Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

Docket No. 234

HENRY J. CZOSEK, ET AL.,

Petitioners.

vs.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,

Respondents.

Place Washington, D. C.

Date January 13, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C C O N T E N T S

* * * * * * * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

HENRY J. CZOSEK, ET AL.,

Petitioners;

vs. No. 234

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,

Respondents.

Washington, D. C.
January 13, 1970

The above-entitled matter came on for argument at 12:30 p.m.

BEFORE:

WARREN BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

RICHARD R. LYMAN, ESQ.
741 National Bank Building
Toledo, Ohio 43604
Counsel for Petitioners

RICHARD F. GRIFFIN, ESQ.
2300 Erie County Savings Bank Building
Two Main Place
Buffalo, New York 14202
Counsel for Respondent,

APPEARANCES (Cont.):

Erie Lackawanna Railroad Company.

JAMES P. SHEA, ESQ.
1412 Main Place Tower,
Buffalo, New York 14202
Counsel for Respondents, O'Mara, McCormick,
Packard and Daly.

- - - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 234, Czosek against O'Mara. Mr. Lyman, you may proceed whenever you are ready.

ARGUMENT OF RICHARD R. LYMAN, ESQ.

ON BEHALF OF PETITIONERS

MR. LYMAN: Mr. Chief Justice, honorable Justices, this is a case which comes before this Court to review a judgment of the Court of Appeals below which partially reverses and partially affirms a District Court judgment granting motions to dismiss the complaint. The Plaintiffs in this case were four employees of the Erie Lackawanna Railroad Company, which is the railroad formed as the result of a merger of the former Erie Railroad and the former Delaware, Lackawanna and Western Railroad.

That merger took place in 1960, and in 1962 the Plaintiffs in the allegations of their complaint, which of course control the facts for our situation here, were furloughed from their employment as stationary engineers. They alleged in the complaint several different theories of action. They contend that that furlough being allegedly as a result of the merger of the railroads was a violation of the Interstate Commerce Act. They allege it was a violation of the implementing agreement with that specification as to what the implementing agreement provided for, or what provisions were relied upon. They alleged that it was further violative

of the Railway Labor Act in that they did not receive thirty days advance written notice of the fact that they were going to be furloughed. They alleged that they received no compensation for their severance from employment, or severance pay, to which they say they were entitled by the Interstate Commerce Act and the implementing agreement. They assert that the furlough constituted a wrongful discharge because they were not subsequently recalled from the furlough, or had not been up until the time of the suit, which was filed in 1967.

They predicate jurisdiction on diversity of citizenship and jurisdictional amounts on the Interstate Commerce Act, Section 5, et seq., and on the Railway Labor Act. There was no specification of anything in the Interstate Commerce Act upon which they were relying to give rise to this action. The only specific jurisdictional allegation as to the Railway Labor Act was this thirty day notice provision.

Finally, in addition to all of these various allegations, they allege that their union failed and refused to process the grievance and collect compensation for them after they had been furloughed or wrongfully discharged, as the case may be, and they say that this failure to process the grievance amounted to hostile discrimination, bad faith, and so forth.

The District Court sustained the motions to dismiss that were filed by both Defendants, finding that there was no

diversity of citizenship. The Defendant, Erie Lackawanna, is a New York corporation, and the only union defendants that were sued were also residents of New York State. It found that there was no basis for such an action or for jurisdiction under the Interstate Commerce Act in that they were not relying on any provision of that Act, or claiming any provision of the statute had been violated, and that the only thing they were basically suing on was the implementing agreement.

As to the Railway Labor Act, they said that the Adjustment Board had exclusive jurisdiction of the contract claim. With respect to the charge that the union had failed to properly represent them, the District Court ruled that although the Plaintiffs used the phrase "hostile discrimination" in alleging that they failed to process their claims properly, the use of that phrase alone would not support jurisdiction under the Railway Labor Act as an unfair representation claim. The District Court further pointed out that the Plaintiffs were not attacking the validity of any collective bargaining agreement, and they were not claiming that they could not personally pursue their administrative remedies to enforce their contract rights under that agreement.

