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# Expanding Federal Court Jurisdiction of Railway Labor Minor Disputes: Richins v. Southern Pacific

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# CASENOTES

## Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes: *Richins v. Southern Pacific*

The 1934 amendments to the Railway Labor Act (RLA) established the National Railroad Adjustment Board (NRAB).[1] The amendments gave the board jurisdiction over "minor disputes," that is, disputes arising between employees and their employer-railroads concerning the interpretation and application of provisions in collective bargaining agreements.[2] The Supreme Court later interpreted the NRAB's jurisdiction to be exclusive.[3] However, in a series of cases beginning with *Glover v. St. Louis-San Francisco Railway*,[4] the Court carved out an ex-

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1. 45 U.S.C. § 153 (1976) (originally enacted as Act of June 21, 1934, ch. 691, § 3, 48 Stat. 1185, 1189).

2. The language vesting minor dispute jurisdiction in the NRAB provides:

> 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(i) (1976). The term "minor dispute" is not found in the statute but is a term used in the railroad industry to describe the types of disputes that may be brought before the NRAB.

3. In Order of Ry. Conductors v. Pitney, 326 U.S. 561, 567 (1946), the Court held that federal courts should "exercise equitable discretion" and defer to the NRAB in cases involving minor disputes. Slocum v. Delaware, L. & W.R.R., 339 U.S. 239, 244-45 (1950), made such deference mandatory for both state and federal courts. More recently, in Andrews v. Louisville & N.R.R., 406 U.S. 320, 326 (1972), the Court overruled Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941), which had allowed a discharged employee to pursue a wrongful discharge claim before the NRAB or sue for breach of contract in state court. The Court stated in *Andrews:* "Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or carrier chooses, was never good history and is no longer good law." 406 U.S. at 322. *See also* Walker v. Southern R.R., 385 U.S. 196, 198 (1966); Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R., 353 U.S. 30, 39 (1957).

4. 393 U.S. 324 (1969).

ception to the exclusive jurisdiction of the NRAB.[5] These cases held that if an employee alleged that his union's conduct was wrongful[6] and that his employer was implicated in the union's misconduct,[7] federal courts could exercise jurisdiction over the minor dispute.[8] Recently, in *Richins v. Southern Pacific*,[9] the Tenth Circuit enlarged the exception by holding that a federal court's exercise of jurisdiction over a minor dispute was proper despite the employee's failure to implicate the employer in the union's misconduct.[10]

Between 1972 and 1975, seven employees of Southern Pacific Company were laid off. The employees, believing the layoffs to be in violation of the collective bargaining agreements governing their employment, initiated minor dispute grievance procedures by filing claims with the union. Following standard procedures for resolving minor disputes, both the railroad and the union conducted independent investigations of the claims. Both determined the claims to be without merit; consequently, the union did not refer the claims to the NRAB.[11] The employees,

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5. In addition to *Glover*, Czosek v. O'Mara, 379 U.S. 25 (1970), and Conley v. Gibson, 355 U.S. 41 (1957), create exceptions to the exclusive jurisdiction of the NRAB.

6. The union's wrongful conduct in *Glover* consisted of a racially discriminatory application of the collective bargaining agreement. Courts have not limited the requisite wrongdoing to racial discrimination but have extended it to conduct constituting a breach of the union's duty of fair representation. *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

7. The exception in *Glover* actually took the form of an exception to the "exhaustion of remedies" rule. The exception applies when resort to the administrative body would be futile because of union-railroad collusion. 393 U.S. at 329-31. Czosek v. O'Mara, 397 U.S. 25 (1970), extended *Glover* beyond collusion to situations in which the employer is implicated in the union's misconduct.

8. The statutory bases for jurisdicton of cases arising under the RLA are 28 U.S.C. § 1331 (1976) and 28 U.S.C. § 1337 (1976).

9. 620 F.2d 761 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981).

10. Neither the complaint nor the appellate brief contained allegations implicating the railroad in the union's misconduct.

In addition to extending *Glover*, the Tenth Circuit's decision in *Richins* is in conflict with decisions in other circuits. In Goclowski v. Penn Cent. Transp., 571 F.2d 747 (3d Cir. 1978), the Third Circuit held that the NRAB had exclusive jurisdiction over a minor dispute regardless of the intertwining of a fair representation claim (based on a union's wrongful conduct) with the minor dispute. *See also* Price v. Southern Pac. Transp., 586 F.2d 750 (9th Cir. 1978); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

There is some authority in the circuits that inferentially extends *Glover* to the factual context of *Richins*. *See, e.g.*, Bagnall v. Air Line Pilots Ass'n, 626 F.2d 336 (4th Cir. 1980); Schum v. South B. Ry., 496 F.2d 328 (2d Cir. 1974); Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974).

