

1951

W. B. Russell v. The Ogden Union Railway and Depot Company : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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In the
Supreme Court of the State of Utah

W. B. RUSSELL,

Plaintiff and Respondent,

vs.

THE OGDEN UNION RAILWAY
 AND DEPOT COMPANY, a corpor-
 ation,

Defendant and Appellant.

Case No.
 7647

BRIEF OF APPELLANT

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MAY 24 1901

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

STATEMENT OF FACTS

PRELIMINARY STATEMENT

The parties will be referred to as in the court below.
The italics are ours.

In making up the record on appeal the Clerk of the District Court used a stamp on the judgment roll numbering the pages from 1 to 73, inclusive, but did not number the reporter's transcript of the proceedings had at the trial

and the transcript bears the reporter's numbers, pages 1 to 54, inclusive. We will therefore refer to the reporter's transcript of the proceedings had at the trial as (Tr. —) and other portions of the record as (R. —).

This case was tried before the Hon. Charles G. Cowley, Judge of the District Court of Weber County, sitting without a jury, and resulted in a money judgment in favor of the plaintiff and against the defendant in the sum of \$18,892.76, together with costs of suit.

The pleadings in this case appear voluminous owing to the fact that a number of appearances were made before the court prior to trial, which involved hearings on demurrers, various motions, applications for amendment, etc. by both plaintiff and defendant. The issues, however, at the time of the trial were quite simple and in order to be of as much assistance to the court as possible we will endeavor to keep this statement of facts confined to those matters relating to the issues litigated by the parties at the trial and which are pertinent to this appeal. The plaintiff presented the entire facts of his case to the court in a few minutes, owing largely to stipulations entered into and admissions made by the defendant. Plaintiff did not testify and he called no witnesses. Therefore, in the first place, we think we should set forth those facts which were either admitted in the pleadings or stipulated to by the parties at the trial.

The corporate existence of the defendant was admitted and it was admitted that the plaintiff on August 3, 1945 was, and had since August 18, 1941, been employed by the defendant as a switchman at its terminal yards at Ogden, Utah; that there had been in existence since October 1, 1942,

and during all the time of plaintiff's employment, a collective bargaining agreement between the defendant carrier and the Brotherhood of Railroad Trainmen covering wages, working conditions, procedure for discipline, and all such other details usually covered in agreements of this type. The agreement covered all "yardmen" employed by the defendant within the limits of the yards at Ogden, and the defendant admitted and now admits that whatever the duties of employees were, who were classified as yardmen working within the Ogden Yard, they were entitled to all the benefits of this contract (Plaintiff's Ex. "E"), whether they belonged to the Brotherhood of Railroad Trainmen, The Switchmen's Union of North America, some other union, or were members of no union at all. It was undisputed that the plaintiff was a member of the Switchman's Union of North America, performed all of his duties within the limits of the Ogden Yard, was classified as a yardman within the contemplation of the agreement referred to, entitled to the benefits thereof, and subject to its burdens.

On August 3, 1945, pursuant to notice, the plaintiff appeared, with the Local Chairman of the Switchmen's Union of North America as his representative, before the Assistant Superintendent of the defendant company to answer a charge of violating the terms of the collective bargaining agreement governing his employment; specifically, for having been absent from duty for a period in excess of ten days without having secured and filled out "Form 153" as provided for in Article XIII, Section 55(b), of the collective bargaining agreement (Plaintiff's Exhibit "E"). The testimony was stenographically reported (Plaintiff's Ex.

"A"), and as the examiner found that the plaintiff was guilty of the charge, the plaintiff was dismissed from the service of the defendant company on August 4, 1945. No issue was made and no evidence was offered at the trial by the plaintiff in support of any claim that the defendant company had failed to follow the agreement in giving the plaintiff proper notice of the time and place of hearing, opportunity to prepare any defense he cared to, or that he was denied the right to a representative of his own choosing, or full opportunity to be heard in person or to have witnesses to testify in his behalf, or to present any other evidence he desired. The only claim plaintiff made at the trial in support of his alleged right to recover was that he was not given a "fair and impartial hearing" and was dismissed without "just cause," and that the defendant therefore was guilty of a breach of the collective bargaining agreement in dismissing him from service.

The plaintiff in his complaint demanded that the court award him damages for "all time lost," asking pay for every single day, that is, 365 days a year, from the date of plaintiff's discharge August 4, 1945, to the date of trial September 7, 1950 (Complaint R. 4; Amendment to Complaint R. 43). He also asked the court to order the defendant to reinstate him in his former employment without any impairment of his seniority rights. The trial court, it appears, decided the case entirely upon the written transcript of the hearing before the defendant's Assistant Superintendent, and on that alone, and entered judgment for the full amount prayed for, \$18,892.76, but did not direct the defendant to reinstate plaintiff in his employment.

The defendant in its answer (R. 5) and in its amendment to its answer (R. 14), denied that it had dismissed the plaintiff without sufficient cause and justification and denied the charge that the plaintiff's conduct failed to show a violation of the collective bargaining agreement under which he was employed and alleged affirmatively that the conduct of the plaintiff was in violation of said agreement and that the dismissal was justified. The court admitted the transcript of the investigation, considered it as substantive evidence and conclusive, although the witnesses are not sworn at such investigations, and refused to hear any evidence offered by defendant to show it was justified in dismissing the plaintiff.

The defendant also denied that the plaintiff had been damaged in any sum by reason of the matters charged in the complaint and in addition thereto set forth the following affirmative matters:

FIRST: That any damages plaintiff might have suffered could have been mitigated by the plaintiff and averted or avoided, in whole or in part, by plaintiff securing remunerative employment after his dismissal, other than employment by the defendant (R. 6).

SECOND: That the plaintiff was not entitled to reinstatement or to recover damages for the reason that he had not, following his dismissal, complied with Article VIII, Rule 38, of the agreement covering the procedure upon application for reinstatement (the detail of which will be covered hereinafter), and that the defendant was powerless to reinstate the plaintiff at any time after his dismissal without violating the agreement as to all of its other employees (R. 14).

THIRD: That the plaintiff failed to object to his dismissal until the 14th day of January, 1946, and that therefore, in any event, he would not be entitled to recover any lost time or damages between the date of his dismissal and the 24th day of January, 1946, account Article VIII, Rule 38, of the agreement providing that objection to dismissal must be filed "not later than thirty days from the date of dismissal; otherwise, pay for lost time will commence ten days after date of letter of objection." (R. 15, and the agreement, Plaintiff's Ex. "A".) (The court respected this provision of the contract and did not give plaintiff "lost time" for this period, so it is not discussed hereafter.)

FOURTH: The defendant pleaded that the plaintiff had, through a representative of the Switchmen's Union of North America, whom he had appointed as his representative to handle his grievance with the defendant, confessed that his testimony given at the hearing was false, advised the defendant that his claim was withdrawn and advised the defendant that it might consider the case "closed," and that the defendant company ever since receiving such advice on May 14, 1946 had treated the matter as closed and terminated and that by reason thereof plaintiff had no rights under said agreement, or otherwise, which he could assert against the defendant company for back wages or reinstatement, and if any such right ever did exist plaintiff was estopped to assert the same (R. 15, 16).

The plaintiff's case having been presented to the court almost entirely on defendant's admissions in the pleadings and stipulations entered into at the trial, we do not anticipate that counsel for the plaintiff can take any serious exception to our statement thus far.

In connection with the first affirmative defense the undisputed evidence was that the plaintiff earned between the date of his dismissal and the date of trial in outside employment the sum of \$7,774.39. The trial court refused to take this into consideration in mitigation of damages.

With respect to the second affirmative defense, Article VIII, Rule 38, of the agreement under which plaintiff was employed (Plaintiff's Ex. "E") provides in part as follows:

"In case dismissal is found to be unjust, yardmen shall be reinstated and paid for all time lost, provided, objection has been filed with the Superintendent in writing not later than thirty days from date of dismissal, otherwise, pay for time lost will commence ten days after date of letter of objection.

"Reinstatement will not be permitted after the expiration of six months from date of dismissal, unless agreeable to the management *and* the general committee, except that a case pending with either the BRT or ORC at the expiration of the six-month period will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be obligatory to consult the committees representing these classes of employes in considering the case for reinstatement."

The plaintiff did nothing about seeking reconsideration or reinstatement until the lapse of nearly five and a half months, at which time, that is, January 14, 1946, J. B. Hudgens, Local Chairman of the Switchmen's Union of North America, wrote to Mr. R. E. Edens, defendant's Superintendent at Ogden, asking him to reconsider the decision and reinstate Mr. Russell in his employment (Plaintiff's Ex. "B"). On January 22, 1946, Mr. R. E. Edens,

the Superintendent, advised Mr. Hudgens that this application for reinstatement of Russell was denied. The Switchmen's Union of North America was authorized in writing by Mr. W. B. Russell to represent him and attached to Mr. Hudgen's letter to Mr. Edens is such written authorization, which at the trial was not disputed (Tr. 4). At the expiration of the six-month period following dismissal there was nothing pending with either the BRT or ORC and the defendant in connection with this case.

Mr. H. C. Beckett, who was and for 15 years had been, the Local Chairman of the Brotherhood of Railroad Trainmen in the Ogden Yards, testified that the BRT was the sole and exclusive bargaining agent for the yardmen in the Ogden Yards (Tr. 44, 45); that Mr. Russell, in person or by or through anyone else, never at any time requested or solicited the BRT in the Ogden Yards to petition for his reinstatement. Mr. Edens testified that he never at any time following the dismissal received an application or petition from either the Brotherhood of Railroad Trainmen or the Order of Railroad Conductors during the six-month period or thereafter for reinstatement or reconsideration of the plaintiff's dismissal (Tr. 41, 42).

We then sought to prove that the Brotherhood of Railroad Trainmen had never been, at any time, agreeable to the reinstatement of Mr. Russell, and although Mr. Beckett so testified, his answers were stricken (Tr. 46). As there was not pending from the Brotherhood of Railroad Trainmen or the ORC (Mr. Edens' testimony Tr. 41, 42), or from anyone else an application for reinstatement at the expiration of the six-month period following dismissal, it

was necessary to show that it was not agreeable to the "General Committee" of the BofRT to reinstate the plaintiff. Two things were necessary to support this affirmative defense, first, that at the expiration of the six-month period following dismissal there was no application for reinstatement of the plaintiff pending with the management from either the BofRT or the ORC; and second, to show that the General Committee was never agreeable at any time after the six-month period had expired to the plaintiff's reinstatement. The court permitted us to prove through Mr. Edens' testimony referred to above and appearing at Tr. 41, 42, that at no time did the Brotherhood of Railroad Trainmen or the ORC have pending with the management an application for reinstatement of the plaintiff, but refused to permit us to prove that the "General Committee" was unwilling to consent to the plaintiff's reinstatement after the six-month period from date of dismissal had expired. We were prepared to show that the "General Committee" as used in the agreement meant the General Committee of the Brotherhood of Railroad Trainmen, and that the ORC was not involved or required to give its consent after the expiration of six months to reinstatement, but in view of the fact that the testimony of Mr. Beckett, the Local Chairman of the BofRT, that the BofRT was not agreeable to the reinstatement (Tr. 46) was promptly stricken, we think we were justified in not offending against the court's ruling by pursuing the matter further. With no application for reinstatement pending from either the BofRT or ORC, and the BofRT being unwilling to consent to reinstatement after the six-month period, the defendant, had it so desired, could not have reinstated the

plaintiff without breaching the agreement with every employe in the Ogden Yard who would be set down one place on the seniority roster because of plaintiff's reinstatement. We apologize for interjecting in this "statement of facts" the foregoing explanatory matter, but it seemed necessary in order to establish the significance of this affirmative defense.

