

1951

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

Utah Supreme Court

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7647
Case No. 7647

In the Supreme Court of the State of Utah

W. B. RUSSELL,

Plaintiff and Respondent,

vs.

THE OGDEN UNION RAILWAY AND
DEPOT COMPANY, a corporation,

Defendant and Appellant.

Brief of Respondent

FILED

JUN 13 1931

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Ogden, Utah

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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 corporation,

Defendant and Appellant.

STATEMENT OF FACTS

As the facts before the lower court were, for the most part, admitted by the pleadings, or stipulated, there is no dispute with respect thereto. As this factual situation may be briefly developed, we take the liberty of so doing, realizing that to some extent it is repetitious of appellant's statement. We refer to the parties as they appeared in the lower court, namely, as plaintiff and defendant.

On August 3, 1945, plaintiff was employed as a switchman by defendant at its yards in Ogden. He had there been so employed for approximately four years. His employment was covered by a collective bargaining agreement entered into between defendant and the Brotherhood of Railway Trainmen, and he was entitled to the benefits and subject to the burdens thereof. This

collective bargaining agreement is in evidence as Plaintiff's Exhibit "E". Plaintiff did not return to work following the completion of his work day on July 21, 1946. On July 31 or August 1, 1945, (there being a conflict between the pleadings and the evidence) at approximately 6:30 o'clock in the morning, defendant called plaintiff by telephone and told him that a formal investigation would be held by defendant that day at 2:00 o'clock p. m. concerning his violation of the collective bargaining agreement by being absent without leave for a period of over ten days. At plaintiff's request the time of the investigation and hearing was continued and on August 2, 1945, plaintiff was notified by defendant to appear on August 3, 1945, at 9:00 A. M. for hearing upon such charge.

On August 3, 1945, the hearing was held in the offices of the defendant company, and conducted by Mr. H. Caulk, defendant's Assistant Superintendent. The complete hearing was reported by Mr. Caulk's clerk, and transcribed. The only witness called at such hearing was plaintiff and his statement was made primarily pursuant to questions propounded by Mr. Caulk. The transcript of the hearing was received in evidence in this cause as Plaintiff's Exhibit "A". As it is relatively short, and as it is of importance to at least some phases of this appeal, we set it out in full.

"Transcript of formal investigation conducted in office of Assistant Superintendent OUR&D Co. 9 AM August 3, 1945, in connection with Switchman W. B. Russell being absent from duty over 10 days without leave of absence in violation of B.R.T. Schedule Rule 55 B.

Officers Present:

H. Caulk, Ass't Supt. OUR&D Co. Conducting

Employees Interrogated:

W. B. Ruseell, Switchman, OUR&D Co.

Representatives of Employes:

J. B. Hudgens, Representing W. B. Russell

Reported by:

J. E. O. Burton, Clerk to Ass't Supt,
OUR&D Co.

Questions by: Mr. Caulk:

Statements of W. B. Russell:

Q Mr. Russell this in an investigation relative you being absent from duty over 10 days without leave of absence in violation of BRT Rule 55 B. Do you wish a representative.

A Yes sir, Mr. Hudgens.

Q State your name, occupation and home address.

A W. B. Russell, Switchman, 933 Ogden Canyon.

Q How long have you been employed by the OUR&D Co.

A August 28 will be 4 years.

Q Do you know the rule that you will not absent yourself from duty 10 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 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.
- Q What other business are you engaged in that you cannot work for the Depot Co.
- A None of my own.
- Q Are you working any place else.
- A No.
- Q I understand you own a Club up the canyon.
- A No.
- Q You work up there don't you.
- A Yes. No.
- Q Do you know how many days you have worked this year.
- A Yes I do.
- Q It hasn't been very many has it.
- A No, I have had more sickness than I have ever had in my life, you can go back on my record and see. I had measles, was scalded and now down with a cold.
- Q You state you have been here four years.
- A Four years August 28th.
- Q And you have never asked for leave at any time layed off.
- A Never went over 10 days except when scalded.
- Q You have made it your business to work some time in each half.
- A Yes.
- Q The fact of matter is you worked as follows during this year.

1st half January, 8 days
2nd half January, 8 days
1st half February 7 days
2nd half February 6 days
1st half March 6 days
2nd half March 6 days
1st half April 2 days
2nd half April 6 days
1st half May 4 days
2nd half May 6 days
1st half June 1 day
2nd half June 2 days
1st half July off 11 days injured and worked
only two days in second half of July since
you were injured.

A That is when I layed off sick, I got scalded
went to work and layed off sick.

Q That doesn't relieve you, you could tell us
you were sick at that time and told them had
to have leave of absence and could have gotten
leave at that time.

A I didn't figure I would be off that much time,
just had cold when layed off, I have been to
a doctor.

Q You haven't worked since have you.