After that ruling by the District Court, Plaintiffs did not seek leave to file an amended complaint or attempt to file one, but instead appealed from the decision of the District Court. Thus all we have in the record before the Court to

support the factual questions involved are the complaints, the two motions to dismiss, plus so-called affidavits that were filed with the District Court in connection with those motions to dismiss.

The union defendants, petitioners here, filed a regular motion to dismiss the complaint based on lack of jurisdiction of the subject matter, and failure to state a claim, and filed no supporting affidavits, so that it was an ordinary motion to dismiss.

The railroads motion was supported by an affidavit of counsel which appears at page 12 of the appendix, which did reflect some facts. On page 13, the second complete paragraph of the page, states the railroad's version of the facts out of which the dispute arose.

The Plaintiffs' attorney filed his own affidavit in opposition to the motions to dismiss, appearing on page 15 of the appendix, in which he does not state any facts, simply recites what he contended the nature of the action to be, and then recited, and I quote, "that the Plaintiffs do not have to allege facts or damages in their complaint under the Federal Rules."

Following this decision of the District Court, Plaintiffs' appeal, the Court of Appeals held the complaint was sufficient to state a Federal claim against the union defendants for breach of the duty of fair representation. But

as to the railroad defendant, it sustained the District Court's dismissal of the complaint for the reason that Plaintiffs had to assert theirclaim for wrongful discharge against the railroad exclusively before the National Railroad Adjustment Board, and further sustained the District Court's other findings as to the lack of any substance in the various other jurisdictional allegations of the complaint.

Q Does the employee, Mr. Lyman, have any avenue through the Adjustment Board as you see it, and if so, what is that?

A The employee?

Q In proceeding against the union only, or in asserting a claim against the union only.

A He may not proceed against the union only before the Adjustment Board. It is our contention that an employee cannot by selective choice of defendants have the alternative of either collecting damages from his union in a court action or proceeding before the Adjustment Board against the railroad. If an employee has an adequate administrative remedy, we contend that it must be resorted to and exhausted, or he must attempt to exhaust it or show that it would be futile to do so under the line of Maddox and Vaca against Sipes

Q And if he prevailed, he has no cause of action against the union? Is that your position?

A No, because the Adjustment Board will make him

entirely whole for the alleged wrongful discharge.

Q Whom does he proceed against before the Board, the employee?

A The Erie Lackawanna Railroad Company.

Q If he prevails, I gather your position is he has no cause of action against the union.

A Because he has recovered fully for any damage or injury.

Q So if he does not prevail, then does he have a cause of action against the union?

A We would contend not, because in the Landmark case, the decision of this court in Vaca against Sipes, one of the basic elements which an employee must sustain in action against his union for unfair representation is that his claim against the company is a good one on the merits. Now, this points up, Mr. Justice, the problem and dilemma the Court of Appeals left us in. If he goes against the railroad company before the Adjustment Board, the Adjustment Board holds an award which this Court has many times ruled is final and binding and conclusive, and the recent amendments of the statute say so, then he has established the absence of any valid claim on the merits. We would say then it would be completely horrendous if he could turn around and collect his full damages in an action against the union for unfair representation.

Q The law does not require, does it, or maybe it does in the railroad area, that back pay be awarded upon reinstatement? I would suppose that is still valid. I know they can still give it.

A They normally do. It would depend upon whether the contract entitled the man to do it or not.

Q But if the Board said the only place you can get a remedy for reinstatement is from the employer, the union certainly could not reinstate him, but we think the only reason the employer fired this man is because of a result of the union's hostility, not because the employer wanted it, but the union wanted the employer to, we will not award him back pay against the employer; let him recover that from the union.

A I have seen no such awards. Of course, you have no assurance.