With respect to the third affirmative defense, the court respected the contract and did not allow "lost time" as damages between the date of dismissal and ten days after receipt of plaintiff's application for reinstatement.

With respect to the fourth affirmative defense, the defendant introduced a letter from Mr. C. E. McDaniels, Acting Vice President of the Switchmen's Union of North America, dated February 15, 1946, addressed to Mr. F. C. Paulsen, Vice President of the defendant company (Plaintiff's Ex. "D"), to which was attached the written authorization of the plaintiff authorizing the Switchmen's Union of North America to represent him, and in which reconsideration and reinstatement was requested by the plaintiff.

Defendant also introduced a letter written by Mr. McDaniels May 14, 1946 to Mr. F. C. Paulsen (Defendant's Ex. "3"), in which he refers to an agreement reached between himself and Mr. Paulsen wherein he undertook to investigate "undesirable procedure on the part of Mr. Russell resulting in false testimony evidenced during formal investigation of August 3, 1945." He then states in the last paragraph of his letter that their investigation of the

alleged false testimony of Mr. Russell has been completed and that, and we quote, "we are withdrawing the grievance and the case is closed."

Mr. R. E. Edens, Superintendent of the defendant company, was sworn and testified that Mr. McDaniels' last letter (defendant's Ex. "3") was given to him by Mr. Paulsen, to whom it was addressed, and that ever since said date the defendant company had considered the matter a closed issue (Tr. 42, 43).

The original fully executed contract between the defendant and BofRT was introduced in evidence and it was stipulated that plaintiff's Exhibit "E", a true copy, might be substituted therefor (Tr. 44).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN ADMITTING THE TRANSCRIPT OF THE PROCEEDINGS AT THE OFFICIAL INVESTIGATION AS SUBSTANTIVE EVIDENCE OF THE FACTS THEREIN STATED.

POINT II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR A JUDGMENT OF NONSUIT.

POINT III.

THE TRIAL COURT ERRED IN LIMITING THE EVIDENCE ON THE QUESTION OF WHETHER OR NOT DEFENDANT HAD BREACHED THE COLLECTIVE BARGAINING AGREEMENT SOLELY. UPON THE TRANSCRIPT OF THE UNSWORN TESTIMONY GIVEN AT THE OFFICIAL INVESTIGATION; IN REFUSING TO ADMIT EVIDENCE PROFFERED BY THE DEFENDANT TO SHOW JUSTIFICATION FOR PLAINTIFF'S DISMISSAL; AND IN REFUSING TO PERMIT THE DEFENDANT TO PROVE THAT PLAINTIFF'S TESTIMONY CONTAINED IN SAID TRANSCRIPT WAS FALSE.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ASSESSING AND FIXING DAMAGES:

(a) IN REFUSING TO ALLOW AS MITIGATION OF DAMAGES THE AMOUNT OF MONEY EARNED BY THE PLAINTIFF IN OTHER EMPLOYMENT BETWEEN THE DATE OF HIS DISMISSAL BY THE DEFENDANT AND THE DATE OF TRIAL;

(b) IN HOLDING THAT THE MEASURE OF DAMAGES FOR BREACH OF THE CONTRACT WAS THE AMOUNT PLAINTIFF

WOULD HAVE EARNED HAD HE WORKED EACH AND EVERY DAY AT HIS FORMER EMPLOYMENT WITH THE DEFENDANT BETWEEN THE RECEIPT BY DEFENDANT OF HIS APPLICATION FOR REINSTATEMENT AND THE DAY OF TRIAL, SEPTEMBER 7, 1950, A PERIOD IN EXCESS OF FIVE YEARS;

(c) IN REFUSING TO PERMIT THE DEFENDANT TO PROVE THAT THE PLAINTIFF DURING HIS EMPLOYMENT BY THE DEFENDANT WORKED ONLY A PORTION OF THE TIME ALTHOUGH STEADY EMPLOYMENT WAS AVAILABLE TO HIM.

POINT V.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO PROVE THAT IT WAS POWERLESS TO REINSTATE THE PLAINTIFF IN HIS EMPLOYMENT AFTER THE EXPIRATION OF SIX MONTHS FROM THE DATE OF DISMISSAL WITHOUT THE CONSENT OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AND IN EXCLUDING DEFENDANT'S PROFFER OF EVIDENCE TO SHOW THAT THE BROTHERHOOD OF RAILROAD TRAINMEN WAS NEVER AT ANY TIME WILLING TO CONSENT TO PLAINTIFF'S REINSTATEMENT BY THE DEFENDANT.

POINT VI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THAT THE PLAINTIFF WAS WITHOUT ANY RIGHT TO MAINTAIN AN ACTION FOR DAMAGES FOR BREACH OF THE CONTRACT, OR IF SUCH RIGHT AT ANY TIME DID EXIST, IN FAILING TO FIND THAT PLAINTIFF WAS FORECLOSED AND ESTOPPED FROM ASSERTING THE SAME.

POINT VII.

THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW WHOLLY UNSUPPORTED BY COMPETENT EVIDENCE IN THE CASE, AND IN ENTERING ITS JUDGMENT UPON SUCH FINDINGS AND CONCLUSIONS.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ADMITTING THE TRANSCRIPT OF THE PROCEEDINGS AT THE OFFICIAL INVESTIGATION AS SUBSTANTIVE EVIDENCE OF THE FACTS THEREIN STATED.

We think it might be helpful if at the very outset we set forth just what the nature of this proceeding was in the court below.

This case is a common-law action for breach of contract and nothing else. The trial court had the right to

determine whether or not the collective bargaining agreement between the carrier and its employe, the plaintiff, had been breached and to apply ordinary common-law principles of the law of damages in assessing damages, if it found that the defendant carrier had breached the contract. That was the full extent of the trial court's power to act in a proceeding of this kind, and it was wholly without jurisdiction to decide anything else. *Slocum v. Delaware, Lackawana & Western Railroad*, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577, decided by the Supreme Court of the United States April 10, 1950. *Order of Railway Conductors v. Southern Railway Company*, 339 U. S. 255, 94 L. Ed. 542, 70 S. Ct. 585, also decided by the Supreme Court of the United States April 10, 1950. *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322.

We think it is generally conceded that following the decision of the United States Supreme Court in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, the bar, and bench both state and federal, considered that an employe of a carrier had an election to pursue his remedy for an alleged breach of a railway collective bargaining agreement either before the administrative body set up by the Railway Labor Act, that is, the National Railroad Adjustment Board, or to take his grievance into the courts, either state or federal. Whether such generally held opinion was justified or not is really immaterial to this discussion because the Supreme Court of the United States in the *Slocum* case, *supra*, definitely held that the jurisdiction of the Railroad Adjustment Board to adjust grievances and disputes of all kinds arising out of collective bargaining agreements in the railroad industry, is

exclusive; that no court, either state or federal, has a right to usurp the exclusive powers of the Railroad Adjustment Board, the congressionally designated agency, to determine *any* question involving the interpretation of such agreements. The case holds that no court, state or federal, has the power to order reinstatement by a carrier of any employe. The decision does, however, countenance maintaining in a court a suit by an employe for damages for breach of a collective bargaining agreement. This decision instantly drew the attention of the entire railroad industry and has become a landmark.

Mr. Justice Black, who delivered the opinion of the court, stated as follows:

“Section 3 of the Railway Labor Act confers jurisdiction on the National Railway Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees ‘growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *.’ The question presented is whether state courts have power to adjudicate disputes involving such interpretations when the Adjustment Board has not acted.”

The defendant railroad in the Slocum case had separate collective bargaining agreements with the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks. Each organization claimed that its members were entitled to certain jobs. The railroad agreed with the Clerks Union. The telegraphers protested and, it appears, pursued their claims as required under the Railway Labor Act in such respects as was necessary and preliminary to invoking the jurisdic-

tion of the National Railroad Adjustment Board. The railroad brought a suit for declaratory judgment in the New York State court, praying for an interpretation of both agreements and for a declaration that the clerks' agreement covered the jobs in controversy and naming both unions as defendants. The telegraphers moved to dismiss on the grounds that the Railway Labor Act left the state court without jurisdiction to interpret the contracts and adjudicate the dispute. The motion was denied and the judgment denying the motion was affirmed by the Court of Appeals of New York. As Mr. Justice Black stated in his opinion,

“The majority (of the New York Court of Appeals) thought that our opinion in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, left state courts free to adjudicate disputes arising out of a carrier-union collective bargaining agreement without obtaining the Board's interpretation of that agreement.”

As we stated above, the New York Court of Appeals was following the opinion generally held by the legal profession that the parties to collective bargaining agreements in the railroad industry had a right to elect whether they would present disputes under such agreements to the Railroad Adjustment Board or to the courts. While the facts in the *Slocum* case, *supra*, are at variance with the case now before this court, the principle which was therein adjudicated is clearly applicable. The opinion is short and we quote therefrom such important portions as appear pertinent. Mr. Justice Black:

“In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retro-

spective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. * * *

“The Act (Railway Labor Act) represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board’s initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation’s railway systems.

“The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors v. Pitney*, 326 U. S. 561. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused ‘to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents.’ Our ground for this holding was that the court ‘should not have interpreted the contracts’ but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. This reasoning equally supports a *denial of power in any court*—state as well as federal—to *invade the jurisdiction* conferred on the Adjustment Board by the Railway Labor Act.

“Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*, 312 U.

S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking *reinstatement* and *back pay*. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. *A common-law or statutory action for wrongful discharge* differs from any remedy which the Board has power to provide and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement its interpretation would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the Moore case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion."

The judgment of the New York Court of Appeals was thus reversed and the cause was remanded for further proceedings not inconsistent with the Supreme Court's opinion.

In Order of Railway Conductors v. Southern Railway Company, supra, decided by the Supreme Court of the United States on the same day as the Slocum case, it appears that a dispute arose between certain conductors and the railroad concerning the railroad's obligation under the collective bargaining agreement to give the conductors extra pay for certain services. Unable to agree through negotiation, the railroad brought suit for a declaratory

judgment seeking to have the court hold that the agreement did not require the claimed payments. The declaratory judgment requested was entered and the judgment affirmed by the Supreme Court of South Carolina. The Supreme Court of the United States, although the same principle was decided the same day in the *Slocum* case, said as follows:

“For reasons set out in the *Slocum* case, we hold that the South Carolina court was without power to interpret the terms of this agreement and adjudicate the dispute. We discuss this case *separately* because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes. After the railroad had sued in the state court, the union filed a petition for hearing and award before the Adjustment Board. The state court nevertheless proceeded to adjudicate the dispute. Sustaining the state court’s action would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by Section 3 First (i) of the Railway Labor Act, 45 U. S. C. A. Section 153 First (i), which provides, that after negotiations have failed ‘either party’ may refer the dispute to the appropriate division of the Adjustment Board. The judgment * * * is reversed.”