11. Brief for Appellee Union at 19-20, Richins v. Southern Pac., 620 F.2d 761 (10th Cir. 1980).

instead of taking the claims to the NRAB themselves as provided in the statute,[12] sought adjudication in federal court by bringing an action against the railroad and the union.[13] The employees alleged that the railroad had breached the collective bargaining agreements and that the union, by failing to process their grievances before the NRAB, had breached its duty of fair representation.[14]

The district court dismissed the action for lack of jurisdiction.[15] It held that the claim for breach of the collective bargaining agreements, being a minor dispute, was within the exclusive jurisdiction of the NRAB.[16] The court further held that the fair representation claim was subject to the "exhaustion of remedies" rule, requiring the plaintiffs to proceed before the NRAB before resorting to federal court.[17]

The Tenth Circuit reversed. The fair representation claim, the court said, could be brought in federal court because it was neither subject to the NRAB jurisdiction nor to the "exhaustion of remedies" rule.[18] The court held that because the fair representation claim was intertwined with the minor dispute, a federal court could exercise jurisdiction over the entire action.[19]

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12. 45 U.S.C. § 153(j) (1976). This section provides that an aggrieved employee may represent himself before the NRAB or designate some other representative. Because of the partisan nature of the Board, *see* notes 21-25 and accompanying text *infra*, the employee usually elects to have his union represent his interests before the NRAB.

13. The employees sought reinstatement with full seniority, lost wages and benefits, and punitive damages. 620 F.2d at 761.

14. *Id.*

15. Richins v. Southern Pac., No. 77-0038 (D. Utah Sept. 6, 1978), *rev'd*, 620 F.2d 761 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981).

16. *Id.*

17. *Id.* Courts have often based their refusal to adjudicate minor disputes on the "exhaustion of remedies" doctrine. In Andrews v. Louisville & N.R.R., 406 U.S. 320 (1972), the Court questioned the accuracy of the term "exhaustion of remedies" for describing the required submission of minor disputes to the NRAB.

> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another.

*Id.* at 325. By stating that in some situations the NRAB remedy is exclusive, the Court in *Andrews* implied that in other contexts it is not. The factual situation in *Glover* is among those not subject to the exclusive jurisdicton of the NRAB.

18. 620 F.2d at 762 (relying on and quoting Czosek v. O'Mara, 397 U.S. 25, 27-28 (1970)).

19. *Id.* at 763.

The *Richins* opinion is unsound not because it expands federal court jurisdiction over minor disputes, but because the expansion is too broad. The propriety of expanding federal court jurisdiction over minor disputes can be determined by balancing two competing interests: providing claimants access to an impartial forum and preserving the RLA's minor dispute resolution process. *Richins,* by allowing federal courts to exercise jurisdiction over any minor dispute to which the union is opposed, ignores the second of these interests and seriously undermines the NRAB grievance process.

The *Glover* holding reflects a sensitivity to the first of the competing concerns—providing claimants an impartial forum. The Court in *Glover* recognized the futility of requiring an individual to submit his grievance to the NRAB when both the railroad and the union oppose the claim. Therefore, the Court granted the claimants immediate access to the federal courts because of the union-railroad complicity.[20] By requiring the claimant to implicate the employer in the union's misconduct, the *Glover* holding protects the individual claimant from union-railroad collusion. However, even where such collusion does not exist, an individual has little chance for a fair hearing before the NRAB if the union opposes his claim.[21] Thirty-four individuals comprise the NRAB—seventeen chosen by railroads and seventeen chosen by unions.[22] An appointment to serve on the NRAB is of indefinite duration; consequently, a member serves at the pleasure of his principal.[23] The NRAB's performance illustrates

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20. 393 U.S. at 330.

21. Less than one percent of the claims submitted by individual claimants have been sustained, whereas twenty-eight percent of the claims submitted by the union have been sustained. Lazar, *"Individual" and "Outside Union" Grievances Before the National Railroad Adjustment Board First Division,* 15 LAB. L.J. 231, 233-34 (1964).

22. 45 U.S.C. § 153(a) (1976).

23. The following excerpt illustrates why representatives invariably serve their principal's interests:

> In all except a very few cases, labor and carrier members vote as a block. Failure to do so has marked the end of the career of one labor member. He represented the Order of Railroad Telegraphers and was sitting on a group of cases which, if decided for the employees, would have the effect of resolving a jurisdictional strike between his union and the Brotherhood of Railway Clerks in favor of the latter. After considerable controversy, the Telegrapher representative voted with the carrier members to deny the claim. Whereupon, the president of the Railway Clerks called a special meeting of the Railway Labor Executives Association, which removed the Telegrapher representative from the Third Division and substituted one from the Hotel and Restaurant Workers.

Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis,* 5 INDUS. & LAB.

that members "vote their constituency" without regard to the merits of a claim.[24] These factors demonstrate the inadequacy of the NRAB remedy for the claimant whose union opposes his claim and urge the expansion of *Glover* to allow federal courts to adjudicate disputes even when collusion is not present.[25]

Nevertheless, in expanding federal court jurisdiction over minor disputes, the second of the competing interests must be accommodated—that of preserving the NRAB grievance process. The Supreme Court, in *Union Pacific Railroad v. Sheehan,*[26] articulated the congressional policy toward minor dispute resolution by stating: "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts."[27] Several considerations support this policy. First, the NRAB is peculiarly qualified to interpret and apply railroad bargaining agreements.

> It should be recognized that the parties to collective bargaining contracts sometimes express themselves obscurely or with undue brevity. Words and expressions have special meanings in the railroad industry. Contract history and past practice often give meanings to language, which the uninitiated do not know. The NRAB is an expert body having knowledge and appreciation of these aspects of agreements in the railroad industry.[28]

Secondly, the NRAB grievance procedures have produced a considerable period of industrial peace in the railroad sector.[29]

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REL. REV. 365, 381-82 (1952).

24. During the ten-year period from 1967 to 1977, 94.4% of all claims presented to the NRAB were deadlocked along railroad-labor lines. (Data compiled from National Mediation Board Ann. Rpts. 1967-77.) The partisan attitude of the NRAB was revealed in an incident arising out of a labor representative's assertion that railroad representatives were partisan in favor of their principals. The railway representative replied that he and other railroad representatives viewed their role as judges rather than advocates. "Within a year or two thereafter the entire [railroad] membership on the First Division was replaced, giving rise to the inference that the [railroads] preferred [their] representatives to be partisans rather than judges." Seidenberg, *Grievance Adjustment in the Railroad Industry,* in THE RAILWAY LABOR ACT AT FIFTY 218 (C. Rehmus ed. 1977).

25. For a detailed discusson of the problems faced by an individual who is not represented by his union, see Lazar, *supra* note 21.

26. 439 U.S. 89 (1978).

27. *Id.* at 94.

28. Larson, *Collective Bargaining Under the Railway Labor Act,* in LABOR LAW DEVELOPMENTS (Proceedings of the Eleventh Annual Institute on Labor Law, 1964). *See also* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 YALE L.J. 567, 568-69 (1937); Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis-II,* 5 INDUS. & LAB. REL. REV. 540, 549 (1952).

29. Seidenberg, *supra* note 24, at 235.

These considerations underscore the need to preserve the integrity of the NRAB grievance procedure.

*Richins* does not adequately preserve the grievance procedure. In order for federal courts to exercise jurisdiction over minor disputes, *Richins* would merely require (1) that the fair representation and minor dispute claims arise from the same series of events, and (2) that the factual allegations be consistent with a pattern of collusion between the railroad and the union.[30] These requirements pose no appreciable jurisdictional barrier to the plaintiff whose union will not press his claim to the NRAB. The first requirement is easily met because the two claims invariably arise from the same series of events,[31] and the second requirement is meaningless because almost any fact situation will support a reading of collusion.[32] Under *Richins*, then, virtually whenever a union refuses to forward a claim to the NRAB, the employee could resort to federal court.

The lack of an adequate bar to federal court adjudication of minor disputes imperils the NRAB grievance procedure. Unions, recognizing that it is more costly to contest a fair representation claim in court than to process a grievance before the NRAB, might be induced to process all claims regardless of merit.[33] The resulting flood of cases could overwhelm the NRAB, recreate the backlog that existed before the 1966 amendments,[34] and possibly destroy the Board altogether.

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30. 620 F.2d at 762-63. The court does not explicitly create a jurisdictional test. The requirements listed textually are inferred from the opinion. In addition to the two requirements listed in the text, the court might require that bifurcation be difficult, *id.* at 762, and that the plaintiff allege the union's conduct to be "maliciously discriminatory," *id.* at 763.

31. The second claim (breach of duty of fair representation) arises from the union's refusal to forward the first claim (breach of collective bargaining agreement) to the NRAB.

32. The language of the opinion requires only that the alleged facts not preclude a reading of collusion. 620 F.2d at 762. Because the factual context of *Richins* necessarily requires the union and the railroad to reach the same conclusion—not to forward the grievance to the NRAB—it is doubtful that any set of allegations would preclude a reading of collusion.

33. *Richins* does not increase the union's amenability to federal court jurisdiction; a fair representation claim is always subject to federal court jurisdiction. However, the number of fair representation claims against the union may increase when the aggrieved employees, whose unions will not refer their minor dispute claims to the NRAB, realize that the minor dispute can be adjudicated in federal court if the union is joined for breaching its duty of fair representation.

34. Prior to the 1966 amendments, the First Division of the NRAB had a backlog of seven and one-half years. Risher, *The Railway Labor Act*, 12 B.C. INDUS. & COM. L. REV. 51, 80 (1970).