Q Would you think it would be improper under the law for the Board to deny full back pay?

A Under your Honors' decision in Vaca against Sipes, if part of his damages were attributable to the union's action, the union of course should be assessed with that liability, in a pro rating process.

Q But the Board could not do that.

A I don't see how the Board could make the decision for some court before which the employee would go against the union.

Q It could say, "We won't give him back pay."

A As against the union, the union would not even be a party to the claim, you see.

Q Or as against the employer they could say, "We will not give him back pay. If he is going to get any back pay, he is going to have to get it from the union."

A Of course, in your Honors' decision in Vaca against Sipes, you pointed out that there is a little different situation presented when, as in this case, the charge of unfair representation is based on failure to process a grievance which is caused by a completely unrelated independent breach of contract by the employer. There is absolutely no allegation in this complaint, no intimation in any of the recitation of facts that the union was in any way responsible for precipitating the furlough or discharge of these men.

Q But that is a pleading problem. It may be that the employee against the union can't prove its case unless it proves something like that, but it does say that there was hostile discrimination, the allegation is hostile discrimination by the union in the complaint.

A The only factual allegation of the complaint to support that conclusory styling of the action is the allegation that the union failed to process the grievance, period. It alleges no motive.

Q Does it have to? Why isn't that a matter of

proof and discovery, and things like that, rather than having to plead your evidence in the complaint?

A Well, your Honor pointed out that hostile discrimination is something akin to malice, actual malice. That sort of concept is of the essence of an unfair representation claim. We don't understand that a union is going to be penalized for maybe failing to properly assess the merits of a claim, unless there is some basic invidious discrimination that is involved and it is better to do so. That is absent in this case. Plaintiff tried to supply it by oral argument of his counsel, even though he did not at the District Court level, at least, although he does now, want to amend his complaint by arguing orally to the Court that maybe there was a political motive, because these people were laid off, but some employees of the former Erie Railroad were kept on, and that therefore there was political discrimination. No rational basis is stated for any such charge of political discrimination. As a matter of fact, I might almost go back to the words of this Court in the Gunther case, "wholly baseless and without reason" to think that a union stood to achieve any political gain or had any political motive by merely failing to collect severance pay for somebody the company had furloughed.

Q But if, as Justice White suggested, there was some underlying hostility on the part of the union officials,

the steward, toward this employee, that would be a factor, would it not?

A If there was just personal spite and malice, I think it would be. There is no such allegation.

Q He might have been an employee who had not cooperated with the union, or who had not cooperated with the particular officers and therefore this was a retaliation. We don't know that, but would not that be a matter of proof rather than pleading?

A If it is, there is very little left of the part of Rule 12 that authorizes the dismissal of complaints for failure to state a claim. We are not contending that detailed facts, common law pleading, technicalities must be observed, but there must be a pleading in the complaint of the basis for the charge that is being made, even though it is not artfully drawn.

Q The complaint does allege hostile discrimination.

A It alleges the pure conclusion, but alleges nothing except the mere failure to process the grievance.

Q But it does allege in so many words hostile discrimination, does it not?

A It alleges that, and has other picturesque language in the paragraphs against the union, but no facts except the bare fact of not processing the grievance. Now, in Vaca against Sipes, as in Maddox, this Court also recognized

the duty to exhaust remedies or attempt to exhaust them as an element of stating a claim, and that was not done here. In fact, on the record in his Court of Appeals brief, counsel for Plaintiffs admits that he could have gone to the Adjustment Board. It is well established that the Adjustment Board does take and is required to take submissions of individual employees, and in the Elgin, Joliet and Eastern case where it has in fact taken them, the Court of Appeals in saying that the Plaintiffs had to go against the railroad before the Adjustment Board admitted ipso facto that Plaintiffs do have a right to go to the Board, and it remanded them to the Board for their claim against the railroad, which was a claim for all of the damages which they have suffered. There is no intimation which would support, in the complaint or in the record anywhere, allocation of any portion of that remedy as against the union.