The Supreme Court of the United States thus holds that an employe accepting his discharge as final may bring a suit in the courts, state or federal, in the nature of a common-law action for breach of contract and that there is nothing else he may maintain a suit for, based on any right growing out of a collective bargaining agreement between a carrier and its employes, and that no court has jurisdiction

to determine any other question under such agreements. It may be that a court, as was said in the *Slocum* case, "in handling a case must consider some provision of a collective bargaining agreement" in order to determine whether or not there has been a breach. It is difficult to see how a court could determine whether or not such a contract had been breached without examining the contract. But the *Slocum* case clearly holds that that is the full extent of the court's power. The instant case was tried by the defendant on such a theory and on the authority above set out. It is an old-fashioned, garden-variety, common-law suit for breach of contract and nothing else, and the measure of damages for a breach, if found, is to be determined by the common-law and decisional law of damages.

Being an ordinary common-law action for breach of contract, we cannot understand why it should not be tried as such; why the plaintiff should not be entitled to produce all competent material evidence available to prove the defendant breached the contract; and why the defendant should not be permitted to produce witnesses, documentary evidence, and defend by introducing any competent material evidence available to show that it had not breached the contract. Instead of trying the case as a simple suit for breach of contract, the court, over our objection, permitted a transcript of unsworn testimony given at the official investigation conducted by the carrier to be introduced as substantive evidence, excluded every particle of evidence offered by the defendant in defense of the charge that the contract had been breached, and decided the case against the defendant solely and exclusively upon a typewritten sheet of unsworn testimony.

The plaintiff's entire case consisted of the introduction of the transcript of the testimony taken at the investigation (Plaintiff's Ex. "A"); a letter written by J. B. Hudgens, Local Chairman of the Switchmen's Union of North America, to Mr. R. E. Edens, defendant's superintendent, dated January 14, 1946, asking reinstatement of the plaintiff (Plaintiff's Ex. "B"); Superintendent Edens' reply to Mr. Hudgens of January 22, 1946 declining to reinstate the plaintiff (Plaintiff's Ex. "C"); and a letter from Mr. C. E. McDaniels, Acting Vice President of the Switchmen's Union of North America, to Mr. F. C. Paulsen, Vice President of the defendant company, dated February 15, 1946, again asking reinstatement of the plaintiff (Plaintiff's Ex. "D"). The plaintiff did not take the witness stand and called no other witnesses. The defendant stipulated as to what plaintiff's rate of pay would have been between the date of his dismissal and the date of trial had he not been discharged, having actually furnished these figures to the plaintiff, and also stipulated that the plaintiff could have, had he desired, worked steadily between the date of his dismissal and the date of trial, with the understanding that we were not admitting that plaintiff would have done so (Tr. 11, 12). The defendant offered no objection to any of plaintiff's exhibits, except Exhibit "A", the transcript of investigation, but as to Exhibit "A" we stated as follows:

"Mr. Bronson: I have an objection, your Honor. I am not willing to stipulate that Exhibit "A" be received. I am willing to stipulate as to B, C and D that they may be received.

"The Court: As to Exhibit "A", is there an objection?

“Mr. Bronson: Yes, I object on the grounds that it is hearsay and self-serving, and in a proceeding in a court can only be used to the extent it states an exception to the hearsay rule by virtue of admissions it may contain therein. I am willing to stipulate plaintiff’s proposed Exhibit “A” is a transcript of the proceedings had at the time of the investigation of Russell, with the exception of the answer to the last question on Page 1, which, I understand, is changed, which was changed.

“The Court: With the pencil mark around it?

“Mr. Bronson: Yes, but your Honor will observe—

“The Court: You mean it was changed after the hearing?

“Mr. Bronson: Before he signed it. I don’t contend he had a right to.” (Tr. 5.)

The colloquy between counsel and the court indicates the position we now take with respect to the admission of this transcript. Of course it could be used at the trial the same as any other document that might contain written admissions, and might be used by either party, if used only for impeachment purposes. The plaintiff was not sworn at the official investigation, was under no compulsion except that of his own conscience to testify truthfully; but even though he had been sworn, it would not have made this transcript admissible in evidence as truth of the matters therein stated, that is, as substantive evidence.

In the case of *Tennison v. St. Louis-San Francisco Ry. Co.*, . . . Mo. . . ., 228 S. W. 2d 718, which was decided by the Supreme Court of Missouri March 13, 1950, and which we

cited to the trial court and discussed at length (Tr. 7), the facts were as follows: The plaintiff had been discharged by his carrier employer following an investigation, for being intoxicated in violation of one of the defendant's operating rules. The contract involved provided:

"Trainmen shall not be suspended, discharged, or unfavorable entries made against their records without just and sufficient cause. In case a trainman is taken off of his run he shall be given a hearing within five days from the time he is taken off, and shall be given sufficient notice in person or in writing, in advance, to have a trainman of his own choice present, who shall be permitted to examine all witnesses and papers pertaining to the case. Charges shall be specific, and he shall have the right to produce witnesses to testify in his behalf. If a trainman is found guilty he will be notified in writing within five days, discipline assessed and cause. If held out of or removed from service unjustly, he will be reinstated, and paid for all time lost."

It was stipulated that the plaintiff was familiar with the rule he was charged with violating. An official investigation was held at the office of the defendant's assistant superintendent and several trainmen made statements there which were reported and transcribed. They were not sworn. The plaintiff testified that he was not intoxicated but that he was "sick." Several of the witnesses at the investigation testified that in their opinion the plaintiff was intoxicated, although one of the witnesses—a brakeman by the name of Foster—testified that he had seen the plaintiff at 5:45 A.M. at Newburg; that he had not seen him at any point prior to that; that he observed his actions and

appearance; that his speech was normal and his appearance was normal and there were no signs of his being intoxicated. Foster was not called to testify at the trial and the court received in evidence the transcript of this unsworn testimony of Foster's given at the investigation. The plaintiff recovered a judgment and the Supreme Court of Missouri reversed, holding that Foster's testimony at the official investigation was hearsay and inadmissible. The court said, at p. 720:

"This statement was, of course, hearsay; but plaintiff contends it was admissible as a declaration against interest of Foster, as a part of the records of defendant and also because of the contract with the Trainmen's Union. None of these contentions can be sustained."

This case is as nearly in point on the facts and the law involved as one would ever expect to find, and the court further stated:

"Plaintiff further claims that the contract with the union required the defendant to justify its action solely upon what was brought out in its investigation and argues that no other evidence can be heard at the trial. However, plaintiff does not wish to so limit himself. Apparently he claims Foster's statement is admissible on that basis; and he also claims that, at least, the contract authorized its use on the theory the agreement was that 'discipline assessed against an employee would be based on evidence brought out at an investigation held by defendant' as provided in the contract. Such claimed construction of the contract is unreasonable. What the contract provided was that trainmen would not be discharged 'without just and sufficient cause.' Methods

were provided for a full investigation of charges and hearing of the employee's side before action. However, defendant is no more precluded thereby from litigating in court the issue of 'just and sufficient cause' than is plaintiff. *Both may bring in any competent evidence they have and object to any incompetent evidence*; and there is no estoppel against defendant because Foster was heard at the investigation required by the contract.

"Plaintiff further argues that Foster's statement was not hearsay because the investigation was conducted by defendant and its officers had the right to examine him. The trouble with this contention is that it was not a proceeding before any one authorized to administer an oath or the power to compel answers, which is essential to effective cross-examination. (Citing 5 Wigmore (3rd Ed.) 58, Sec. 1376; 8 Wigmore 73, Sec. 2195; *Bartlett v. Kansas City Public Service Co.*, 349 Mo. 13, 160 S. W. 2d 740, 142 A. L. R. 666.) We hold that this statement was hearsay and that it was not admissible under any exception to the hearsay rule."

To like effect is the case of *Johnson v. Thompson*, ... Mo. ..., 236 S. W. 2d 1, decided December 5, 1950. This was a suit by the administratrix of a deceased conductor for damages for breach of a collective bargaining agreement in which it was claimed that the deceased had been discharged without "good and sufficient cause" and "without a fair and impartial trial." The charge at the investigation was for violation of Rule G of the company which prohibited use of intoxicants. At the trial a witness named Ogletree, who was present at the official investigation, was allowed to testify that at the investigation Johnson,

the conductor, denied that he was intoxicated at the time and place charged. The court held:

“This testimony was clearly inadmissible (citing the *Tennison* case, *supra*). It is not admissible under any exception to the hearsay rule.”

The court further said:

“Under the issues to be decided in this case this testimony was very important. The defense relies solely upon the issue that the deceased Johnson reported for duty as conductor on defendant railroad while under the influence of intoxicants and unfit for service. The proof, therefore, that defendant denied being intoxicated at the hearing *was on the very issue to be decided in the case*, and therefore constituted reversible error.”

Here, again, the court is holding that the case is to be tried “*de novo*.” That in the trial of the issue as to whether or not the defendant was guilty of the charged violation the unsworn testimony given at the official investigation cannot be admitted as substantive evidence of the facts therein stated. It is precisely what we contend for on this assignment of error.

We cannot state our position any more succinctly than is set forth in the above opinions. A comparison of the agreement in the instant case with that involved in the *Tennison* and *Johnson* cases, *supra*, reveals that they are substantially the same in those particulars involved in this suit. These decisions are in accord with the holding of the Supreme Court of the United States in the *Slocum* case, *supra*; that is, they have treated the situation as a simple

common-law action for breach of contract and held, as we contend for here, that there is no reason for following different procedure or applying different rules of evidence than are customarily applied in such actions.

The discussion of this assignment of error may appear to be unnecessarily extensive to dispose of the simple principle of evidence involved, but it seemed to us desirable to cover at the outset some of the law in this case in a general way. We assert that the trial court committed reversible error in admitting the transcript of the unsworn statements made at the official investigation as substantive evidence of the facts therein stated in the face of the objection made.

POINT II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR A JUDGMENT OF NONSUIT.

The only evidence offered by the plaintiff in addition to the transcript of the investigation, was the letter of January 14, 1946, from J. B. Hudgens, Local Chairman of the Switchmen's Union of North America, to defendant's superintendent, R. E. Edens, asking reinstatement of the plaintiff (Plaintiff's Ex. "B"); Mr. Edens' reply thereto of January 22, 1946, declining plaintiff's reinstatement (Plaintiff's Ex. "C"); the letter of C. E. McDaniels, Acting Vice President of the SUNA, dated February 15, 1946, to Mr. Paulsen, the defendant's Vice President, asking reinstatement of the plaintiff (Plaintiff's Ex. "D"); in addition

to which we stipulated that the plaintiff, had he been so disposed, could have worked steadily between the date of his dismissal and the date of trial, and we stipulated as to what his rate of pay would have been had he elected to work (Tr. 11, 12). There cannot be the slightest doubt but that the plaintiff failed to make a *prima facie* case, if it is concluded that it was error to admit over our objection the transcript of the unsworn statements made at the official investigation. If it was error to admit the transcript as substantive evidence of the matters therein stated, the plaintiff's case when he rested was *completely destitute of any competent evidence* showing a breach of the contract by the defendant and the court should have granted the motion for a nonsuit which was made (Tr. 13).

