

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BELFAST & MOOSEHEAD)	
RAILROAD, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 90-0114 P
)	
PETER DUFOUR, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON MOTION BY UNIONS TO INTERVENE
PURSUANT TO FED. R. CIV. P. 24(a)(2) or 24(b)(2)**

Several railway labor unions ("Unions")¹ petition the court to allow them to intervene in the instant action, in which the plaintiff railroads² challenge the constitutionality of the Maine Railroad Personnel Act, 32 M.R.S.A. §§ 4140-50 ("Act"). The Unions seek to intervene as of right under Fed. R. Civ. P. 24(a)(2) or permissively under Fed. R. Civ. P. 24(b)(2). The plaintiffs oppose the Unions' request. For the reasons set forth below, I recommend denial of the Unions' petition as to both types of intervention but suggest that they be accorded *amicus curiae* status. The briefs they

¹ Four unions filed an initial Motion for Leave to Intervene on October 2, 1990 -- the Brotherhood of Locomotive Engineers, the Brotherhood of Railway Carmen, Division of TCU, the American Train Dispatchers Association, and the Railway Labor Executives' Association ("RLEA Motion" or "RLEA Unions"). A fifth union, the United Transportation Union, filed a separate Motion for Leave to Intervene on October 22, 1990 ("UTU Motion").

² The plaintiff railroads are Belfast & Moosehead Railroad, Bangor & Aroostook Railroad, Boston & Maine Railroad, Canadian Pacific Limited, Maine Coast Railroad, New Hampshire Northcoast Corporation, Springfield Terminal Railway, St. Lawrence & Atlantic Railway and Maine Central Railroad.

already have submitted, as well as any they may care to offer later in this action, merit consideration on that basis.

I. PROCEDURAL REQUISITES

Fed. R. Civ. P. 24(c) mandates that would-be intervenors serve motions to intervene upon the parties that "shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The Unions have failed to heed these basic commands. Indeed, the RLEA Motion erroneously states that it is filed pursuant to the Maine Rules of Civil Procedure. The Unions neither accompanied their motions with the requisite pleadings nor filed them belatedly. The Unions instead filed their motions with memoranda stating grounds for intervention but neglecting to specify claims or defenses. In a subsequent reply memorandum, the Unions flesh out their grounds for intervention but again fail to delineate claims or defenses. *Intervenors' Reply to Plaintiffs' Opposition to Motion to Intervene* ("Unions' Reply Memorandum").³ The Unions urge liberal construction of their pleadings, *id.* at 1-2, but their transgressions are serious enough to merit denial on this ground alone. *See, e.g., Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987). Nonetheless, I rest my recommendation not only on procedural flaws but also on the substantive weaknesses addressed below.

II. INTERVENTION AS OF RIGHT

³ The Unions' Reply Memorandum was filed by the RLEA Unions and adopted as well by the UTU. *See* *Intervenor's Reply to Plaintiffs' Opposition to Motion to Intervene*.

To qualify for intervention as of right under Fed. R. Civ. P. 24(a)(2), a prospective intervenor must (1) submit a timely application; (2) claim "an interest relating to the property or transaction which is the subject of the action"; (3) be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) show that the would-be intervenor's interest is not "adequately represented by existing parties." The would-be intervenor bears the burden of demonstrating the latter three prerequisites. *International Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 342 (1st Cir. 1989). All four preconditions must be met. *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989).

A. Timeliness

The Court of Appeals for the First Circuit outlines four factors relevant to evaluating the timeliness of a petition to intervene: the length of time the petitioner knew or reasonably should have known of its interest before seeking intervention; prejudice to existing parties because of delay; prejudice to the petitioner if unable to intervene; and whether unusual circumstances militate for or against intervention. *Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5, 7 (1st Cir. 1989). The First Circuit has found untimeliness when petitioners waited to file for 13 months, *id.*, and seven-and-a-half months after being put on notice of their rights, *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 143 (1st Cir. 1982). This court (Carter, J.) judged a motion to intervene timely when a petitioner filed two months after commencement of an action. *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 81 (D. Me. 1988), *aff'd*, 884 F.2d 629 (1st Cir. 1989). The First Circuit has observed that the Supreme Court found four months too long a delay. *Cannon*, 696 F.2d at 143. The Unions filed five-and-a-half months after the instant action was commenced on April 20, 1990. The plaintiffs

argue that the petition is untimely because it was filed after the expiration of the discovery deadline and one week before the extended deadline to file motions for summary judgment. Plaintiffs' Memorandum in Opposition to Motion for Leave to Intervene ("Plaintiffs' Memorandum") at 4. The Unions' unexplained five-and-a-half-month wait to file for intervention militates against a finding of timeliness. However, I do not find the delay prejudicial to existing parties. The plaintiffs assert that they may be prejudiced from the possible reopening of discovery. *Id.* This fear does not appear well-grounded in that the Unions offer to abide by the original parties' time limits and discovery restrictions. Unions' Reply Memorandum at 4. I discern no evidence of the final two factors -- prejudice to the Unions if barred from intervening or unusual circumstances. I therefore find the Unions' motion to intervene timely, as conditioned on their promise to abide by prearranged timetables.

B. Interest in the Subject of the Lawsuit

An intervenor must show that its interest in the lawsuit is "direct, substantial, and legally protectible." *Dingwell*, 884 F.2d at 638 (quoting *Flynn v. Hubbard*, 782 F.2d 1084, 1092 (1st Cir. 1986) (Coffin, J., concurring)).