Q But on the pleading question again, in addition to what Justice White has referred to, about the allegation of claim of hostil discrimination, there is an explicit allegation that the union breached its duty to the Plaintiff as a member and violated the collective bargaining agreement by not representing him in the claim against the railroad. Do you say that is not enough to raise the issue?

A The allegation that they did not represent them and prosecute their claim is a factual allegation. The other

is not the allegation of any fact, but a conclusion, and again relying upon Vaca against Sipes, the mere failure to represent and process is not sufficient. It must be a malicious, bad faith failure to represent or process. A union cannot be held to any standards of competence, such as a doctor is required to observe in malpractice suits and that sort of thing.

Q There are cases which have held, I don't think in this Court, but there are cases in Courts of Appeals which have held that the relationship between the union and its members is in the nature of a fiduciary relationship.

A We agree, and were some factual basis alleged, other than these bare statements, showing that that fiduciary relationship was breached, showing an act which by its nature would breach it, then it would be a different question.

If the Court please, I would like to reserve a few minutes for rebuttal unless the Court has some further questions that they wish to ask now.

Q Could I ask you just one question? There is a collective bargaining agreement. Was there a collective bargaining agreement? This was in connection with a merger, was it not?

A Yes, Mr. Justice. There of course is always the so-called schedule agreement on these railroads, setting forth the basic rates of pay, rules and working conditions.

Then there was an implementing agreement to implement the merger.

Q Is there a provision in any of the agreements which indicates that the unionhas a duty, a contractual duty to represent the employee before the Adjustment Board?

A Not that I know of. The railroad unions in general have maintained the proposition that they may take employees' claims to the Adjustment Board, or they may advise them, "We don't think this is a claim that has much merit, but you are free to take it yourselves if you want to, but we won't do it at union expense."

Q Let us assume the union freely admits that it is a good claim but it just says, "We don't normally undertake this", the employee is permitted to go before the Board by the law, and let him go by himself.

A Yes, your Honor. I think the union can lawfully do that, and perhaps the remedy for that, if the employee wanted more extensive representation and activity by his union representative, is to choose another union that will give it to him if he would not get it from that union.

Q Under the bargaining agreement, are the pre-Board steps of the grievance procedure operable by the employee himself without the union's cooperation?

A We did not get into that in this case. On most properties they are. This implementing agreement is not before

the Court in the record. Actually I reviewed it recently and it is at the initial stages to be resorted to by the employee himself.

Q Not by the union.

A As I read it.

Q Not by the union.

A No. I think within 60 days of the time he claims he is affected by the merger, the employee is supposed to file on certain forms that were supplied a claim for compensation.

Q So the employee is not barred from the grievance procedure because the union refuses to process it.

A No, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lyman.

Mr. Shea.

ARGUMENT OF JAMES F. SHEA, ESQ.

ON BEHALF OF RESPONDENTS, O'MARA,

McCORMICK, PACKARD AND DALY

MR. SHEA: Mr. Chief Justice, if it please the Court, it would appear that the chief thrust of the Petitioners argument, of course, is against the sufficiency of the complaint. With that in mind, I must be very candid to the Court. The employee respondents here rely on this Court's prior decision in Conley vs. Gibson, and on page 7 of our brief, we quote what we believe to be the law of the United

States relative to the sufficiency of a complaint in a Federal Court. The Court indicated there that "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Now, with this in mind, this is why I argued before the Circuit Court of Appeals in New York outside the record because there just is not any record here outside of the complaint and the affidavits of counsel. The reason I did argue to the Second Court of Appeals as to what I believed is the factual background which has not been disputed as far as I know by any of the counsel here as to the factual background which underlies the complaint in this case.