Even though it was proper for the court to admit the transcript as substantive evidence of the facts therein stated, it was and is our position that nothing therein contained established a *prima facie* case of breach of the contract, but on the contrary, such evidence affirmatively established the fact that defendant had not breached the agreement.

The only charge in the complaint which plaintiff attempted to prove to establish breach on the part of the defendant was that the defendant "wrongfully and arbitrarily discharged the plaintiff" and "dismissed him without * * * cause." Article VIII, Section 38, of the agreement provides in part, and so far as pertinent, as follows:

"Investigations: No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established. The man

whose case is under consideration may be represented by an employe of his choice, who may be a committeeman, who will be permitted to interrogate witnesses. The accused and his representative shall be permitted to hear the testimony of witnesses. Charges will be investigated within 5 days and the result of the investigation will be made known within 3 days.

Article XIII, Sec. 55, provides as follows:

“(b) Yardmen taking leave of absence for a period of over ten days must secure and fill out Form 153 so the leave will be covered as a matter of record.”

It appears from the transcript of the official investigation that the plaintiff was fully aware of the rule which required him to secure and fill out Form 153 to cover an absence in excess of ten days. The following testimony is taken from the transcript, the questions by Mr. H. Caulk, defendant's Assistant Superintendent, the answers by the plaintiff:

“Q. Do you know the rule that you will not absent yourself from duty ten days or over without written leave?

“A. Yes, sir.

“Q. Why didn't you obtain written leave?

“A. Because I was sick in bed at the time.

“Q. Why didn't you ask the office for a leave of absence?

“A. I called just as soon as I got out of bed, soon as *they* called me and told me I was over it.”

At the bottom of the second page of the transcript the following question and answer appear, the question by Mr. Hudgens, Local Chairman of the SUNA, who was representing the plaintiff:

“Q. And you talked to train desk before the expiration of your ten days?

“A. No. They called me on the 31st, they called me out of bed at 6:30 A.M. and told me to be here for investigation and I was too sick and couldn't make it.”

Now it appears to us from the last two questions and answers quoted above that in spite of the fact that the rule required Form 153 to be filled out to cover an absence in excess of ten days, that the management, in case the plaintiff was sick, would have considered the rule sufficiently complied with if the plaintiff had called the office or the train desk on the telephone or had someone do so on his behalf. Both the examiner and the union representative, Hudgens, by their questions indicated that a telephone call by plaintiff or someone in his behalf would, in case of sickness, be considered compliance with the rule, even though Form 153 was not filled out. When the plaintiff answered, “I called just as soon as I got out of bed, *soon as they called me* and told me I was over it,” he was referring to the call he received from the company advising him to appear for an official investigation. There is nothing in the transcript and there was nothing in the evidence to indicate that anyone called him at any time and told him he “was over it” and he clears this up in his answer to the last question quoted from the transcript above wherein he admits

that he never called the train desk before the expiration of the ten days, and never got in touch with his employer until his employer called him on the 31st of July, 1945. As in the case of *Tennison v. St. Louis-San Francisco R. Co.*, supra, the fact that he failed to comply with a company rule and regulation, of which he was fully aware, is sufficient to justify his dismissal in the absence of a showing that he was disabled from complying therewith. He gave as his reasons for not complying with the rule that he was "sick." He gave no reason as to why his wife or someone else could not, at his request, have notified his employer that he was sick and would be absent in excess of ten days, even though it was a fact that he was "sick." The questions and answers contained in the transcript may seem somewhat innocuous to one not fully conversant, as was said in the *Slocum* case, supra, with "railroad problems and railroad jargon." However, to one familiar with the on-the-ground operation of carrier-employee disciplinary matters, these questions and answers take on a great deal of significance. The examiner called the plaintiff's attention to the fact that since the first of 1945 and up until the time he was summoned for an investigation he had worked much less than half the time; that he had worked 16 days in January, 13 days in February, 12 days in March, 8 days in April, 10 days in May, 3 days in June, 6 days in July, although with respect to July it is admitted he was off work part of the time owing to having been scalded while off duty. The plaintiff did not dispute the fact that he was only working a few days each half. What is the significance of this? By working a few days each half of a month this man retained his seniority and continued to build up seniority. Such conduct

left him free to occupy himself for the most part in any way he saw fit other than attending to his job with the defendant. Such conduct was seriously prejudicial to the rights of the defendant's other employees on the seniority list, and for the company to tolerate it certainly violates the spirit, if not the letter, of the agreement. It will be said that he was not charged with this offense. Assuming this to be true, can it be said that such admitted conduct on his part did not involve his credibility and furnish a reasonable basis for the examiner to doubt his word when he endeavored to explain his violation of the offense he was charged with by stating that he was "sick." He admitted that he knowingly violated the rule he was charged with violating. We do not think that the examiner was any more required to believe his explanation that he was "sick" than a jury would be required to believe such testimony in the trial of either a civil or criminal action. It should be again pointed out that the employe in these investigations cannot be required to give sworn testimony.

The plaintiff was asked the following questions:

"Q. I understand you own a club up the canyon.

"A. I don't.

"Q. You work up there don't you?

"A. Yes."

When it came time for the plaintiff to sign the transcript of the testimony he struck out the answer "yes" and wrote in pencil "no." We do not contend that he did not have a right to do this, but we do contend that the examiner had a right to believe that the truth was "yes" and not "no."

We think the foregoing question and answer has some bearing on the plaintiff's credibility when he stated he was "sick" and the examiner had a right to consider it. Does any member of the court believe, or does anyone believe, that a few months ago when the railway system of the United States was so badly crippled that the federal government had to intervene on account of thousands of switchmen simultaneously reporting "sick," that they were in fact "sick?"

The evidence with respect to the plaintiff's working but a few days each half over a long period of time and admitting and later denying that he had other employment, has an additional significance in that the examiner was entitled to take it into consideration in connection with the assessing of discipline.

The National Railroad Adjustment Board has consistently held that the imposition of discipline will not be reviewed unless in their opinion the carrier's judgment was arbitrary or in bad faith and even though, had the Board been sitting in judgment originally, they would have imposed less drastic discipline, and that not only the charge under investigation but the employe's general conduct during the period of his employment may be considered by the employer in imposing discipline. In Award No. 9542 of the National Railroad Adjustment Board, *BofLF&E v. Redding Company*, it was said:

"The discipline of employes is, necessarily, a prerogative of management. Imposing discipline, under this prerogative, involves the exercise of discretion on the part of management, which, while

it may not be abused, should not be interfered with when reasonably exercised.”

In Award No. 10649, *Engineers v. Southern Pacific*, the Board said:

“In a case of discipline this division interferes to set aside or to modify a decision *only* when the procedure adopted by the carrier has denied to an employe a fundamental right or when the decision imposing the discipline is manifestly unjust.”

In Award No. 13356, *Trainmen v. Union Pacific*, it was said:

“The carrier duly charged its employe, one Price, with violation of certain operating rules and upon hearing thereof said employe was found to have violated said rules, and the discipline assessed was dismissal. The *credibility* of the witnesses and the *weight* to be given their testimony is determined by the hearing officer and in the absence of a showing his judgment was arbitrary or capricious, it will not be disturbed.”

In Award No. 12883, *Conductors and Trainmen v. Kansas, Oklahoma & Gulf*, the Board said:

“The severity of the discipline imposed is not subject to determination here.”

The Railroad Adjustment Board has also consistently held that in assessing discipline an employe’s past record may be taken into consideration. In Award No. 1599, *Porters v. The Pullman Company*, the Board said:

“In disciplinary matters it is not only proper, but essential, in the interest of justice, to take past

record into consideration. What might be just and fair discipline to an employe whose past record is good, might, and usually would, be utterly inadequate discipline for an employe with a bad record."

In Award No. 4229, *Porters v. The Pullman Company*, a disciplinary action for insubordination, the Board said:

"The organization also objected to the consideration or review of a past incident of insubordination by claimant. We have said before that in fixing the penalty it is proper to consider the past record of an employe." (Citing Award 1599.)

In Award No. 12427, *ORC v. Western Pacific Railroad Company*, the Board took into consideration the claimant's past *good* record, ameliorating the discipline assessed on account thereof. The Board said:

"In view of the claimant's past record and the circumstances under which the violation occurred, we think the discipline imposed was excessive in considering the nature of the offense. In view of the length of time the claimant has been out of service by reason of the sentence imposed, we think he has been sufficiently disciplined and that he should now be immediately reinstated with seniority rights unimpaired but *without pay for time lost*."

In Award No. 12429, *Brotherhood of Railroad Trainmen v. Western Pacific Railroad Company*, the Board said:

"There is ample evidence in the record to sustain the carrier's finding that claimant was guilty of violating its operating rules as charged. Such finding authorized the carrier to impose discipline. Of course, this authority must not be abused by imposing excessive discipline and thus arbitrarily take

from such employe rights which he had earned under the agreement. But this does not mean that the carrier must in every instance impose the same sentence for like or similar offenses. What it does mean is that the sentence imposed in each case should be reasonable, that is, just and proper, considering the nature of the offense *and* the past record of the employe involved."

In Award No. 13142, *BofLF&E v. Union Pacific Railroad Company*, the Board said:

"Past record, good or bad, may be taken into consideration in fixing the discipline."

The above quotations could be multiplied by the score but the above awards are all recent and reflect the consistent attitude of the National Railroad Adjustment Board. We do not say that the opinions of the Railroad Adjustment Board are binding on our courts, but when the Supreme Court of the United States has said that Congress placed exclusive jurisdiction in the Railroad Adjustment Board to interpret collective bargaining agreements between carriers and employes, their opinions and interpretations, it seems to us, should carry considerable persuasion with the courts.

The Railway Labor Act was never designed to interfere with the discretion of a carrier in selecting its own employes or in discharging them. There reposes in the carrier full discretion to discharge any of its employes at any time and for any cause except as it may be inhibited by some provision in the collective bargaining agreement.

In *Texas, N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 74 L. Ed. 1034 at 1046, 50 S. Ct. 427, it was said:

“The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employes or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employes to have representatives of their own choosing.”

In *Virginia Railway Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 781, 57 S. Ct. 592, the Supreme Court again said, referring to the provisions of the Railway Labor Act:

“They do not interfere with the normal exercise of the right of the carrier to select its employes or to discharge them.”

In *Beeler v. Chicago, R. I. & P. Ry. Co.*, 169 F. 2d 557, the court said:

“The act does not interfere with the normal right of the employer to select its employes or discharge them or to create or abolish positions, so long as it does not impair the collective bargaining process.”