A No I haven't. I had had more trouble with
sickness than any time since I have been down
here.

Questions by Mr. Hudgens:

Q While you were sick during this last period of
time were you attended by Co. doctor.

A Yes, Dr. Stratford.

Q And you talked to train desk before the expiration of your 10 days.

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

Q Do you have a release from the doctor.

A No, I am still under his care.

I have read the above and it is correct:

Transcript correct:
s/b J. E. O. Burton''

/s/ Wm. B. Russell
W. B. RUSSELL

On August 4, 1945, defendant dismissed plaintiff from its service, assigning as its reason therefor that plaintiff had been absent from his employment for a period of over ten days in violation of Rule 55 (b). Rule 55 (b) for the asserted violation of which plaintiff was so discharged, is as follows:

“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.”

On January 14, 1946, and within a period of six months from the date of discharge, plaintiff filed with defendant written objections to his dismissal, and requested reinstatement. (Exhibit “B”). On January 22, 1946 defendant, through its Superintendent, re-affirmed the dismissal, saying: (Exhibit C)

January 22, 1946

“Mr. J. B. Hudgens, Local Chairman
Switchmen’s Union of North America, Lodge
No. 279
804 - 7th Street
Ogden, Utah

Dear Sir:

Referring to your letter of Jan. 14, 1946 making claim for reinstatement, with pay, favor switchman W. B. Russell who was dismissed from service Aug. 4, 1945 for being absent in excess of 10 days without written leave of absence:

The rules require yardmen to have a written leave to be absent from duty 10 days or more. Russell failed to do this, and it is my position that the action taken in his case is fully justified. Claim is therefore respectfully declined.

Yours truly,

/s/ R. E. Edens”

On February 15, 1946, Mr. C. E. McDaniels, Acting Vice President of Switchmen’s Union of North America, presented to Mr. F. C. Paulsen, Vice President of the defendant company what in effect was a petition for review by Mr. Paulsen of Mr. Edens’ reaffirmance of the dismissal. (Plaintiff’s Exhibit “D”). This was supplemented by a communication from Mr. McDaniels to Mr. Paulsen dated April 1, 1946. (Defendant’s Exhibit 4). On May 14, 1946, Mr. McDaniels further wrote Mr. Paulsen (Defendant’s Exhibit 3), and as the defendant claims much in his brief for this particular communication, we set it out in full.

“Office of Acting Vice President

134 Cleveland Avenue
Salt Lake City 4, Utah

May 14, 1946

Mr. F. C. Paulsen, Vice President
Ogden Union Railway and Depot Co.
10 South Main Street File OUR&D-3

Dear Sir:

Reference is made to our conference, your office, May 7, 1946, in connection with your file 011.221 attached to our grievance, reading:

‘Claim for reinstatement, with seniority rights unimpaired, and compensation at the applicable rate, August 6, 1945 and each SUBSEQUENT date thereto until restored to service favor switchman W. B. Russell, Ogden Yard, account dismissed from the service August 4, 1945 for his alleged responsibility in connection with unauthorized leave of absence’

in connection with the reinstatement of former switchman W. B. Russell, Ogden, Utah.

As agreed during our conference, further action on the subject matter was to be held in abeyance pending our investigation of undesirable procedure on the part of Mr. Russell resulting in false testimony evidenced during formal investigation of August 3, 1945.

This investigation has been completed and it is 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 and circumstances devolving upon similar allegations as appear in the introduction of the formal investigation of August 3, 1945 we are withdrawing the grievance and the case is closed.

Yours truly,

/s/C. E. McDaniels

C. E. McDaniels, Acting Vice
President, S. U. of N. A.

PS: Note change in address.
Phone 7-7593''

Thereafter this action was commenced whereby plaintiff sought the judgment of the court for reinstatement, and damages for all time lost, predicated such claim upon his contention that his discharge had been wrongful, and upon Section 38 of the collective bargaining agreement, reading, so far as here pertinent, as follows:

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

* * * * *

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

NOTE—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.”

Upon conclusion of the trial, the court made and entered findings of fact, conclusions of law, and its judgment, whereby it determined plaintiff's discharge to have been wrongful, denied plaintiff reinstatement, but awarded him judgment for all time lost.

THE NATURE OF THE CASE ON APPEAL

Inasmuch as the lower court denied to plaintiff his prayer for reinstatement, and plaintiff did not appeal from that ruling, that phase of the case is not before this court. Accordingly, we are at a loss to understand why the question of reinstatement is dealt with so extensively by defendant in its brief.

Actually the only questions here involved are

- (1) Did the lower court commit reversible error in its rulings on evidentiary matters;
- (2) Did it commit reversible error in denying defendant's motion for non-suit;
- (3) Was it correct in concluding that under the facts plaintiff's discharge was wrongful;
- (4) Did it apply the correct rule in its determination of the dollar amount of recovery to which plaintiff was entitled for his wrongful discharge.