To strike a proper balance between assuring an impartial forum to claimants and protecting the NRAB grievance process, the standard for determining when minor disputes may be brought in federal court should fall somewhere between the *Glover* test[35] and the *Richins* test.[36] Before exercising jurisdiction over a minor dispute, a court should require the plaintiff to show that the NRAB remedy is inadequate because (1) the union refused to represent the employee's interests before the NRAB,[37] and (2) such refusal was arbitrary or motivated by hostility. If the plaintiff fails to make the required showing, the minor dispute should be adjudicated by the NRAB.[38]

The plaintiff's characterization of the union's refusal to represent his interests would determine how the court should test his allegations. If the refusal is alleged to be arbitrary, then the court should adjudicate the minor dispute only if the plaintiff's showing that the NRAB remedy is inadequate can survive a motion for summary judgment. Under this test, the party moving for summary judgment (the railroad) would set forth evidence showing a rational, legitimate reason for the union's conduct. To survive the motion, the responding party (the employee) would have to raise an inference that the reason was not rational or not legitimate. However, when hostility is the alleged basis for the refusal, the summary judgment threshold does not adequately protect the NRAB jurisdiction. A showing of hostility requires an inquiry into the "state of mind" of union officials. Because courts are reluctant to grant summary judgment when someone's "state of mind" is at issue,[39] the court should not adjudicate a

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35. This test requires the plaintiff to allege (1) that the union breached its duty of fair representation, and (2) that the employer is implicated in the breach. 393 U.S. 324 (1969).

36. This test requires (1) that the alleged facts not preclude a reading of collusion, and (2) that the fair representation and minor dispute claims arise from the same series of events. 620 F.2d 761 (10th Cir. 1980).

37. This standard can be adapted to include situations in which the union, though not unwilling to refer the minor dispute to the NRAB, is unable to adequately represent the claimant's interests before the Board. (*E.g.*, the union's interests are adverse to those of the claimant.) In this context, the plaintiff would be required to show (1) that the union is unable to adequately represent the claimant's interests, and (2) that hostility is the cause of the inability. The two requirements are jurisdictional facts, thus requiring proof by a preponderance of the evidence before a federal court could adjudicate the minor dispute.

38. Plaintiff's showing is similar to the elements of a fair representation claim. *See generally* Clark, *supra* note 6.

39. "As a general proposition, summary judgment is likely to be inappropriate when issues of motive, intent, and other subjective feelings and reactions are material." 6

minor dispute when hostility is alleged to have motivated the refusal unless the plaintiff first wins the fair representation claim on the merits.[40]

The jurisdictional threshold set forth above protects the NRAB grievance scheme by allowing federal court jurisdiction over minor disputes only if the plaintiff can show that the NRAB remedy is inadequate because of union misconduct. By permitting access to federal court without a showing of union-railroad collusion, the threshold is more responsive to the need for an impartial forum than the *Glover* rule.[41]

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MOORE'S Federal Practice ¶ 56.17, at 930 (2d ed. 1976). In the fair representation context, several courts have denied motions for summary judgment when the inference of wrongdoing was weak. *See, e.g.*, Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978); Conrad v. Delta Air Lines, Inc., 494 F.2d 914 (7th Cir. 1974).

40. A finding that the union breached its duty of fair representation by refusing to represent an employee's interest before the NRAB removes the jurisdictional barrier preventing federal courts from adjudicating the minor dispute. Conduct constituting such a breach should be limited to arbitrary or hostile conduct—conduct identical to that required in the plaintiff's showing that the NRAB remedy is inadequate. Some commentators assert that procedural negligence by a union also constitutes a breach of the union's duty of fair representation. *See* Morgan, *Fair is Foul, and Foul is Fair—Ruzicka and the Duty of Fair Representaton in the Circuit Courts*, 11 TOL. L. REV. 335 (1980). However, a breach based on procedural negligence should not satisfy the jurisdictional threshold set forth in the text. Forcing a railroad to adjudicate a minor dispute in federal court because of a union's negligence could cause the railroad to waive a statute of limitations or similar defense that may have arisen due to union negligence in filing the appeal. Requiring the railroad to adjudicate a minor dispute in federal court if the union's breach is founded on arbitrary or hostile conduct does not involve such a waiver, but only a change in tribunals.

41. Although access to federal court is greater under this proposed test than under *Glover*, it does not provide access to federal court whenever the NRAB remedy is inadequate due to the NRAB's institutional bias. A claimant could have a valid grievance against the railroad, but because the union's refusal was not arbitrary or hostile (*e.g.*, the union interests are legitimate but adverse to those of the claimant), the grievance must be taken to the NRAB for adjudication. Because the Board proceedings are partisan and because review of Board decisions is very narrow, such a claimaint is left without a remedy.