The Respondent employees were four former members of the Delaware, Lackawanna and Western Railroad. They had varying periods of service with that railroad, ranging from 47 years to 9 years. Of course, the merger took place in 1960 and these men were employed as stationary engineers in the City of Buffalo at what was known as the Michigan Avenue Power Plant. They were laid off during the summer, which was the usual procedure with the company. They were not called back to work for the fall season and the plant was closed down. Of course, when the merger took place between the two railroads, there was a merger, if you will, of the unions involved. Employees

were members of Local 826, System Federation 78, Council 2. They were stationary engineers and they supplied steam to provide heat for the power plant and also provided heat for the trains as they came into the station.

The Erie Railroad built a new station, a new plant in the City of Buffalo. These four men, the Respondent employees here as stationary engineers were not called back to work. Their jobs were replaced by four former employees of the Erie Railroad, and these four former employees of the Erie Railroad were not stationary engineers, but were laborers. It was the contention of the employees, and they made this known -- again this is not in the record, but I feel I have to bring it to the Court's attention, with the Court's permission -- they brought this situation to the attention of the master mechanic for the railroad and the union representative. The answer that they received from both parties was that they were not affected employees with respect to the merger, that the reason they lost their jobs, or to use the word "furlough", as the other counsel used it, was because of the obsolescence of this Michigan Avenue Power Plant.

Now, in the lower courts, in the District Court, and in the Court of Appeals, both the attorneys for the union and the attorneys for the railroad indicated that these men had not lost their jobs, that they were just furloughed. Of course, this is almost eight years later, and they still called

it a furlough; they don't call it a wrongful discharge. They brought this situation to the attention of the master mechanic and the union representative. As I indicated before, they got the same answer. It was written to the president of the union and he said, "The reason you were given before by the General Chairman of the local council was a sufficient reason as to why you do not have your jobs." And that is the end of the matter.

There were no forms given to the employees here to start any kind of action before the National Railroad Adjustment Board, nothing of this sort. Nothing was done at all.

Action was commenced in the Western District of New York. Complaint was filed, and summonses were served on certain of the Defendants. It is the major contention of the employees here that this is a fair representation case against the union, and that the National Railroad Adjustment Board under no decisions that I know of does not have jurisdiction over an unfair representation claim against the union alone. My reading of cases in the Second Court of Appeals in New York, particularly the Cunningham case, indicates that when a plaintiff has a claim against the union for unfair representation, and also connected with that would have a wrongful discharge claim against the company, that a better practice is not to disassociate the claim to make the plaintiffs seek their relief in two different areas of law, as it were,

but to let the employee plaintiff sue both people in the Federal District Court, and it is my understanding of the Cunningham case that that is what was done. Judge Medina indicated that in a closely integrated action that this is the better practice, and this is what should be done. This is what I argued to the Court of Appeals in New York.

As to the argument of Mr. Lyman relative to the company, the railroad should not be let off, I agree, but I think that the Court of Appeals in its opinion left the employees with an out, as it were, because they allowed us to amend our complaint, if we could, against the company alleging that if it was not collusion, but at least some kind of tacit understanding between the two defendants as to these job replacements, because -- again this is not in the record, but the employees would attempt to prove that there was some kind of an agreement between the company and the union as represented by stronger people from the former Erie Railroad, that there was some kind of agreement as to these four jobs.

Q How would you get around the rule that the Board has exclusive jurisdiction to pass on --

A Wrongful discharge?

Q Yes, and other grievance type cases.

A As I understand the Cunningham case, that is the posture of the case that was tried, Mr. Justice, wrongful discharge along with the unfair representation.

Q I know, but somebody might challenge that here in this Court.

A Right.

Q If the railroad, which I take it would have the right under the law to take that kind of a case to the Board, wouldn't it?

A That is my understanding of the law, also.

Q What if the railroad says, " I insist on taking this to the Board"?

A That would be the first time that the railroad has said that, then, because there was no allegation before that they could have brought it to the Board. Then you come to the problem, the same factual set of circumstances, that the employees, as I say, would be forced to go into two different forums to litigate the one question.