Defendant contends that the lower court was wrong on each of the matters, and that we, as plaintiff's counsel, pawned off on the lower court a “bill of goods”. We naturally resent the implication thus embodied in

the defendant's characterization of our efforts on behalf of the plaintiff, and submit that it is wholly unjustified. Every proposition urged by us in the lower court was and is supported by law, and that the lower court's acceptance of our position was correct under the law we shall now demonstrate. In so doing we shall answer defendant's contentions point by point, and in the order presented in defendant's brief.

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TRANSCRIPT OF THE PROCEEDING AT THE OFFICIAL INVESTIGATION AS SUBSTANTIVE EVIDENCE OF THE FACTS THEREIN STATED.

At the outset it may be advisable to make some comment with respect to the decisions of the Supreme Court of the United States relative to the jurisdiction of state courts to hear and decide actions such as this. The first is *Moore v. Illinois Central Railway Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754. In this case it was categorically held that a state court had jurisdiction to determine an action for damages by an individual against a railroad for breach of a collective bargaining agreement.

The Moore case was followed by *Slocum v. Delaware, Lackawanna & Western Railroad*, 338 U. S. 229, 94 L. ed. 535, 70 S. Ct. 577; *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255, 94 L. ed. 542, 70 S. Ct. 585; and *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 90 L. ed. 318, 66 S. Ct. 322. These cases differed from the Moore case in that whereas in

the Moore case an individual was suing for breach of the agreement, in the other three cases the actions were between the unions and the carriers seeking judicial interpretations of collective bargaining agreements. In the Slocum and Southern Railway cases, actions were brought for declaratory judgments interpreting the agreements; the Pitney case was a jurisdictional dispute involving the railroad and two unions. The Supreme Court in each case held that interpretations of collective bargaining agreements of the character there sought lay with the Adjustment Board under the Railway Labor Act, and not with the courts, but in so holding it did not disturb its decision in the Moore case to the effect that an *individual* might seek recourse in the courts for personal redress for breach by a carrier of a collective bargaining agreement. In fact the Moore case was specifically reaffirmed. In this connection the Supreme Court in the Slocum case said:

“Our holding here is not inconsistent with our holding in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 83 L. Ed. 1089, 61 S. Ct. 754. 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.”

Personally, we do not believe there is any disagreement between counsel for defendant and ourselves on this point, although we do conceive a disagreement as to the jurisdiction of a state court in the matter of reinstatement, and, it is perhaps well to pinpoint our views on that matter as it may have some bearing on the question of the measure of recovery, although the question of reinstatement itself is not before this court.

We understand it to be counsel’s position that while a state court has jurisdiction to entertain an individual’s suit for damages for breach of a collective bargaining agreement, it has no jurisdiction to order reinstatement, and counsel derives its comfort for this position from the decisions of the Supreme Court of the United States, *supra*. We submit, however, that such point was neither involved nor so decided in any of such cases. It was at one time in the Moore case, as an examination of the history of that case discloses, and its disposition is interesting.

Moore first brought an action against the *Yazoo & M. V. R. Co. and Illinois Central Railroad Co.*, 166 So. 395, in connection with his seniority rights, claiming that the carrier had wrongfully assigned him number 57 instead of 37. The Supreme Court of Mississippi dismissed his action, holding that by failing timely to protest his seniority assignment, and accepting work

assignments thereunder, he had waived his right to invoke the aid of the court. The significant part of the decision is that it is predicated upon a waiver of rights and nowhere does the court suggest that in the absence of such waiver it was without power to aid him.

Later Moore was discharged from service for "unsatisfactory conduct", and following such discharge brought an action for damages for wrongful discharge under the collective bargaining agreement. This action was brought in the courts of Mississippi, was removed to the federal court, and ultimately reached the Supreme Court of the United States. *Moore v. Illinois Central Railroad Co., Supra.* It involved no question of reinstatement or seniority; as his earlier case did. It was therein definitely settled that the courts had jurisdiction of his individual claim under the collective bargaining agreement, and if any implication is to be drawn therefrom it is that the court, having jurisdiction to adjudicate his rights to damages under the contract, likewise had jurisdiction to adjudicate his right to reinstatement under the contract had he sought reinstatement in his action.

Other cases may be cited which, while not strictly on all fours with the factual situation in the present case, indicate the power of the courts to deal with the question of reinstatement as well as with the monetary recovery to which a wrongfully discharged employee may be entitled. Thus, in the case of *Fine v. Plat (Tex.)* 150 S. W. (2nd) 308, it was held that a seniority right is a contract right which will be protected by the court, and that the court had power to require specific performance of an agreement fixing the plaintiff's seniority rights.

