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Eldon E. Rasmussen v. United States Steel Company : Reply Brief

Utah Supreme Court

8081 RB

IN THE SUPREME COURT
of the
STATE OF UTAH

ELDON E. RASMUSSEN,
Plaintiff and Respondent,

— vs. —

UNITED STATES STEEL COMPANY,
Defendant and Appellant.

Case No. 8081

REPLY BRIEF

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CITATIONS

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This reply brief is filed that the questions to be here determined may be clarified and that misleading statements and confusing arguments may be eliminated from the Court's consideration.

It is contended by respondent that the implied in fact contract upon which he relies was formed on August 3, 1948, based upon prior custom and publications. (Resp. Brief p. 14) It is appellant's position that there were no publications or prior custom upon which respondent justifiably could rely to support his contention.

I.

There were no publications prior to August 3, 1948, or prior to respondent's termination, upon which respondent could justifiably rely to establish his alleged implied in fact contract.

A. Prior to August 3, 1948 there were no company or corporation publications pertaining to a job evaluation program for non-exempt salaried employees of Geneva Steel Company.

1. On May 7, 1947, a Wage Rate Inequity Agreement was negotiated between Geneva Steel Company and the United Steel Workers of America, CIO, representing hourly production, and maintenance employees within the Geneva plantsite providing for a job evaluation program for production and maintenance jobs only. This agreement was the first of its kind at Geneva Steel Company and had no application to or connection with salaried positions of any kind at Geneva Steel Company.

2. The joint announcement of June 25, 1948 (Plaintiff's Exhibit 5) referred only to the program as it applied to the above-mentioned wage rate inequities agreement and there is no reference or indication, express or implied, of the extension or application of any kind of program for non-exempt salaried workers of Geneva Steel Company. It should be noted that at that time the CIO Steel Workers Union had no connection whatsoever with any clerical or salaried employees at Geneva Steel Company and therefore any such statement involv-

ing the Steel Workers Union would not be applicable to such salaried employees.

B. The letter of August 3, 1948, was not intended to, did not and could not apply to, or be understood as applying to respondent and could not be the basis upon which to establish an implied in fact contract.

It is now contended by respondent that the implied in fact contract upon which he relies was formed on August 3, 1948. (Resp. Brief p. 14) The further statement is made that the Witness Nelson and respondent saw and "understood the announcement as applying to them." (Resp. Brief p. 11)

What they may have seen or understood is, of course, of no consequence unless appellant was, in some way, responsible for having created that understanding or allowed it to exist. (1) The letter referred to (Ex. P-3) was directed to Plant Department Heads, not to any non-exempt personnel in or out of the General Offices. Moreover, it specifically states that the department head was to notify employees in his department by personal contact and that the information which followed was for his use in making said personal contact. (2) The fact is that neither the Witness Nelson nor respondent testified that he even saw the letter, much less that he understood it applied to him. Mr. Nelson stated:

> "I don't remember having seen this letter." (R. 128)

and the respondent:

"Q. I will show you what is marked Plaintiff's Exhibit 3 and ask you if you remember seeing that bulletin?

A. I saw something that gave that information.

Q. You don't remember whether this is the identical one you saw which contained that information, is that right?

A. That is right." (R. 160)

Counsel cannot be serious in his contention that an employee in the General Office could believe that the letter applied to him. Even if it be conceded that "all salaried employees" and "members of plant personnel" are two distinct groups as counsel argues, the fact remains that all employees referred to were given a $17.00 a month increase. The reference to a salary inequities program is that such a program will be undertaken with respect to "said non-exempt salaried positions." "Said" positions could be none other than those next above described, i.e., those who received a $17.00 raise. Respondent received, not a similar or comparable raise, but one of more than 150% of that increase, to wit, $26.00 a month. (R. 51)

Respondent's increase was the 10% referred to in the first paragraph of the notice; he could with equal propriety claim to be included among that group, "Exempt Salaried Personnel," as to which there never has been a job evaluation program or any retroactive salary adjustments.

C. There was no publication subsequent to August 3, 1948 of any kind by Geneva Steel Company referring to the general office salary evaluation program until after respondent had terminated his employment with Geneva Steel Company.