Four of the unions characterize their interest in the subject matter of the lawsuit as one of "assuring that the health and safety of their members are protected." Memorandum of Points and Authorities in Support of Motion for Leave to Intervene ("RLEA Memorandum") ¶ 5. They contend that engineers are exposed to the health hazards the challenged regulations are intended to protect, *id.* ¶ 6, that their attorneys participated in administrative proceedings leading to adoption of the challenged Maine regulations, *id.* ¶ 7, and that the attorneys contributed to proceedings on relevant federal law, *id.* ¶ 8. The RLEA Unions assert that their attorneys have "special knowledge in these areas," presumably meaning areas of relevant federal legislation. *Id.* ¶ 8. A fifth union alleges essentially the same bases for intervention, adding that its members operate railroads within Maine. Memorandum of Points and Authorities in Support of Motion for Leave to Intervene ("UTU Memorandum"). In their reply memorandum, the Unions contend additionally that they have "a vested and substantial interest in ensuring that the railroads do not misstate applications of collective bargaining agreements and the impact that the MRPA has upon these agreements." Unions' Reply Memorandum at 2.

The Unions' interest in lending the court expertise, partly to prevent railroad misstatements, does not justify intervention. *American Nat'l Bank & Trust v. Chicago*, 865 F.2d 144, 147 (7th Cir. 1989). Their interest in protecting members' safety is significant and arguably direct, although their

pleadings and memoranda make out a flawed case of directness.⁴ Nonetheless, I cannot conclude that this interest is "legally protectible." The Unions' participation in the creation of the Act, and their keen interest in its fate, do not confer the right to defend it. *See, e.g., United States v. City of Pittsburg*, 467 F. Supp. 1080, 1082-83 (N.D. Cal. 1979), *aff'd*, 661 F.2d 783 (9th Cir. 1981) (questioning whether postal-worker union's interest in defending trespass ordinance protectible). In this instance, the Unions lack standing to champion their point of view.

C. Impairment of Intervenor's Interests

The Unions argue that an adverse ruling would affect their right to protect the safety of their members' workplace. Unions' Reply Memorandum at 3. Essentially, this amounts to an argument that the Unions would be hurt by the *stare decisis* effect of an adverse ruling. When a case such as this presents questions of first impression, the implications of *stare decisis* can suffice to persuade the court of impairment of would-be intervenors' interests. *International Paper*, 887 F.2d at 344. However, the magnitude of the *stare decisis* problem is greatly diminished when existing parties adequately represent the prospective intervenor's position. *Id.* at 345. For the reasons discussed below, that is the case here. I therefore find that refusal to grant intervention will not impair or impede the Unions' interests.

D. Adequate Representation by Existing Parties

⁴ The RLEA Memorandum does not allege that the four unions seeking intervention have members who work in Maine. Neither the RLEA Memorandum nor the UTU Memorandum states that the Unions' members work for the plaintiff railroads.

The Unions fall far short of demonstrating inadequate representation by existing parties. The Unions closely track the defendants' positions on the constitutionality of the Maine Act and regulations promulgated thereunder. *See generally* Intervenor's Response to Plaintiffs' Motion for Summary Judgment. The Unions' argument that the defendants cannot adequately address Railway Labor Act preemption, Unions' Reply Memorandum at 3, is conclusory and unpersuasive. Because the named defendants share "the same ultimate goal" as the would-be intervenors, adequacy of representation is presumed. *Narragansett Indian Tribe*, 868 F.2d at 8 (quoting *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)). To overcome that presumption, the Unions would have to demonstrate "adversity of interest, collusion, or nonfeasance." *Moosehead*, 610 F.2d at 54. They do not attempt to do so. In all, the Unions fail to dispel the impression that their interests in this action substantially coincide with those of the defendants. *See, e.g., International Paper*, 887 F.2d at 342 (state of Maine and town of Jay "in substantial agreement as to the proper outcome of this case"); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889 (6th Cir. 1978) (interests of teachers' union largely overlapped with interests of school board, a named party).

III. PERMISSIVE INTERVENTION

To qualify for permissive intervention under Fed. R. Civ. P. 24(b)(2), a petitioner must satisfy the requirement of timeliness and assert claims or defenses that have "a question of law or fact in common" with the main action. The court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The First Circuit imposes the additional threshold requirement of proving independent jurisdictional grounds for the claims or defenses, including standing to assert them. *International Paper*, 887 F.2d at 345-46; *Amoco*, 690 F. Supp. at 84. The court retains discretion to refuse permissive intervention even if all minimal requirements are met. *Amoco*, 690 F. Supp. at 83-84.

As noted above, the Unions lack standing to defend the Maine Act from the plaintiffs' constitutional challenge. Hence, their petition for permissive intervention must be denied.

IV. AMICUS CURIAE STATUS

The Unions in the instant case apparently desire above all to air their expert views on unsettled areas of law central to the disposition of this case. In offering to adhere to preexisting timetables, they essentially have pledged to forgo discovery. In this respect, they are similar to the would-be intervenors described by the First Circuit in *International Paper*:

The state's argument seems to be that since it is seeking "simply to make its views known concerning a statute," rather than to assert a claim, it does not make sense to require it to establish an independent ground for jurisdiction. This argument misconceives the role of an intervenor. If the government merely wants to make its views known, it can very often secure permission to file an amicus brief.

International Paper, 887 F.2d at 346-47. Given the Unions' interest and professed expertise in the subject matter of this action, I recommend that the court confer upon them *amicus curiae* status. This status should aid the court and enable the Unions to accomplish most of their ends with the least disruption to the case and existing parties.

V. CONCLUSION

For the foregoing reasons, I recommend that the Unions' motions to intervene be **DENIED** and that the Unions be granted *amicus curiae* status.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of December, 1990.

David M. Cohen
United States Magistrate Judge