It is a matter of general knowledge, at least among all of those who have had the slightest contact with the Railroad Adjustment Board, that before that tribunal the employe fares exceedingly well. Perhaps we should not question the plaintiff's election to sue for damages in our courts, which he has a right to do, but he originally started

out to secure not only damages, but an order for reinstatement at the hands of the court. It is extremely rare for an employe to forego the advantage he has before the Board in a controversy with the employing carrier. We do not believe this court has ever had before it a case of this nature. We feel justified in assuming that plaintiff and his counsel were pessimistic about selling the Railroad Adjustment Board the "bill of goods" they so successfully pawned off on the trial court in this case.

In denying defendant's motion for a nonsuit we understood the court to indicate that even though the plaintiff was guilty of the charge, it did not involve a "substantial" breach and should not be considered a breach of the contract warranting any disciplinary action (Tr. 15). We do not think such a construction by the court was warranted and before the case was concluded we offered to prove that the rule had been generally enforced against employes who violated it, and we offered to prove that Mr. Hudgens, the Local Chairman of the Switchmen's Union of North America, had himself been dismissed from the service of the company for a violation of this very rule which plaintiff was charged with violating. The court refused to permit the proof, which was error, if the reason for denying the motion for nonsuit was because he did not consider plaintiff's violation of Rule 55(b) a substantial breach. And further, in this connection, we do not think that the court has a right and we are sure the Railroad Adjustment Board would not think it had the right, to determine whether the breach of any given operating rule was or was not sufficient to warrant discipline by the carrier, but that this is a pre-

rogative to be exercised in the discretion of the management. Absenteeism is of peculiar concern to the railroad industry. No rule is more strictly enforced. The necessities of the business require it. The defendant is a public utility charged by government fiat with maintaining the "free and uninterrupted flow of interstate commerce." The absence of a very few employes at any given point without their giving notice to the carrier so as to enable it to provide other employes, can cripple operations, delay trains and cause all manner of disturbance, to the detriment of the public generally. The rule must be enforced against the engineer of a streamline train as well as against a switchman, it must be and is enforced against all employes whose duties involve the movement of trains.

We think the plaintiff's evidence showed a failure on his part, without any excuse therefor, to comply with what he knew to be an important rule of the company governing his employment. Even had he been "sick" he was not so disabled that he could not have complied with the rule in question or notified his employer of his intended absence from duty. The contract makes no exception for failure to comply with the rule on account of sickness. If an employe was unconscious, or in jail, or subject to any condition where it was really impossible for him to give notice of his absence, no one would try to enforce this provision of the contract against him. Such a situation would rarely arise. We know from common experience that an employe can and does let the "boss" know when he is unable to come to work.

We think that the trial court committed reversible error in refusing to grant defendant's motion for a nonsuit,

even though it is held that the court was justified in deciding the case solely on the unsworn testimony taken at the official investigation.

POINT III.

THE TRIAL COURT ERRED IN LIMITING THE EVIDENCE ON THE QUESTION OF WHETHER OR NOT DEFENDANT HAD BREACHED THE COLLECTIVE BARGAINING AGREEMENT SOLELY UPON THE TRANSCRIPT OF THE UNSWORN TESTIMONY GIVEN AT THE OFFICIAL INVESTIGATION; IN REFUSING TO ADMIT EVIDENCE PROFFERED BY THE DEFENDANT TO SHOW JUSTIFICATION FOR PLAINTIFF'S DISMISSAL; AND IN REFUSING TO PERMIT THE DEFENDANT TO PROVE THAT PLAINTIFF'S TESTIMONY CONTAINED IN SAID TRANSCRIPT WAS FALSE.

Our contention in connection with the first phase of this assignment of error is that the court should have permitted, as was said in the *Tennison* case, *supra*, both sides "to bring in any evidence they have and object to any incompetent evidence," in determining whether or not the defendant had breached the contract in dismissing the plaintiff. In other words, the trial court on the authority not only of the *Tennison* and *Johnson* cases, but of the *Slocum* case, in trying a simple common-law action for breach of a contract, should have permitted an investigation *de novo* to determine whether or not the defendant was warranted

in dismissing the plaintiff from service. The position we contend for under the first phase of this assignment of error is simply another facet of the assignment of error discussed under Point I and the cases there cited and the argument there made are equally applicable at this point. We will not prolong this brief by unnecessary repetition, and we incorporate herein what was said on this matter in our discussion under Point I.

To show justification for the plaintiff's dismissal we offered to prove that during the four years beginning with the 18th of August, 1941, up to the 1st of August, 1945, when the plaintiff was dismissed, he could have, had he so desired, worked every day; and owing to the fact that the war was in progress could have frequently worked a double shift. That, in fact, during this period of time his earnings for the year 1941 were \$888.00; 1942, \$2,449.27; 1943, \$2,308.44; 1944, \$1,622.71; and the first seven months of 1945 preceding his dismissal a total of \$431.71. It thus appears that his total earnings for a period of four years aggregated \$7,700.13 (Tr. 34, 35, 52, 53). We offered to show that during the ten day period that he was off the job without having notified his employer by filling out Form 153 or notifying his employer of his absence in any other way, that he was in fact working and operating a "beer joint" in Ogden Canyon, and to prove that when he testified at the official investigation with respect to this matter that his testimony was false (Tr. 37). We also offered to prove that during this period of time he was not "down in bed" as he said; that he did not consult a doctor until the seventh day after he laid off; that he then walked into the doctor's office complaining of an earache,

saw the doctor only on that one occasion, and that after he had received notice that he was dismissed from service he went to Dr. Stratford, who had treated him on the one occasion, who did not then know that he had been dismissed, and got a release indicating that he was able to work (Tr. 37). We did prove, without objection, that the witness Combe, for whom the plaintiff had worked as a bartender intermittently from the year 1941 until May of 1950, was the owner of the Pine View Inn in Ogden Canyon, and that the establishment was leased in the name of the plaintiff's wife, Mrs. Russell, as lessee (Tr. 32). We were ready and we offered to prove that the plaintiff himself was, at the time he claimed to be sick during the ten day period which was the subject of investigation, actually operating and working at this establishment and had been operating the same for many months prior thereto. We also offered to prove that Dr. Keith Stratford, the company doctor, although he gave Mr. Russell a "return to work release," *subsequent to Russell's dismissal and without knowledge thereof*, when Russell came to his office and requested it, would nonetheless testify that Russell, in spite of the complaint he made when he visited the doctor seven days after he laid off—on July 21, 1945—was able to work and perform all the duties of his employment, and that during the ten days the plaintiff was off without leave (which was the subject of investigation) he was able to work and discharge the duties of his position (Tr. 53).

All of the foregoing offers of proof were rejected by the court. In this connection, the admission contained in Mr. C. E. McDaniels' letter to Mr. F. C. Paulsen dated May

14, 1946 (Defendant's Ex. "3") that the plaintiff did, in fact, give false testimony at the investigation held August 3, 1945, which culminated in his dismissal, should have had great weight.

We submit that the court committed reversible error in refusing to permit the defendant to make the above proof. We think under the holdings of the Supreme Court of the United States designating this type of action as a simple suit for breach of contract and the holding in the *Tennison* and *Johnson* cases, *supra*, that we were entitled to offer such evidence as would justify our dismissal of Russell, and if we are right in this proposition, we do not think it necessary to belabor the matter further. It seems to us obvious that the evidence we offered to produce was amply sufficient to justify the defendant company in dismissing the plaintiff and we should have been permitted to introduce it.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ASSESSING AND FIXING DAMAGES:

- (a) IN REFUSING TO ALLOW AS MITIGATION OF DAMAGES THE AMOUNT OF MONEY EARNED BY THE PLAINTIFF IN OTHER EMPLOYMENT BETWEEN THE DATE OF HIS DISMISSAL BY THE DEFENDANT AND THE DATE OF TRIAL;
- (b) IN HOLDING THAT THE MEASURE OF DAMAGES FOR BREACH OF THE CON-

TRACT WAS THE AMOUNT PLAINTIFF WOULD HAVE EARNED HAD HE WORKED EACH AND EVERY DAY AT HIS FORMER EMPLOYMENT WITH THE DEFENDANT BETWEEN THE RECEIPT BY DEFENDANT OF HIS APPLICATION FOR REINSTATEMENT AND THE DAY OF TRIAL, SEPTEMBER 7, 1950, A PERIOD IN EXCESS OF FIVE YEARS;

(c) IN REFUSING TO PERMIT THE DEFENDANT TO PROVE THAT THE PLAINTIFF DURING HIS EMPLOYMENT BY THE DEFENDANT WORKED ONLY A PORTION OF THE TIME ALTHOUGH STEADY EMPLOYMENT WAS AVAILABLE TO HIM.

(a) The defendant pleaded affirmatively that any damage plaintiff might have suffered could have been mitigated by the plaintiff and averted or avoided, in whole or in part, by plaintiff's securing remunerative employment after his dismissal other than employment by the defendant (R. 6).

We believe it was incumbent upon the plaintiff to prove his damages, if any, occasioned by the alleged breach of the contract by defendant, the same as is required of the plaintiff in any other common-law action for contract breach. There is not one word of testimony in the entire record to indicate what plaintiff's damage if any was, and so far as the record shows, he may have earned at other employment in excess of what he might have been able to earn between the date of his dismissal and the date of trial

had he continued in the employ of the defendant. We were able to locate several parties for whom the plaintiff had worked between the date of his dismissal and the date of trial and served these employers with a subpoena duces tecum. Their undisputed evidence showed that the plaintiff between the date of his dismissal and the date of trial earned at other employment the sum of \$7,774.39. The court indicated at the outset that he considered the evidence immaterial, but because the testimony was to be short and the witnesses were all in court with their records, consented, at our solicitation, to hear the testimony and reserve a ruling (Tr. 19). In the decision the court completely disregarded this showing, refusing to mitigate the damages in the amount proved to have been earned by the plaintiff in other employment.

The witness, H. B. McEwan, an accountant who kept the books for the H&A Annex, a beer dispensary, testified that between March 15 and October 15, 1947, the plaintiff for his services as a bartender was paid the sum of \$1583.80 (Tr. 19, 20).

The witness David H. Hadley, who operated a sand and gravel business, produced in court his business records showing that the plaintiff for his services as a truck driver was paid in the month of November, 1947, \$156.67; in December, 1947, \$152.04; in January, 1948, \$56.05; in March, 1948, \$99.24; in April, 1948, \$298.52; in May, 1948, \$228.33, and in June, 1948, \$120.29, an aggregate of \$1111.14. These records are identified as defendant's Exhibit "1", and it was admitted that the records were kept in the regular course of the witness' business (Tr. 24) (Defendant's Ex. "1").

The witness Earl W. Folkman, manager of Dr. Pepper Bottling Works in Ogden, testified that from October, 1948 to the date of trial his company paid the plaintiff \$4,879.45 for services as a "driver salesman" (Tr. 27, 28).

The witness Frank Combe, owner of the Marion Bar, testified that he was a personal friend of the plaintiff and had paid him the sum of \$200.00 for tending bar between December, 1949 and June, 1950 (Tr. 28). He also testified that the plaintiff had tended bar for him during the years 1942, 1943 and 1944, sometimes at night and sometimes in the day, which was during the period of time the plaintiff was employed by the defendant as a switchman (Tr. 29, 30). He could not or would not produce any intelligible business records.