1. The United States Steel News article dated July, 1950 (Plaintiff's Exhibit 14) refers to an agreement executed between the CIO Steel Workers Union and certain subsidiary companies of United States Steel Corporation. It was a salary inequities agreement negotiated between those companies and the Steel Workers Union and had application only to the salaried employees in the companies represented by the United Steel Workers of America, CIO. Geneva Steel Company was not a party to any of those agreements and therefore they could not bind Geneva Steel Company in any way either by application or by implication. Moreover, these agreements applied only to salaried workers represented by the union and had on application whatsoever to salaried employees in the General Offices of any of the companies involved.

2. Salary Inequities Agreement — Geneva Steel Company and United Steel Workers of America, CIO, dated July 27, 1950:

(a) This agreement applied only to salaried employees represented by the CIO Steel Workers Union. There is no reference or indication that this agreement was to have any application to salaried employees not represented by the Union.

(b) This agreement by its terms established the retroactive date for union-represented salaried employ-

ees at May 1, 1950. (See December 1, 1950 Notice (Plaintiff's Exhibit 5) which has not been disputed by respondent.

(1) It is inconceivable that the company and the union would agree in writing to a May 1, 1950 retroactvity date if all of these salaried employees had a vested right by means of a prior implied in fact contract to retroactivity benefits back to March 9, 1947, as contended by respondent.

(2) The December 1, 1950 Notice (Plaintiff's Exhibit 5) indicates very clearly that the company in its sole discretion had extended this date of retroactivity to March 9, 1947 for all non-exempt salaried employees within the bargaining unit. This announcement changing the date of retroactivity from May 1, 1950 which was agreed upon in the collective bargaining agreement between the company and the union to March 9, 1947, clearly indicates that any determination of retroactivity date was within the sole discretion of the company as late as December 1, 1950 which date was subsequent to respondent's termination of employment with the company.

II.

It was appellant's intent to exclude from a retroactive salary adjustment any non-exempt salaried employee in the General Office who had quit prior to the establishment of the Standard Salary Scale.

We had understood respondent's contention to be that the alleged implied contract to make a retroactive adjustment in respondent's compensation arose from previous statements, acts or conduct and not because of, but even in spite of appellant's intention.

However, on page 16 of his brief respondent states:

> "It was Respondent's contention therefore that the Company did not intend to prohibit former employees from receiving their retroactive pay."

The evidence relied on refutes the contention.

1. The policy manual of the Delaware corporation (Ex. P-13) expressly excluded "an individual who quit or was discharged" from any consideration in respect to a retroactive wage adjustment. That policy was the guide and standard used at the Geneva operations until June of 1951. (R. 99) The language above quoted was deleted in the policy manual issued June 1, 1951 (Ex. P-12) and the words "as determined by the Salary Administration Committee" substituted therefor. The reasons for the change were fully explained by the Witnesses Friedley and Heald. (R. 107, 153-4) The best evidence of appellant's intent is its actual conduct and the fact is not disputed that no one who quit prior to the formulation of the program was given any retroactive adjustment in his compensation. (R. 106)

2. The news release of March 26, 1951 (Ex. P-7) is at best a newspaper reporter's statement and is clearly hearsay. The statement evidences no intent other than one to make similar payments in the future to "similar workers" in the general or headquarters office. There is not the remotest suggestion or hint that individuals who quit would be paid retroactive compensation. The suggestion is indeed to the contrary; a worker is one who is working, not one who had quit and had done so with adequate warning as to what effect his action might have. (R. 107)

3. The announcements of December 15, 1950 (Ex. P-15, P-16) expressly state the requirement that one must be on the payroll on the effective date of the new salary scale in order to receive retroactive compensation. And these documents are the first announcement of any kind made by appellant after it had been definitely determined to adopt such a program for the General Office at the Geneva operations.

4. The letter to Mr. Lawrence Lyman dated April 2, 1951 (Ex. P-8) reads in part:

> "Included in this equity study is a retroactive payment back to March 9, 1947, where due, to those on the payroll at the time the program is installed, and retroactive payments to those on lay-off status at that time."

Further comment is unnecessary — the intent is clear. (See also statement by respondent's witness T. Nelson,

who said that he knew in February, 1951 that employees must be on the payroll in order to receive retroactive pay. (R. 130)).

