jurisdiction. *See* Harrison v. United Transp. Union, 530 F.2d 558, 566 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (Winter, J., concurring in part and dissenting in part). *See also* note 29 *supra*.

50. *See* Wolfson v. Blumberg, 229 F. Supp. 191, 192 (S.D.N.Y. 1964), *appeal dismissed*, 340 F.2d 89 (2d Cir. 1965).

If the district court has power to proceed against the union it also has power over the railroad since "[i]t would be absurd to require this closely integrated suit to be cut up into segments." Cunningham v. Erie R.R., 266 F.2d 411, 416 (2d Cir. 1959) (citations omitted).

51. *See* Wolfson v. Blumberg, 229 F. Supp. 191, 192 (S.D.N.Y. 1964), *appeal dismissed*, 340 F.2d 89 (2d Cir. 1965).

In terms of the problems traditionally associated with joining parties and joining claims, the *Richins* court was correct in refusing to split the proceeding. First, joining the Railroad to the fair representation claim against the Union should not destroy the district court's jurisdiction because the facts are consistent with a pattern of collusion between the Railroad and the Union. Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). Thus, the implication is that the Railroad is at least a permissive party to a fair representation claim against the Union. *See* FED. R. CIV. P. 20(a). *See also* Rumbaugh v. Winifrede R.R., 331 F.2d 530, 537 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Although a district court cannot give full relief if the Railroad is not a party, this is not a case where the Railroad is joined merely to provide complete relief. Consequently, the suit is not one primarily between employees and their union so as to warrant the Railroad's dismissal, but rather "is one between some employees on the one hand and the union and management on the other [so] . . . [t]he federal courts may therefore properly exercise jurisdiction over both the union and the railroad." Glover v. St. Louis-S.F. Ry., 393

Although the dangers of inefficient or inconsistent adjudication are avoided by consolidating the claims before either the district court or the Board, the district court is institutionally better suited to hear these intertwined claims, and *Richins* was correct in remanding the case to that forum. Nevertheless, the court's holding is subject to abuse because aggrieved employees may assert a spurious fair representation claim for the sole purpose of avoiding the Board's otherwise mandatory jurisdiction over the underlying contractual dispute. The *Richins* holding, therefore, should be tempered by a good faith test; an employee presenting an intertwined claim to the district court should be allowed to proceed only upon a pretrial showing sufficient to withstand a motion to dismiss.

Although these considerations militate against bifurcating intertwined claims, under the "primarily" contractual test proposed by the Third Circuit in *Roberts* and *Goclowski*[52] claims could be consolidated before the Board rather than the district court. Thus, the true justification for vesting jurisdiction over intertwined claims in the district court lies in the institutional competency of the two tribunals.

The Board is well suited to resolving questions of contract interpretation because the Board has expertise in interpreting railway collective bargaining agreements.[53] Half of its members are selected by railroad employees' unions and half by railroads.[54] Board members usually come from high positions within these organizations,[55] and thus are familiar[56] with the

U.S. 324, 329 (1969). *Cf.* Haley v. Childers, 314 F.2d 610, 615, 617-18 (8th Cir. 1963) (railroad dismissal proper where only joined to give complete relief, suit was primarily between employees and union, and only valid claim against railroad draws into controversy interpretation and application of collective bargaining agreement); Cunningham v. Erie R.R., 266 F.2d 411, 416 (2d Cir. 1959) (railroad must stay in proceeding in order to give complete relief); Wade v. Southern Pac. Co., 243 F. Supp. 307, 311 (S.D. Tex. 1965) (same). Second, as to the effect of joining claims, the fair representation and contract violation claims and the prayers for relief are not easily separable. Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981).

52. *See* notes 29-37 *supra* and accompanying text.

53. *See* note 16 *supra* and accompanying text.

54. Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167, 169 (1968), *reprinted in* U.C.L.A. INST. OF INDUS. REL., REPRINT NO. 189, at 169 (1968).

55. Daugherty, *Arbitration by the National Railroad Adjustment Board*, ARBITRATION TODAY 93, 100 (J. McKelvey ed. 1955).