The aggregate amount of the earnings as shown above constitutes the figure of \$7,774.39 shown to have been earned in other employment by the plaintiff.

We think that the failure of the court to take into account the monies earned by the plaintiff in other employment was to do something more than to make the plaintiff "whole." The damages of \$18,892.76 which the court awarded and the amount shown to have been earned in other employment brings the plaintiff's reward to the sum of \$26,667.15 for the period of five years following his dismissal. This is not damages, but a *penalty* and one the trial court had no right whatsoever to exact from the defendant in this proceeding. The plaintiff Russell, we offered to prove, earned only the sum of \$7,700.13 during the entire four year period he was employed by the defendant

(Tr. 35). As stated, he introduced not one word of testimony or other evidence tending to establish his damage, if any.

It is an elementary rule of the general law of damages that one must exercise reasonable care to prevent the enhancement of any damages caused by wrongful act. This rule applies in suits for breach of contracts of employment. In 56 C. J. S., Section 59, it is stated:

“A discharged servant cannot lie by unemployed for the remainder of the term, and then claim full compensation; he is bound to make the best use of his time, and seek other employment. Where the amount received in other employment equals or exceeds that contracted for, there can be no recovery.”

In 56 C. J. S., Section 28 (120), it is said with respect to actions for breach of a contract of employment:

“General rules as to trial and judgment apply to actions by an employe against his employer for breach of his rights under a contract between the employer and the employe’s organization. * * *

“The measure of damages for breach of an employment contract is the amount an employe would have received as wages had the contract been performed, less the amount he has earned during the period.”

In 35 Am. Jur., Master and Servant, Section 57, it is said:

“It is a principle of the law of damages that all facts and circumstances which go to show a reduction in the amount necessary to compensate the plaintiff or account for injuries sustained by the

breach of a contract may be shown in mitigation of damages. * * * The defendant employer may show in reduction of the damages the fact that the employe actually engaged in other profitable employment."

This is the generally applied common-law rule of damages for breach of a contract of employment, and it is for this reason we think the court should at least have given consideration to the amount of money it was shown without dispute to have been earned by the plaintiff in other employment. It is further stated in the citation of American Jurisprudence, *supra*:

"It is a well settled principle that upon the breach of a contract of employment calling for personal services by the wrongful discharge of the employe, the latter is required to use reasonable efforts to obtain other employment of like nature for the purpose of lessening or minimizing the damages. In short, in an action by a wrongfully discharged employe by reason of the breach of his contract of employment, the defendant employer may reduce the amount of damages recoverable by whatever the plaintiff has earned or by reasonable diligence could have earned in other employment subsequent to his discharge."

(b) and (c) At the request of plaintiff's counsel the defendant furnished to the plaintiff a tabulation showing the number of days plaintiff could have worked between the 27th day of January, 1946 and the date of trial, had he so desired, and stipulated as to the rate of pay he would have received, there having been three increases of pay on the job plaintiff would have held during such period of time. In so stipulating, however, we specifically indicated that we

would not admit that plaintiff would have worked every day (365 days a year) during such period of time, and although there was no evidence that he would have done so, the court in fixing the damages and allowing him the sum of \$18,892.76, assumed that he would. We offered to prove what the plaintiff's earnings were between the years 1941 and 1945 and to prove that during such period of time he only worked a portion of the time, although he would have been able to work steadily (Tr. 35, 36). For this purpose we offered as a witness the defendant's head timekeeper, Mr. D. B. Porter, and the company's books. The court sustained objections to this evidence and rejected our offer of proof. When asked what significance this evidence had and what we claimed therefor, we stated to the court:

MR. BRONSON: "I should think your Honor would want to know what the probability would be following August 1945, the date of dismissal, of his working 7 days a week, 30 or 31 days a month * * * which is what they are endeavoring to get your Honor to hold. I think it is proper for you, the Court, to draw inferences from the fact that he only worked half the time for four years and he would not work 7 days a week for the past five years. In conclusion, the next thing I propose to show was the exact days he was off. I make the offer of proof at this time and your Honor can rule on it." (Tr. 36).

We reassert the above and we contend that it was a proper matter for the court to take into consideration; that the court had no right to ignore such evidence and make an assumption, not based on any evidence, that the plaintiff would have worked every single day for a period of five years following his dismissal.

The contract (Plaintiff's Ex. "E") provided in Article VIII, Section 38:

"In case dismissal is found to be unjust, yardman shall be *reinstated and paid for all time lost*
* * *."

Under no circumstances, even in a hearing before the National Railroad Adjustment Board, would the plaintiff be entitled to "all time lost" unless he was "reinstated." I expect that it will be argued that the trial court thought from the evidence that the plaintiff should be reinstated and that the court refrained from reinstating the plaintiff solely because under the *Slocum* case, supra, it was without jurisdiction to make such an order; that because the court thought that the plaintiff should be reinstated he was entitled to "all time lost." But the *Slocum* case definitely did not hold that courts have full jurisdiction in suits involving railway collective bargaining agreements *except to reinstate an employe*. The case holds that courts have no jurisdiction other than to try a simple common-law action for damages for breach of contract; that they cannot interpret the contract; that they cannot pass on the question of whether or not an employe is entitled to reinstatement, or to any other benefits under the contract. They have jurisdiction to decide (1) was the contract breached, (2) if so, the damages if any, and nothing else. And they have absolutely no right to apply any other principles in assessing damages than those that have always been recognized in courts of law in simple contract actions.

In *Eubanks v. Galveston, H. & S. A. Ry. Co.*, (Texas) 59 S. W. 2d 825, in which a brakeman brought suit for

damages for an alleged breach by the defendant carrier of a collective bargaining agreement which provided that where the employe was unjustly discharged he should be paid "for all time lost," the court said:

"The contract provides that, if the employee is unjustly discharged, he shall have pay 'for all time lost.' The trial court seems to hold that this provision was intended to set aside the common-law rule as to the measure of damages for breach of this contract and substitute a different measure fixed by the contract itself. The trial court then seems to hold that the measure fixed by the contract would not charge Eubanks with money actually earned during the time between his discharge and the judgment, and would not obligate him in any way to mitigate his damages by making a reasonable effort to secure other employment. The Court of Civil Appeals holds, in effect, that the provision in the contract requiring the railway company to pay him 'for all time lost' means nothing more than to obligate the railway company to pay for the loss of earnings. In other words, we understand the opinion of the Court of Civil Appeals to hold that *the common-law rule should be applied in measuring the damages*. We approve this holding."

The provisions of the contract under discussion cannot, in our opinion, be considered a stipulation for liquidated damages for the reason that it is inextricably connected with reinstatement, and the payment for "all time lost" is predicated upon and can only be ordered upon reinstatement. The Board itself frequently orders reinstatement without ordering the carrier to pay the employe for "time lost." It is therefore not considered as a stipulation for

liquidated damages in case of breach even by the Board itself. What the plaintiff's damages were, if any he had, we do not know. There was no evidence on the matter and it is impossible for this court or anyone else to ascertain from the record in this case whether plaintiff was damaged by his discharge or not. So far as the record shows he may have earned in excess of what he would have earned had he continued to be employed by the defendant. It was plaintiff's burden to prove his damages, not the defendant's.

We submit that there was an utter failure of proof of damages on the part of the plaintiff and that it was reversible error for the trial court to assess damages against the defendant in any amount, and certainly reversible error to assess damages in the manner the court did.

POINT V.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO PROVE THAT IT WAS POWERLESS TO REINSTATE THE PLAINTIFF IN HIS EMPLOYMENT AFTER THE EXPIRATION OF SIX MONTHS FROM THE DATE OF DISMISSAL WITHOUT THE CONSENT OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AND IN EXCLUDING DEFENDANT'S PROFFER OF EVIDENCE TO SHOW THAT THE BROTHERHOOD OF RAILROAD TRAINMEN WAS NEVER AT ANY

TIME WILLING TO CONSENT TO PLAINTIFF'S REINSTATEMENT BY THE DEFENDANT.

In connection with this assignment of error Article VIII, Section 38, of the agreement provides:

"Reinstatement will not be permitted after the expiration of six months from date of dismissal, unless agreeable to the management *and* the general committee, except that a case pending with either the B.R.T. or O.R.C. at the expiration of the six month period, will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be *obligatory* to consult the committees representing these classes of employes in considering the case for reinstatement."

The six months period following Russell's dismissal expired February 3, 1946. The fact that the agreement provides that before the expiration of six months "it shall not be *obligatory*" to consult the union, clearly indicates the intention of the parties that it is obligatory to have the union's consent after six months, unless the employee's case is then pending with the "General Committee." At the expiration of six months there was nothing pending with the defendant company from the BRT or ORC. On January 22, 1946 Mr. Edens wrote to Mr. Hudgens, Local Chairman of the Switchmen in Ogden, declining to reinstate the plaintiff. There the matter rested until February 15, 1946, when Mr. C. E. McDaniels, of the Switchmen's Union, not of the Brotherhood of Railroad Trainmen, made another application for reinstatement. Mr. Edens testified that the defendant had not at any time received any application or peti-

tion from the Brotherhood of Railroad Trainmen to reinstate or to reconsider Mr. Russell's dismissal (Tr. 41). That no application before the expiration of the six months period was ever made by anyone other than Mr. Hudgens, Local Chairman of the Switchmen (Tr. 42). There was thus no case pending with the BofRT or ORC at the expiration of six months following dismissal. Therefore, without the consent of the "General Committee," which we offered to prove was the General Committee of the Brotherhood of Railroad Trainmen, the sole bargaining agent for yardmen, but were precluded from so doing, the defendant could not have reinstated the plaintiff had it desired to do so. We offered to prove, and again were prohibited from doing so, that there never was a time either before or after the expiration of six months following dismissal when the "General Committee" was willing to consent to the defendant reinstating this employee.

Mr. H. C. Beckett was called by the defendant and testified that he was the Local Chairman or Local Representative of the Brotherhood of Railroad Trainmen in Ogden, and had been for some 15 years (Tr. 43). That he was familiar with the contract which is involved in this suit (Tr. 44), and, in fact, it appears that he signed the same on behalf of the Brotherhood of Railroad Trainmen when it was negotiated and entered into with the defendant company. He testified that the Brotherhood of Railroad Trainmen was the sole and exclusive bargaining agency for the men working in the Ogden Yard and handled their grievances (Tr. 44, 45). He testified that neither Mr. Russell in person, or by or through anyone else, ever requested the

BofRT to petition the defendant company for reinstatement (Tr. 45, 46). We then offered to prove a vital and essential matter in support of this affirmative defense, to-wit, that the Brotherhood of Railroad Trainmen never were at any time agreeable to having the defendant reinstate the plaintiff, to which the court sustained plaintiff's objection (Tr. 47). We also offered to prove that the BofRT up to and including the date of trial were unwilling to consent to the defendant reinstating the plaintiff and this offer of proof was rejected (Tr. 46).