5. Respondent's reliance on Exhibit P-11 (Resp. Brief, p. 17) is not readily understood. The exhibit was prepared after this suit had been commenced (R. 159) and for the sole purpose of answering respondent's Interrogatory No. 8. (Answer No. 6, R. 51, 61). The computation sought by respondent was simply to determine what payments would have been made to respondent for the retroactive period March 9, 1947 to his termination, had he been fully qualified for any payments. It should be no surprise that such a computation could be made.

III.

There was no custom with respect to general salary increases or otherwise which could be used as a basis for an implied in fact contract relating to a salary inequity program and the details of eligibility for retroactive benefits.

Respondent has relied upon an alleged "custom" as the basis upon which his implied in fact rests. (Resp. Brief p. 14) The court below instructed the jury that they could take into consideration "the establishment of a custom that the plaintiff would be treated in the *same* manner as some other employees who had received or were about to receive retroactive reclassification pay." (Inst. 11, R. 202, emphasis ours.)

In its instruction No. 12, the court stated:

> "If you find that there was an established business custom known by both of the parties hereto, you are instructed that the terms of such custom shall constitute part of the agreement, if any, between the parties since it will be assumed that each of the parties hereto contracted having in mind such custom."

It is elementary that a custom which is permitted to control the rights of the parties in the manner stated by the trial court must comply with all the requirements of an established business custom. None of such requirements are present in this case.

A. The alleged custom is by respondent's own evidence limited to the subject of general pay increases, and the custom, if any, relative thereto cannot control the rights of the parties with respect to a salary inequity or job evaluation program. The subjects are distinct, separate and unrelated. (R. 60, 97, 126, 136).

B. The evidence does not support the existence of any custom at Geneva Steel Company prior to respondent's termination of employment.

Respondent has alleged a custom as to general salary increases. The following evidence was presented to support the allegations:

> Witness T. Nelson: ". . . It was customary" that when "the hourly people would receive a blanket increase, some time following that, may-

be two or three weeks, the general office personnel would receive an increase *somewhat similar* to it." (Emphasis ours) (R. 126)

Respondent stated that he he received *two* general increases during his employment and answered that the general practice as he understood it was,

> ". . . the salaried employees were treated very similar to the hourly or union employees, they were paid a similar amount very shortly thereafter." (R. 136)

F. Ray Friedley:

> ". . . So far as the dates are concerned that is correct, so far as the rates of pay or general increases are concerned, they would differ of course." (R. 97) and "well, general increases being related usually to cost of living increase, the treatment would be similar."

J. D. Dillon: (R. 60)

"Q. Were general pay increases granted union employees and non-unions employees at or near the same time?

A. Yes.

Q. Were those pay increases, although not actually the same, *were they comparable and corresponding anywhere near* to the pay increases granted to union employees?" (Emphasis ours).

In addition, the facts, not in controversy, show that there were two general increases granted during respondent's employment at Geneva Steel Company:

(1) April 1, 1947.
Union employees—12-½c per hour.
Non-union salaried employees—$22.00 per month.

(2) July 16, 1948.
Union Employees—9-½c per hour.
Exempt employees—10%.
Non-exempt salaried employees:
(a) Inside the plant—$17.00 per month.
(b) General offices—10%
(c) Respondent received 10% or $26.00 per month.

Further testimony by J. O. Dillon: (R. 80)

> "There was no obligation on the part of the company to follow any particular line;"

and upon further questioning:

> "Actually there was no practice, no procedure on the part of the company which required them to follow both through, or with any group that was not subject to a contract such as we had with the steelworkers." (R. 80)

and on recross (R. 81), Mr. Dillon explained the loose use of the word "policies" and also the procedure used by management in evaluating general increase situations for employees not represented by a union.

It is our position that such evidence does not satisfy the requirements of an established custom. Those requirements as set forth in 25 C.J.S. 78, Customs and Usages, Section 2, are as follows:

> "Stated concisely and generally, a usage or trade custom must be ancient, certain and uniform, compulsory, consistent, general, continued, notorious, reasonable, not in contravention of law and acquiesced in."

With respect to antiquity, the record shows that the custom claimed by respondent allegedly arose by virtue of two general salary increases within a two year period, which salary increases, by respondent's own admission, were not the same as the general wage increases negotiated with the union. It is submitted that the test of antiquity is not met by evidence of such a nature.

The requirement of certainty and uniformity is fundamental to the existence of any established business custom.