56. *Id.*; Wells, *Federal-State Jurisdiction in Railway Labor Relations*, NEW YORK UNIVERSITY SEVENTH ANNUAL CONFERENCE ON LABOR 29, 42 (E. Stein ed. 1954).

customs, usages, and procedures of the railway labor field[57] and the technicalities and complexities of railroading.[58]

Moreover, the bipartisan makeup of the Board makes it a particularly appropriate forum for contract violation claims. Both parties to the collective bargaining agreement—the union and the railroad—are represented on the Board.[59] Thus, Board members may expertly determine what the parties meant by provisions and language in the agreement. Additionally, Board members tend to be strongly partisan, acting more as advocates than as judges.[60] This is appropriate in a contract violation claim against the railroad since the union representatives would presumably act in the employees' interest,[61] serving as a check on the railroad representatives, and the railroad representatives would likewise act as a check on the union representatives.

The Board is not suited for fair representation claims, however, in that its expertise in minor disputes[62] is inapposite to problems of fair representation.[63] Arbitrary, discriminatory, or bad faith conduct by a union toward a member of the collective bargaining agreement breaches the duty of fair representation.[64] Consequently, a union might bargain for discriminatory contract provisions,[65] give inadequate attention to a grievance,[66] or fail to discharge its duty of fair representation in some other manner indicating its bad faith.[67] A knowledge of

57. Taylor v. Hudson Rapid Tubes Corp., 362 F.2d 748, 750-51 (3d Cir. 1966); Elgin, J. & E. Ry. Co. v. Burley, 327 U.S. 661, 664 (1946).

58. Daugherty, *supra* note 55, at 100. The members speak the railroad jargon, Wells, *supra* note 56, at 42, and know the problems, policies, and positions of the railroads and unions. *See* Murphy, *Agreement on the Railroads—The Joint Railway Conference of 1926*, 11 LAB. L.J. 823, 835 (1960), *reprinted in* NEW YORK STATE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS AT CORNELL UNIVERSITY, REPRINT SERIES NO. 98, at 823, 835 (1960).

59. *See* Drapkin & Davis, *Health and Safety in Union Contracts: Power or Liability?*, 65 MINN. L. REV. 635, 642 (1981).

60. Daugherty, *supra* note 55, at 100.

61. *See generally* Murphy, *supra* note 58, at 834 (RLA was enacted to settle differences between employers and employees).

62. *See* Monaghan v. Central Vt. Ry., 404 F. Supp. 683, 686 (D. Mass. 1975).

63. *See* note 59 *supra*. Expertise tends to indicate bias. *See* Daugherty, *supra* note 55, at 101.

64. Vaca v. Sipes, 386 U.S. 171, 190 (1967). *See* Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 703 (1980).

65. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944).

66. *See* Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); Figuero de Arroyo v. Sindacato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

67. *See* Drapkin & Davis, *supra* note 59, at 639. A fair representation claim may properly arise if the claim of malicious discrimination sufficiently alleges bad faith and ill will. *See* Roberts v. Lehigh & N.E. Ry., 323 F.2d 219, 223 (3d Cir.

railroading is not useful in evaluating these kinds of breaches,[68] which are patterned after violations of common law fiduciary obligations.[69]

The Board's bipartisan representation is also suspect in cases involving intertwined claims of fair representation and contract interpretation. Because the basis of the fair representation claim is that the union has not discharged its duty to the plaintiff, the assumption that the Board's union representatives will be more sympathetic to the plaintiff than to the railroad[70] is no longer valid.[71]

The federal district court is therefore the appropriate forum for intertwined contract and fair representation claims. Courts routinely interpret contracts and determine fair representation claims.[72] Moreover, courts regularly rule on fiduciary duties and relationships in a variety of contexts. Finally, in contrast to the Board, the trier of fact in the district court is less likely to be influenced by partisan allegiance because there is no direct interest in the outcome of the controversy. Thus, the *Richins* holding that intertwined claims belong before the court is correct on the strength of the institutional competence of the district court and the problems of bias inherent in the Board's composition.[73]