Q If you amend, as the Court of Appeals suggested you might, do I understand you to say that you concede that the railroad could take that case, the collusion case, to the Board?

A No.

Q You are saying only the discharge case.

A Correct, your Honor. The employees are not suing for loss of seniority rights, or anything like that. We accept the furlough or discharge or whatever you want to call it as final. We are just pursuing those remedies. There is no

other minor dispute category involved.

Q So you just want money. You don't want the job back.

A They want retribution as far as monetary damages are concerned. There has been no offer of severance pay or anything like that.

Q But you still win your case even if you fail in your effort to join the company.

A I am not sure whether I do win the case, your Honor.

Q Why? Your case is not dismissed.

A Before the Board, you mean?

Q No, in the court. It is not dismissed in court. Do you think the Second Circuit conditioned your right to maintain this suit upon your joining the employer?

A No.

Q No, it did not.

A That is correct, it did not.

Q You could still proceed against the union even if you did not join the employer.

A That is true, your Honor.

Q The cause of action might require some kind of proof of employer participation, might it not, even against the union.

A Even more than that, Mr. Justice, because of

course the discharge was precipitated by the company.

Q So your evidence would have to go to employer conduct whether or not you amended to add the --

A It certainly would be an evidentiary problem in the District Court to do that.

Q So you are not alleging a union caused discharge.

A No, because in the pure sense the union could not cause it.

Q You are just alleging an unremedied discharge.

A Right. At least collusion on the part of the union with the railroad to cause the lost employment by the employees here.

Q Suppose in this posture now, the employer were to go to the Board on the discharge case. I gather the railroad could do that, couldn't they?

A That is my understanding.

Q Even though you are not asking for reinstatement.

A That is correct, we are not asking for reinstatement.

Q And suppose there were a determination of the Board favorable to the railroad?

A Then these employees are out of the picture as far as the railroad is concerned.

Q What is the bearing of a determination of the

Board in favor of the railroad upon your lawsuit against the union?

A As I said, as far as the railroad is concerned.

Q You would still have your case against the union.

A Going back to the union, it is my understanding we are still allowed to sue the union, but again it is a practical problem, an evidentiary problem as far as these employees are concerned. Why disjoint the case when it is a closely integrated problem and allow the plaintiffs to go into a Federal District Court at least expense to them?

Q You don't concede there might be any kind of question at all about your lawsuit against the union if the Board were to find in favor of the railroad?

A That is the reason I did not want to go to the Board, naturally, because the Board is comprised of members of the union and the company. When you are alleging a complaint such as this, that there was some kind of conspiracy, which is kind of a bad word, but some kind of collusion, anyway, against the employees by both sides, as this Court indicated in Glover, although that was a racial discrimination case, I really don t see too much distinction between this case and the Glover case as far as allowing these employees to go into a District Court, and not to disassociate.

Q If you wanted to, you could decline the

option that the Court of Appeals gave you, and maintain the action against the union only, couldn't you?

A I could, your Honor.

Q And then except for the statute of limitations, if you failed there, you could move against the railroad.

A The statute of limitations is veryimportant in this case, because as I pointed out to the Court, it is almost eight years old now. My understanding of the procedure of the National Railroad Adjustment Board is that it is quite time-consuming as far as getting before the Board and getting a decision. Essentially that is the position of the employees in this case, unless the Court has any further questions. Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shea.

Mr. Griffin, you may proceed whenever you are ready.

ARGUMENT OF RICHARD F. GRIFFIN, ESQ.

ON BEHALF OF RESPONDENT, ERIE

LACKAWANNA RAILROAD

MR. GRIFFIN: Mr. Chief Justice, members of the Court, may it please the Court, on behalf of the Erie Lackawanna, the respondent employer in the case, basically it is our position that we had a right to have the question of this matter of whether the furloughing or discharge was right or wrong, whether it had anything to do with the merger. Basically this is a question of an interpretation of agreements,

and that under the Railway Labor Act the design of that is that where agreements are interpreted in this type of dispute the National Railroad Adjustment Board is the one to interpret the agreements, and accordingly the Plaintiffs had an obligation to take the case there.