In Sickelco v. Union Pacific Railroad Co., 111 F. 2d 746, the court held:

> "We think that the general doctrine is well put in 17 C. J. 451, Custom and Usages, §10; 'A usage or custom of trade must be certain and uniform in order to be binding. It is not sufficient that it is merely as certain as the nature of the business to which it applies will permit. Further, a loose and variable practice will not be allowed to control the rights of the parties, nor will an alleged usage which leaves some material element to the discretion of the individual.'

"And in the same volume of Corpus Juris, 453, Customs and Usages, Sec. 11, 'A custom must be compulsory, and not left to each one's option to obey it. Likewise, a usage, in order to be regarded as entering into a contract, must be clearly distinguished from mere acts of courtesy or accommodation.'"

In Nelson v. Southern Pacific Co., 15 Utah 325, the Utah Supreme Court stated as follows:

"To establish the validity of a custom of trade, the usage must have existed such a length of time as to become generally known, and must be shown to be reasonable, uniform, certain, and not contrary to law.

". . . it is apparent that the court's definition is erroneous, because, as will be observed, it violated one of the essential elements necessary to the existence of a custom or usage of trade, which is that it is certain . . . A custom does not depend upon whether the business in which it is claimed will permit its existence. The question is, does it actually exist? Is it established as a fact? In addition to being certain, the custom or usage must be uniform, reasonable and not contrary to law. There are no comparative degrees as to the certainty of a custom. It is either certain or it is not, and the charge of the court in qualifying this element is erroneous, . . ."

See also:

Security Commercial & Savings Bank v. Southern, etc. Bank, 74 Cal. App. 734, 241 P. 945;

Etna Forge and Bolt Co. v. Youngstown Sheet & Tube Co., 282 F. 786;

Young v. One Hundred and Forty Thousand Hard Brick, 78 F. 149;

Bowling v. Harrison, 6 How. (U.S.) 248, 12 L. ed. 425.

Respondent's evidence fails completely to satisfy this requirement. The facts with respect to general salary increases show, and respondent readily admits, that the increases were not the same. He relies, however, upon a general practice of making "comparable" or "similar" or "anywhere near the same" general increases to support his allegations of an established business custom. Such a contention is untenable. Two general salary increases which were neither certain nor uniform in their application cannot satisfy the certainty requirements necessary for the existence of an established business custom.

A custom must also be compulsory and must not be left to each one's option to obey it, and a usage must clearly be distinguishable from mere acts of courtesy or accommodation. 25 C.J.S. Customs and Usage, Section 5. See, also, Sickelco v. Union Pacific Railroad Co., supra. The record shows and the fact is that the company was not required or obligated in the granting of general increases to employees not represented by a Union and that Geneva Steel Company in its discretion, determined the nature and amount of all pay increases, general or otherwise, with respect to such employees. (R. 81). Surely a

desire on the part of the company to treat its non-union employees in an equitable manner on occasions of two general increases cannot give rise to a binding custom which requires identical treatment for all employees, Union and non-union, in the future. Appellant submits that the evidence nowhere supports the existence of such a custom at Geneva Steel Company.

The requirement of consistency is not satisfied by the undisputed facts. How can two general salary increases which differed from each other and from the general wage increases negotiated with the Union meet this test of consistency?

It should be apparent from the above that there was no custom of any kind at Geneva Steel Company upon which respondent justifiably could rely to establish his alleged implied in fact contract.

CONCLUSION

The far-reaching effect of a decision herein adverse to appellant cannot be over-estimated. Should the decision below be allowed to stand no reason is apparent why appellant would not be required to grant non-union employees every benefit negotiated by the unions. And the same rule would be applied to any employer who had made the slightest effort to treat all his employees in an equitable manner. We believe it may be safely assumed that the labor organizations would be among the first to object. The unions would be deprived of much of the

strength behind their organizing drives if it could be said that all benefits they may secure would as a matter of law be granted to all non-union employees.

And if, in the past two unions representing employees of the same employer had accepted similar contracts, would this court require in all future dealings that each union accept without further ado what the other had negotiated? We believe the answer is obvious.

It is respectfully submitted that the court below erred in denying appellant's motion for a directed verdict and in denying appellant's motion for judgment notwithstanding the verdict. The judgment should be reversed.

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