1963). Although some courts have refused to find the requisite hostile discrimination on facts similar to *Richins*, *see, e.g.*, Thompson v. New York Cent. R.R., 361 F.2d 137, 138-42 (2d Cir. 1966), others have so found, *see, e.g.*, Brady v. Trans World Airlines, Inc., 401 F.2d 87, 90-93 (3d Cir.), *cert. denied*, 393 U.S. 1048 (1968). The Eighth Circuit has stated that "where a good faith allegation of discrimination is made, specific facts in support of the general allegations need not be set forth and a court may not dismiss the suit for want of jurisdiction." Haley v. Childers, 314 F.2d 610, 616 (8th Cir. 1963) (citing Conley v. Gibson, 355 U.S. 41 (1957)); Ferro v. Ry. Express Agency, Inc., 296 F.2d 847, 851 (2d Cir. 1961); Sells v. International Brotherhood of Firemen & Oilers, 190 F. Supp. 857, 860 (W.D. Pa. 1961).

68. Nor are such determinations aided by experience with the RLA, since the duty of fair representation is not expressly mentioned therein, but rather has been inferred from powers delegated by Congress to unions under the statute. Aaron, *supra* note 54, at 167.

69. *Id.* at 182.

70. *See* 78 CONG. REC. 11,714, 11,718 (1934). *But cf. id.* at 11,716 (employers vitally interested in welfare of employees).

71. Aaron, *supra* note 54, at 170. *See* Carroll v. Brotherhood of R.R. Trainmen, 417 F.2d 1025, 1027 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Board jurisdiction in such cases would facilitate the union in avoiding its duty of fair representation. Aaron, *supra* note 54, at 170.

72. *See, e.g.*, Conley v. Gibson, 355 U.S. 41 (1957).

73. Moreover, the joining of the railroad to a fair representation claim against the union does not destroy the court's jurisdiction, *see id.* at 45, at least where the railroad is joined because it actively participated in the union's discriminatory conduct that was the basis of the fair representation claim.

Vesting jurisdiction over intertwined claims in the district court assumes, however, that the fair representation claim is asserted in good faith. This assumption is subject to abuse since employees might "allege hostile discrimination on the part of the union in every contract interpretation suit under the Railway Labor Act . . . ."[74] Moreover, a rule giving the courts jurisdiction over hybrid claims where contract interpretation is so incidental that the railroad's joinder is required solely to afford complete relief[75] would destroy the integrity of the Board as the exclusive tribunal for resolution of "minor" disputes.[76]

To promote the integrity of the Board and to guard against abuse, the court should therefore test the validity of every intertwined fair representation claim. The court should hold a pretrial conference to determine whether the fair representation claim rests on sufficient evidence to withstand a motion to dismiss for failure to establish the court's competency. If the plaintiff makes out a prima facie case of breach of the duty of fair representation, the federal court should be presumed the appropriate forum for both claims, subject to rebuttal by show-

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Rumbaugh v. Winifrede R.R., 331 F.2d 530, 536-37 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Apparently this is alleged to be the situation in *Richins*, since the court found that the evidence supported a finding of a pattern of collusion between the Railroad and the Union. Richins v. Southern Pac. Co., 620 F.2d 760, 762 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). Although plaintiffs' damages allegedly followed from the misleading conduct of the Union, *see* Harrison v. United Transp. Union, 530 F.2d 558, 562-63 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), it was immediately caused by the Railroad's furloughing the plaintiffs. Therefore, the Union and the Railroad should be held liable. *See id.*; Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798-99 (2d Cir. 1974). Because the Railroad allegedly colluded with the Union, there is good reason to stretch jurisdiction over the Railroad as well as the Union. *Cf.* Harrison v. United Transp. Union, 530 F.2d 558, 561, 563 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (fair representation claim against union may be heard in court but there is no reason to stretch the statute to allow employees to maintain an original cause of action against the railroad; case might be different if railroad and union acted in concert to discriminate or railroad agreed with union to breach union's duty to give employee timely notice while having knowledge of that duty).

74. Wade v. Southern Pac. Co., 243 F. Supp. 307, 312 (S.D. Tex. 1965). *Cf.* Hill v. Southern Ry., 402 F. Supp. 414, 418 (W.D.N.C. 1975) ("Plaintiff is now asking to join an additional party as the clock strikes midnight in the hope of qualifying for an exception to the *Andrews* rule" of exclusive Board jurisdiction over minor disputes.).