There being nothing pending from the BofRT or the ORC at the expiration of six months following plaintiff's dismissal, and the General Committee of the BofRT not being willing to consent to plaintiff's reinstatement after the six months period, the defendant could not have reinstated the plaintiff, had it desired, without breaching the contract as to each and every yardman employe in the Ogden Yards who would be set down one place on the seniority roster by reason of such reinstatement. It would have given rise to a cause of action for damages against defendant by each and every one of such yardmen employes. The plaintiff is bound by this provision of the contract; it is binding on the carrier, and it exists for the benefit of all the employes covered by the agreement. The plaintiff has only such rights as are given to him by the contract in question, which was negotiated by the BofRT, sole bargaining agent for all yardmen. The plaintiff is bound to proceed in securing his rights under this contract in accordance with the *procedure* agreed upon therefor by the carrier and the bargaining agency. To have reinstated the plaintiff in the face of opposition by the BofRT might easily have precipitated a

strike—one of the main evils the Railway Labor Act and collective bargaining agreements in the railroad industry are designed to prevent. Nothing is more zealously guarded by employes than their seniority, and rightly so. Reduction in seniority means a loss of earnings, less agreeable work, less favorable working shifts, and danger of being cut off upon a reduction of forces. It is easy to understand why not even the Union wanted Russell reinstated. Employes quite naturally resent one who secures unto himself all the benefits of a collective bargaining agreement, prejudicing the other employes on the property by standing in the way of their advancement on the seniority roster, when it is done by one who will not protect his job, works only part time, and engages in some profitable outside business or employment. Russell clung tenaciously to a job in the railroad industry during the war years by working only part time. He retained his seniority and built it up in an industry that was crying for men to work to keep military supplies moving to the west coast, and in an industry whose employes were exempt from military service so that they might help maintain the transportation system so essential to winning the war. We were prepared to show that the plaintiff, instead of protecting his job, engaged in the profitable business of selling a scarce commodity and one in great demand at that time, to-wit, beer, in a community that was congested with military personnel and war-industry workers. It was for such reasons that the BofRT would not consent to plaintiff's reinstatement, as they had a right to, and not because (as we expect will be claimed) the plaintiff was not a member of the Trainmen's Union, but of the Switchmen's Union.

We submit that in refusing to reinstate the plaintiff when his case was not pending with either the BofRT or the ORC at the expiration of six months following dismissal, and when the General Committee of the BofRT was unwilling after the expiration of six months to consent to defendant reinstating plaintiff, that the defendant was *maintaining the integrity of the agreement* it had with its employees rather than breaching the same, and on this affirmative defense alone the defendant was entitled to a judgment of no cause of action at the hands of the court. We submit that the showing made on this point warrants this court in remanding the case with instructions to enter a judgment of no cause of action in favor of the defendant.

POINT VI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THAT THE PLAINTIFF WAS WITHOUT ANY RIGHT TO MAINTAIN AN ACTION FOR DAMAGES FOR BREACH OF THE CONTRACT, OR IF SUCH RIGHT AT ANY TIME DID EXIST, IN FAILING TO FIND THAT PLAINTIFF WAS FORECLOSED AND ESTOPPED FROM ASSERTING THE SAME.

Attached to plaintiff's application of January 14, 1946 for reinstatement, filed in his behalf by J. B. Hudgens, Local Chairman of the Switchmen, is Russell's written signed authorization to the SUNA to represent him in handling his grievance with the defendant company (Plain-

tiff's Ex. "B"). This authority is likewise attached to the letter of C. E. McDaniels, Acting Vice President of the SUNA, dated February 15, 1946, asking reinstatement and addressed to Mr. F. C. Paulsen, Vice President of the defendant company (Plaintiff's Ex. "D"). This "designation" or "authorization" by the plaintiff of the SUNA was admitted by plaintiff (Tr. 4, 5). It is as broad and extensive as can be imagined, the plaintiff giving the SUNA full authority to represent him in any way they saw fit and consenting to be bound by their disposition of the case. It was a commitment made by the plaintiff to the defendant company that it might deal with any officer or representative of the SUNA the same as though they were dealing with the plaintiff in person; it was a commitment made to the defendant that the plaintiff would be bound by any disposition of this case that might be made by an officer or representative of the SUNA, or agreed upon by such officer and the defendant company. This communication, addressed to the defendant, says:

"I, the undersigned, hereby authorize the Switchmen's Union of North America and any and all of its officers and representatives to represent and act *in my * * * place and stead*, as my * * * agent and representative in the prosecution of grievance claim, reading: (statement of the claim) against The Ogden Union Railway and Depot Company, and I * * * authorize the Switchmen's Union of North America and any and all of its officers and representatives to represent and act as my * * * agent and representative *in my * * * place and stead, in all further prosecution* of the afore quoted grievance, * * * and I authorize and empower the Switchmen's Union of North

America and any and all of its officers and representatives to negotiate, adjust and *dispose of* the herein quoted grievance claim *in any manner*
 * * *

(Sgd.) W. B. Russell."

This is perhaps as good a place as any to point out that the substance of the rambling, erroneous, and at times incomprehensible presentation by Hudgens in his application for reinstatement of January 14, 1946, and by McDaniels in his application for reinstatement of February 15, 1946, is of no assistance or consequence in the disposition of this case. The only significance of these two "submissions" or letters is that it is shown thereby that the SUNA, through Local Chairman Hudgens and later through Acting Vice President McDaniels, were representing the plaintiff pursuant to their authorization by the plaintiff.

We desire at this point to invite the court's attention to the defendant's Exhibit "3", a letter written by plaintiff's duly authorized representative, C. E. McDaniels, to the vice president of the defendant company, dated May 14, 1946. We also want to point out that this letter was the final and last communication passing between the parties from the time it was delivered until several years later when plaintiff filed the present suit. A careful examination of this letter (Defendant's Ex. "3"), reveals in the second paragraph thereof that Mr. McDaniels and Mr. Paulsen during negotiations had been in conference over the case and that Mr. McDaniels had agreed to conduct an examination into the defendant's charge that Russell did not tell the truth at the investigation which resulted in his dismissal. McDaniels then states in the next and last para-

graph of this letter that the "*investigation has been completed*" and "*we are withdrawing the grievance and the case is closed.*" Is there any doubt that the investigation disclosed that Russell did not tell the truth at the investigation? Is there any doubt that this is an admission by Russell that he falsified at the investigation? Is there any doubt that the case was at this point finally and conclusively disposed of, by the plaintiff's stipulation that he had no valid claim against the defendant, by his advice to the defendant that he was "withdrawing the grievance," and that the "case was closed," in view of the full and complete authority McDaniels had from the plaintiff Russell "to negotiate, adjust and dispose of the grievance *in any manner*"? This was the plaintiff speaking and it is as though he spoke to the defendant in these words, "I did not tell you the truth at the investigation. The charge made against me was true and I now admit it. I withdraw the claim I have made against you and you may consider the matter closed."

There can be no claim made here that this was not binding on the plaintiff. He had never revoked the authority of McDaniels, although he had the right to do so at any time. He did not take the stand at the trial and did not call McDaniels to repudiate, explain or modify the clear meaning of this letter in any way. It cannot be said that because McDaniels in his letter also said that the withdrawal was "without prejudice to our contentions and position as expressed in our letter of February 15, 1946, and without establishing a precedent as to adjustment of future grievances possessing dissimilar facts," that such statement was a limitation of any kind, or a reservation of a right in the

plaintiff to sue the defendant company years later. Mr. McDaniels as the Acting Vice President of the Switchmen's Union of North America is accustomed to negotiating with management in labor relations cases. He obviously is saying in the above quoted portion of his letter that he is not relinquishing the "principles" contended for in his application for reinstatement dated February 15, 1946, as applied in a proper case; that he does not want his admission of the invalidity of Russell's claim to prejudice "the adjustment of future grievances possessing dissimilar facts and circumstances."

There is no ambiguity or equivocation in McDaniels' letter, and defendant's treatment of the case as closed and finally terminated was fully warranted. And after receipt of this notice that the grievance was withdrawn and the case closed, the defendant, according to the testimony of Mr. Edens, its Superintendent, had always treated it as a closed issue (Tr. 42, 43).

We pleaded the affirmative defense of estoppel against plaintiff to maintain this action five years after the above representations were made and to recover as damages "lost time" for five years, or, for that matter, to maintain any action at any time after defendant received the notice of withdrawal of the grievance. That the notice to defendant that it could treat the case as closed, and the defendant thereupon closing the case, operated to defendant's detriment if plaintiff is now permitted to maintain this action, we have not the slightest hesitancy in asserting. Up to the very moment the notice of withdrawal was received the matter was an open issue with the defendant and considera-

tion was being given thereto, evidenced by exchanges of correspondence and personal conferences. Vice President Paulsen of the defendant company had not rejected plaintiff's claim and he had the undisputed authority to allow it in whole or in part, or make any disposition thereof he deemed proper. Had the plaintiff himself not terminated all consideration of his case the management might have as frequently happens in these cases, ordered the reinstatement of plaintiff "on a leniency basis" on "probation," plaintiff might have been returned to work without loss of seniority rights, or he might have been given a new seniority date. He might have been given some back pay or he might have been returned to work without any allowance for time lost. True, his claim might have been rejected entirely, but it is not what might have been the ultimate disposition of the claim that determines whether or not defendant incurs a detriment if plaintiff is allowed to maintain this suit. The detriment lies in the fact that the plaintiff *caused the defendant by his representations to cease weighing and considering the disposition of the claim*, treating the matter as closed and not as an outstanding claim with, as it must always be considered, the possibility of ultimate liability. Had the consideration by the defendant continued and resulted in total rejection of the claim, either party might have taken the matter for final determination to the Railroad Adjustment Board. The Railway Labor Act, Section 3, First (i), 45 U. S. C. A., Section 153, page 1022, provides that the carrier and employe failing to reach an adjustment by negotiation,

"The dispute may be referred by petition of the parties *or either party* to the appropriate division of

the Adjustment Board with a full statement of the facts, and all data bearing upon the dispute.”

In *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255, 94 L. Ed. 542, 70 S. Ct. 585, cited *supra*, where negotiations between the railroad and union failed to bring about an agreement and the railroad had brought suit in the state court, the union filed a petition for a hearing and award before the Adjustment Board. The Supreme Court of the United States reversed the holding of the state court for the reason that the court did not have jurisdiction. We cite this case again at this point in support of the proposition that the defendant in this case had the opportunity to progress its controversy with Russell to a final conclusion by submitting the matter to the Adjustment Board. The Supreme Court of the United States said:

“Sustaining the court’s action (in assuming jurisdiction) would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the Board the other party would be deprived of the privilege conferred by Section 3 First (i) of the Railway Labor Act, 45 U. S. C. A. Section 153 First (i), which provides that *after negotiations have failed ‘either party’ may refer the dispute to the appropriate division of the Adjustment Board.*”

We do not have to show that had the negotiations not been terminated by the plaintiff and resulted in refusal by the defendant to reinstate, that such action by the defendant would have been approved by the Railroad Adjustment Board, in order to show that the defendant suffers a detriment by such termination of negotiations by the plaintiff.