Q Mr. Griffin, the railroad has not cross-petitioned here, has it?

A No, your Honor.

Q Are you objecting to the leave allowed the employees to amend?

A Am I objecting to that?

Q Yes.

A Yes, your Honor.

Q How can you? You did not cross-petition that against you, did you?

A No, I did not.

Q As I understand it, all we have here is the union's petition. Isn't that all?

A That is correct in terms of a petition, your Honor.

Q What you mean is that you don't like it, but you have not asked us to review it.

A No, I have not filed any formal petition. My understanding was that all questions are before the Court, and this Court has the power in the posture that it is to order

reinstatement of the District Court decision, which dismissed as against all defendants without any leave, and furthermore although the main thrust of the union's argument is that the complaint should be dismissed as against it, it also in its brief makes certain implicitly alternative arguments as against the railroad.

Q But, Mr. Griffin, you are a respondent, aren't you?

A That is correct, your Honor.

Q Ordinarily a respondent is here defending the judgment below, isn't he?

A Yes.

Q You are here attacking the judgment in so far as amendment against the railroad was permitted, aren't you?

A In part that is my purpose, your Honor, yes. It is my position that the gratuitous non-asked-for permission to start, in effect, another lawsuit against the railroad that the Second Circuit gave was improper and unnecessary.

Q My question is whether you can bring that to us without having cross-petitioned against the judgment which gave that leave to the co-respondents.

A It is a good question, and I am frank to say, your Honor, I am not able to authoritatively respond. At the time that the petition on behalf of the union was filed, I do recall that in our office we went into that thing, and it is

my impression -- I could be wrong -- that we determined at that time that if certiorari was granted by this Court on the union's application, then the Court would have the power, once it was granted, to review the particular issue that I am referring to here.

Q Why were you ever classed as a respondent in this case, anyway? Because you did not petition? Is that it? You are not a petitioner, but a respondent, is that it?

A That is right. I was originally a defendant in the District Court, and an appellee in the --

Q You wanted to sustain the District Court's judgment of dismissal.

A That is correct, your Honor.

Q The Court of Appeals reversed the District Court, and you objected to that.

A That is correct.

Q You and the union argued together in the Court of Appeals.

A That is correct. We were there to sustain Judge Henderson, the District Judge's decision that there was no case, in effect, that we should be out 100 per cent. Then the Second Circuit in effect sustained that on the basis of the case in pleadings before it, but as I say gratuitously gave leave for the plaintiffs to start, in effect, another lawsuit against us.

Q When you say "gratuitously", what do you mean?

A No one asked for it. They say ab initio, or on its own --

Q But there it is, Mr. Griffin. It is a judgment and is a judgment adverse to you. You have not appealed from the part of it that is adverse to you, have you?

Q Are you sharing respondent's time here?

A Yes. We made an application to divide the time. I apologize for being unable to answer this authoritatively, but on the question which is the other question I think we are entitled without question to address ourselves to, that is whether the railroad should be in the case at all, and whether the exclusive remedy to the plaintiffs is not before the Adjustment Board, it is our position that this case must be in the Adjustment Board, and that the exceptions to that that this Court has decided, such as in the Glover case --

Q Of course, Mr. Griffin, if the employees don't amend as against the railroad, you are out of the case anyway, aren't you?

A Right, and they never have amended.

Q I wonder why you are here at all.

A If I knew that the union, and if the union in its brief did not suggest that this Court should make some adverse determinations, and maybe keep us in the lawsuit, then as far as that part of it, I would not be here. I think it is

quite clear that we should not be in the lawsuit, and as I think Justice White developed in the questions, this employee had all of the chance in the world to go before the Adjustment Board. He had counsel for years, and his counsel decided not to go to the Adjustment Board. He had every opportunity in the world. There was nothing to prevent him, but he did not want to go there. This Court has consistently held that the Railway Labor Act provides exclusive remedy and he has an obligation to go there.