75. In such a situation, the fact that the Board is not authorized to hear disputes against a union is not altered by the joinder. *See* Brady v. Trans World Airlines, Inc., 401 F.2d 87, 93 (3d Cir.), *cert. denied*, 393 U.S. 1048 (1968).

76. *See* Andrews v. Louisville & N.R.R., 406 U.S. 320, 322 (1971); notes 15-16 *supra* and accompanying text. The Board's jurisdiction is suspect, however, when a bona fide fair representation claim is raised. *See* notes 62-71 *supra* and accompanying text.

ing the severability of the contract violation claim. If the claims are severed, the contract claim should be decided by the Board, and, unless clearly erroneous, its decision should be binding on the court.

This good faith test is preferable to the approach adopted by the Third Circuit in *Roberts* and *Goclowski*, under which the Board retains jurisdiction over intertwined claims that are "primarily" contractual.[77] Although neither *Roberts* nor *Goclowski* define the term "primarily," the *Roberts* court stated that the test is whether "the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, *depends* on the interpretation of disputed terms of the collective bargaining agreement . . . ."[78] This test is unworkable because such a determination is too difficult to make at such an early stage of the proceeding. To evaluate whether a claim is "primarily" contractual under that test would require a decision on the merits of the alleged contract violation.[79] By contrast, the good faith test is not contingent on the outcome of the claims, thus enabling the court to rule on the jurisdictional question without reaching the merits.

In conclusion, the *Richins* court was correct in finding the federal district court, rather than the National Railroad Adjustment Board, competent to hear a contract violation claim against the Railroad and the Union. Intertwined claims have caused problems in the past because the Board exercises origi-

77. *See* notes 29-37 *supra* and accompanying text.

78. Roberts v. Lehigh & N.E. Ry., 323 F.2d 219, 222 (3d Cir. 1963) (emphasis added).

79. This proposition is not undermined by the application of the contract interpretation test in *Goclowski* since there the factual basis of the contract violation claim was distinct from that of the fair representation claim. *See* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 754 (3d Cir. 1977). The *Goclowski* court bifurcated the proceeding, holding that while the district court was competent to hear both the railroad and the union on the unfair representation claim under the doctrine of pendent jurisdiction, because proof of the railroad's collusion "would amount to an undermining of the collective bargaining agreements," *id.* at 761 n.18, the contract claim was a "minor dispute" which could only be properly heard before the Board. Because of this potential for undermining the collective bargaining agreement, it appears that the fair representation claim in *Goclowski*, like virtually all such claims, at least colorably involves questions of interpretation or application of a collective bargaining agreement. Richins v. Southern Pac. Co., 620 F.2d 761, 763 n.3 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 918 (1981). It would be peculiar, however, to confer primary jurisdiction over an entire case on the Board "because a *potential* defense to a valid complaint of hostile discrimination *might* involve questions of contract interpretation." Thompson v. New York Cent. R.R., 361 F.2d 137, 149 (2d Cir. 1966) (Lumbard, C.J., concurring in part and dissenting in part) (emphasis in original).

nal jurisdiction over disputes involving contractual interpretation, yet its jurisdiction is expressly limited to disputes between the Railroad and its employees. Because the Union is a necessary party to a fair representation claim, intertwined claims raise a barrier to the Board's jurisdiction. Some courts have severed intertwined claims, but considerations of adjudicative efficiency and the danger of inconsistent outcomes militate against this result. Thus, while the courts are generally in accord that intertwined claims can be consolidated under a theory of pendent jurisdiction, they have split over whether the district court or the Board is the most appropriate forum. Rejecting Third Circuit precedents to the contrary, *Richins* correctly recognizes that the district court is institutionally better suited to hear intertwined claims. The district court routinely handles both contractual and fair representation claims, and is a neutral forum. By contrast, the Board's expertise in matters involving railroads is inapposite to fair representation claims, and the Board's strongly partisan representation may unduly prejudice an employee's prospects for relief. These concerns notwithstanding, the integrity of the Board's jurisdiction over minor contractual disputes can be preserved only if the district court hears intertwined claims after determining that the fair representation claim is raised in good faith, and is not simply an attempt to avoid the Board's jurisdiction.