It would, of course, be impossible to show what disposition the Adjustment Board would make of the case in such an event, but the defendant had the right, that is, the opportunity to proceed to bring to a final conclusion the determination of a claimed liability with reasonable dispatch, and of that right it is deprived, to its detriment, if this suit after so long a lapse of time can now be maintained. The company justifiably considered the matter terminated *in its favor*. So long as there was any possibility that the company would ultimately have to return the plaintiff to work with pay for "lost time," the company would have or could have pushed the matter to a final conclusion to shorten the time they might have to pay wages to plaintiff without receiving services from him. Knowing that there was a possibility in a controversy of this kind that they would have to pay the employee wages for "lost time" if they ultimately failed to have the dismissal sustained, can anyone believe the defendant company would have let the matter rest for five years, risking the possibility of heavy damages if they finally lost the case? It was because of the plaintiff's advising defendant that he was withdrawing his grievance, that the case was "closed," that the defendant remained inactive for so long, to its serious detriment, if this court says this case may now be maintained. But we reiterate that it is not what the ultimate outcome would have been had plaintiff not terminated the case that determines "detriment," and it is not what course defendant would have pursued, but for such termination, that determines "detriment." Those matters are not known and cannot in the nature of things in such a case as this ever be made known, but the *opportunity* for the defendant to bring the case to

a successful conclusion or to reduce its damage, if not successful, by expediting its disposal was there, and it was there until destroyed by the plaintiff's advice to the defendant to close the case.

In Restatement of the Law, Contracts, Section 90, page 110, the legal principle here involved is set forth as follows:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Injustice in this case, it seems to us, can be avoided only by requiring the plaintiff to retain the position he took when he advised the defendant that his grievance was withdrawn and that it could consider the controversy terminated.

A statement of the rule is contained in the case of *I. X. L. Stores Co. v. Success Markets*, 98 Utah 124, 97 P. 2d 577, in which this court said:

"The estoppel here relied upon is known as an equitable estoppel or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by *disappointing the expectations* upon which he acted. Such a change of position is sternly forbidden. This remedy has always applied so as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault."

In Williston on Contracts, Revised Edition, Volume I, page 494, Section 139, it is said:

“It is generally true that one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations * * *.”

Professor Williston, Volume I, Revised Edition, Section 140, page 503, after quoting the rule from Restatement of Contracts, as above set forth, says:

“It is not to be denied that there are numerous cases in which this element of justifiable reliance to one’s detriment is held not sufficient to make a gratuitous promise binding. Therefore, Section 90 (quoted above) does not assert a sweeping rule that in every case action in reliance is sufficient support for a promise.”

We are not certain that the factual situation in the case before the court involves a promise without assent or consideration. It seems to us that the forbearance on the part of the defendant to progress its dispute with the plaintiff Russell, in view of his representation that defendant might treat the case as “closed,” might well constitute consideration. If, however, that is not the case, the situation then falls within that well recognized principle of the law wherein estoppel is recognized as a *substitute for consideration*. Probably there is no distinction, but merely a different rationale applied to the same problem. At any rate, it seems to us to clearly fall within the aforequoted pro-

vision from the Restatement of Contracts and the discussion thereof by Professor Williston. Continuing, he says:

“In the first place it is only where the action induced is definite and substantial that any legal consequences follow from the gratuitous promise. In the second place, such an action should reasonably have been expected by the promisor. Under these words it will not be enough that some action of the promisee even of substantial character has been induced by the promise. A promise of one thousand dollars with which to buy a motor car may thus be binding if it induced the purchase of the car. A promise of one thousand dollars for no specified purpose will not be binding, though it induces similar action. If the promisee is helpless to do otherwise, he has not acted or foreborne in reliance on the promise within this doctrine.

“Finally the words are added at the end of the section for greater caution ‘if injustice can be avoided only by enforcement of the promise.’ With these qualifications it is believed that the provisions of Section 90 (the Restatement) do not go beyond the existing law, in many jurisdictions at least, and that the section is a useful coordination of the classes of cases enumerated in the preceding section.”

That the action induced in the present case was “definite and substantial” should be apparent from the fact that it results in a very large judgment against defendant, if the plaintiff is now allowed to repudiate. Was defendant’s action “reasonably” to be expected by the plaintiff Russell? What action on defendant’s part other than treating the controversy “closed” and terminated could be expected when he advised the defendant in effect that the charge made against him was true, that he falsified, that he was

withdrawing his grievance, and that the defendant could consider the matter "closed"? The promisee, the defendant, was not helpless to do otherwise than it did. It might have, before negotiations were concluded, reinstated the plaintiff on some basis as frequently happens in such cases. It could have progressed this pending case, which had a potential liability, as all such controversies have, to final conclusion and with dispatch and avoided an accumulation of over \$18,000.00 damages, except for the representations of the plaintiff himself. And finally, we believe the facts are such that "injustice can be avoided only by enforcement of the promise." We would like to observe parenthetically that the word "promise" is obviously used in the Restatement in a broad sense and it is readily apparent that it covers any kind of representation by words or conduct.

We believe that this case now before the court fulfills the requirements of the law as set out in the Restatement and the carefully detailed analysis thereof by Professor Williston. It is true that the earlier cases did not look with favor upon estoppel as a defense. The modern view is to consider the application of the doctrine of estoppel, particularly the kind we are dealing with here, as comporting with the very highest sense of equity and pure justice.

We submit that the plaintiff should be estopped to maintain this action, in view of his conduct and representations in leading the defendant to believe that the case was disposed of, and the defendant's reliance thereon to its detriment. We earnestly say to this court that on this assignment of error alone the case should be remanded to the District Court with instructions to enter judgment against

the plaintiff and in favor of the defendant of no cause of action. This disposition seems particularly appropriate in view of the plaintiff's admission that he falsified at the investigation—his admission that he was guilty of the charge upon which his dismissal was based and which is the whole basis for this suit.

POINT VII.

THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW WHOLLY UNSUPPORTED BY COMPETENT EVIDENCE IN THE CASE, AND IN ENTERING ITS JUDGMENT UPON SUCH FINDINGS AND CONCLUSIONS.

In order to avoid prolonging this brief we will endeavor to treat this assignment of error as briefly as possible. What we have heretofore said herein addresses itself pertinently to this assignment and should make it clear that the findings of fact (R. 51), and conclusions of law (R. 61), are unsupported by the evidence, and the judgment (R. 63) is based upon erroneous findings.

The original judgment signed by the court gave to the plaintiff as damages the sum of \$23,001.92, which was \$4,000.00 more than the plaintiff was entitled to, figured in accordance with the court's theory, and was in excess of \$8,000.00 over the amount demanded in the complaint (R. 34). We filed a motion to correct the judgment, to amend the findings of fact and conclusions of law, asking the court pursuant to the new rules of procedure to enter judgment in

favor of the defendant of "no cause of action" (R. 48), and also filed a motion for a new trial (R. 37).

The plaintiff filed objections to our motion to amend the findings of fact and conclusions of law and to correct the judgment, submitted a new set of findings of fact and conclusions of law and judgment to the court. The court disposed of the defendant's motion to correct the findings of fact, conclusions of law and judgment, and motion for a new trial, by signing and having entered the amended findings of fact, conclusions of law and judgment submitted by plaintiff's counsel (R. 54). Although it was not necessary under the new rules of practice and procedure for us to move the court to correct its findings and conclusions, in order to raise the matter on appeal, we considered it was our duty to the trial court to fully present our views on the law and the evidence, which we did in oral argument almost in as much detail as set forth in this brief. When, however, the court signed another set of findings of fact and conclusions of law and judgment, which were substantially the same as the first set of findings, conclusions, and judgment signed, we considered we had discharged our responsibility as counsel to the court and took this appeal.

Without rearguing the matter, we submit that the evidence was wholly insufficient to warrant the court in finding, as it did, that during the entire ten day period, which was the period covered by the investigation, and up to and including the date of the hearing, the plaintiff was ill and under the care of Dr. Stratford (R. 58); that plaintiff's absence without leave in excess of ten days "was not intentional or willful" (R. 58); that "the defendant wilfully and

arbitrarily discharged the plaintiff" (R. 59); that "on the 14th day of May, 1946, the said C. E. McDaniels *withdrew* as plaintiff's representative" (R. 59); and that "the plaintiff duly performed all things on his part required by the contract as conditions to his reinstatement" (R. 61).

As to the conclusions of law, we think there is no basis for concluding that Rule 55(b), which the plaintiff was charged with violating, "has no application to the facts surrounding plaintiff's absence"; that "plaintiff's rights to recover from the defendant by reason of defendant's wrongful discharge of plaintiff became fixed as of the 22nd day of January, 1946"; that "plaintiff is not estopped from asserting his claim against the defendant"; that "the defendant is not entitled to offset against time lost by plaintiff, by reason of its wrongful discharge of the plaintiff, other earnings of plaintiff during such period"; and that the plaintiff is entitled to recover \$18,892.76 from the defendant (R. 61, 62).

The judgment in this case is based upon findings and conclusions that are not supported by the evidence and we submit that the evidence is such that this court cannot remand the case with instructions to correct the findings and conclusions so as to support the judgment. We submit this assignment of error on the argument made in connection with the preceding points discussed.

CONCLUSION

It seems to us that throughout the progress of this case the court construed the contract strictly against the defendant in every particular where the plaintiff claimed a right,

and indulged the widest liberality in favor of the plaintiff wherever the defendant sought to assert some right under the contract. The plaintiff sought to hold the defendant to strict accountability and sought successfully the utmost indulgence for himself. We think both parties are entitled to the same treatment. This contract is not one drawn by the defendant company so as to warrant such a method of interpretation and application. It is well known that this type of contract is invariably the result of days and sometimes weeks of negotiations between the company and the union with a considerable number of men from each side participating. Each side brings to the conference room long experience in the labor relations problems of the industry. Both sides understand all phases of the subject matter, they know what they want, they do not sign until they have each secured the best terms they think possible, and when they do sign they know what their respective rights and duties are under the contract. They deal at arm's length and it cannot truthfully be said that either side has the other at a noticeable disadvantage in negotiating. Therein lies the success of the collective bargaining idea in American industry. The contract in subsequent disputes should be construed and applied the same as to both parties and with fairness and impartiality.

If we have not been helpful to the court by multiplying citations to adjudicated cases it is not because we have not made the effort. There have been relatively few cases of this type before the courts and this explains the limited number of authorities which can be found close enough to the facts or the legal principles involved as to be worthy of citation. Controversies such as this one, as was most

plainly indicated by the Supreme Court of the United States, do not belong in the courts, nor have they, except in relatively few instances, been submitted to the courts. An examination of the reports of the awards of the National Railroad Adjustment Board discloses that they are disposing of approximately 1500 cases a year arising under collective bargaining agreements entered into pursuant to the Railway Labor Act.

We respectfully submit that this case should be remanded to the District Court with instructions to enter judgment in favor of the defendant and against the plaintiff of "no cause of action", such disposition being amply warranted under either Point V or Point VI. We further submit that the trial court committed reversible error in admitting the transcript of the proceedings at the official investigation as substantive evidence, in denying the defendant's motion for a judgment of nonsuit, in refusing to admit evidence offered by the defendant to show justification for plaintiff's dismissal, in assessing damages in the manner it did, and that these errors individually, and certainly collectively, warrant the court in at least reversing the judgment and remanding the case for a new trial.

Respectfully submitted,

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