Now, Mr. Shea, and I will just conclude with this, went outside of the record to argue about the merits of the case. I think I have to respond in this respect. He says that the Erie Railroad hired old employees of Erie, that the merged railroad hired old employees to run a new power plant after the one power plant was closed down in Buffalo. That is not a fact. It is not for you to decide whether or not it is a fact, but he has gone into it, and he never before put this in. They did not build a new power station and hire new people because in Buffalo the old Lackawanna had one of these great huge stations that you could not give away for years. Finally it was sold for taxes or something, and the power plant that heated it and so on came to an end. That is where these men worked. For the limited time that there was passenger service, there was a source of steam elsewhere in Buffalo that was used and they did not build a new power plant, as Mr. Shea suggests.

Accordingly, that is why all along they took the position that their jobs came to an end due to a railroad obsolescence, that the merger had nothing to dowith it, and accordingly that there is no case. I think that that is what the Railroad Adjustment Board would hold. There is no political discrimination. There is nothing in the case, and that is why there has never been anything set forth in the pleading, because they don't have anything to set forth. In the Glover case where there was a futility question, counsel went into great detail.

So in conclusion, it is our position very basically that the District Court was correct in dismissing the case, 100 per cent, as against the defendant, Erie Lackawanna, and we feel that is where we should be. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lyman, you have three minutes left.

REBUTTAL ARGUMENT OF RICHARD R. LYMAN, ESQ.

ON BEHALF OF PETITIONERS

Q Why did you make the railroad a respondent?

A Because the Court of Appeals left us as the sole defendants to defend against a charge or claim for damages based on the acts of the railroad company, and not on our acts. If the railroad had not been made respondents, they are out of it, and we have to share their burden according to the drift of the --

Q Your complaint is that instead of limiting the

relief to the employees to amend on grounds of collusion against the railroad, you wanted the railroad what, made something else? Were you challenging the judgment as to the extent to which the railroad is kept in, or what?

A Under Vaca against Sipes, the Court made it very clear that the railroad cannot slough its burden on paying for its wrongful breach of contract off onto the labor union simply in a situation where, like here, the union did not process the claim for the employees to complain about what the railroad had done.

Q Let me see if I get it. Your point is you want out entirely on the pleading argument that there is no cause of action against the union.

A Yes.

Q But if one has been, then you are entitled to have the employer in as a full co-defendant, is that it?

A Yes, because their damages cannot properly be placed upon the union. Now, the leave to amend to allege collusion that the Court of Appeals granted to plaintiffs does not save us, because on a remand, suppose first they may not amend, and may decide they would rather just go against us. Then we are out. We are lost. If they do amend and then the District Court finds there was no cdlusion, as there is no suggestion inthis case that there was, except in the Court of Appeals idea that maybe that is the kind of an action that

that is the kind of an action that could be brought jointly, and that if there were no collusion, they could not be sued, if they do amend and bring the railroad back in, suppose the railroad gets out on maybe even a summary judgment showing there is no shadow of support for the charge of collusive action, then the case would be left in the same posture that it is now where a purely independent act of breach of contract by the railroad is being defended solely by the union.

Q One thing that does emerge here is that the Court of Appeals thought that these pleadings stated a cause of action against the union. That is clear that they thought that, whether correctly or not.

A Yes, your Honor, and we submit that they did not do so against the union. We argued that at some length in our brief, and cited decisions from the Sixth Circuit, the Seventh Circuit, the Tenth Circuit, which are very clearly contrary to the holding of this Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lyman. The case is submitted. Thank you, gentlemen.

Whereupon, at 1:25 p.m., the argument in the above-entitled matter was concluded.)

- - -