In the case of *Heasley v. Plasterers' Local No. 31*, (Pa.) 188 *Atlantic* 286, in which it was held that the court had jurisdiction to compel reinstatement, the court went on to say that the right to contract for work is a property right, and the court has the power to restrain its impairment.

In the case of *Locomotive Engineers v. Mills*, (Ariz.) 31 *Pacific* (2) 971 the Supreme Court of Arizona said that an interference with a man's livelihood is sufficient to give a court jurisdiction as such an illegal act amounts to interference with a visible property right. In that case the court took jurisdiction to prevent the interference with a railway employee's seniority as against the contention that such seniority was not a property right granted to and vested in the individual.

Finally, in the case of *Coyle v. Erie Railroad Company* (N. J.) 59 *Atlantic* (2) 817, which case involved an action brought for reinstatement and for wages lost as a result of an improper discharge, the court ordered the plaintiffs reinstated to their former positions with the employer, with their seniority rights unimpaired as well as back pay from the time of their dismissal to the time of their reinstatement.

We unduly labor the point, however, as the court in this case denied reinstatement.

To return now to the specific point involved under this heading, namely, the admissibility as substantive evidence of the transcript of the hearing which resulted in plaintiff's discharge. In considering this matter it must be borne in mind that the parties had a written contract covering the employment, and this contract

dealt specifically with the matter of plaintiff's discharge. The first sentence of Rule 38 provided:

“No yardman will be suspended or dismissed without first having a fair and impartial hearing *and his guilt established.*” (Italics added)

That the last phrase relates to the hearing necessarily follows. In other words, before the plaintiff might properly be discharged, charges of misconduct must be brought against him, he must have a fair and impartial hearing on such charge, and his guilt of the offense charged must be established at the hearing. Anything less would be a mockery. If he might be discharged for matters other than those involved in the charge, or if his guilt as to the charge might be determined other than as a result of the hearing, the provision for a fair and impartial hearing becomes meaningless.

Therefore we submit, the contract itself provides that as a condition to proper dismissal a charge must be brought, a fair and impartial hearing had on the charge, and his guilt of the charge established at the hearing.

Now what is the best evidence as to whether (1) a charge was made; (2) a fair and impartial hearing on the charge had; and (3) guilt of the charge established at the hearing. The answer is obvious. It is the record of the hearing itself, and that is what was introduced in evidence, and what defendant now complains of. The record of the hearing shows on its face that it was taken and prepared by defendant's own representatives, and counsel for defendant stipulated that such record (Exhibit “A”) constituted a complete transcript of the hearing. (Tr. 5).

This is by no means the case of *Tennison v. St. Louis-San Francisco Ry Co.*,Mo....., 228 S. W. (2) 713, relied upon by defendant. In that case the contractual provision was:

“Trainmen shall not be suspended, discharged, or unfavorable entries made against their records without just and sufficient cause”.

The court, in construing this provision said:

“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 for 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.”

In other words, the crux of the matter was whether there was in fact “just and sufficient cause” for the discharge, and whether such just and sufficient cause did in fact exist was a matter to be determined by the court on competent evidence there presented; that an unsworn statement of one not a party to the litigation was hearsay, and not admissible.

Here the contractual provision is:

“No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established.”

In the Tennison case the right of proper discharge was predicated upon the *existence* of “just and sufficient cause”. Such “just and sufficient cause” might exist independent of any hearing, and, if it did in fact exist, would justify dismissal.

In our case, the right to proper discharge is conditional upon a hearing and the establishment of guilt at the hearing. Just and sufficient cause in our case is not sufficient. Our contract conditions the right to discharge upon the establishment of guilt at the hearing. Thus, we say that there is no relationship between the Tennison case and ours.

The same is true as to the second case relied on by defendant, namely, *Johnson v. Thompson*,Mo....., 236 S. W. (2) 1. In that case the contractual provision was:

“Any conductor may be suspended from duty for a reasonable time, or for investigation of any alleged misconduct, or for violation of rules or orders, and may be discharged from the service of the company *for good and sufficient causes*.

* * *

Thus, in the Johnson case the court held that the question it was trying under the contract was whether “good and sufficient cause” for discharge existed. In our case the question under the contract was whether plaintiff’s guilt of the charge against him had been established at his hearing. The distinction between the two is vital, and plaintiff’s rights under the contract must not be lightly discarded. Here the defendant agreed that plaintiff might not be discharged unless

certain conditions were established. Because other contracts impose milder conditions upon other carriers is not here our concern.

Defendant's position simply is that irrespective of what developed at the hearing, evidence thereof was inadmissible. An assumption will demonstrate the fallacy of this reasoning. Let's assume that at the hearing it was conclusively established that plaintiff was not *in fact* absent without leave for a period in excess of ten days, yet defendant nevertheless discharged him for violation of that rule. Under those circumstances could it be suggested that the record of that hearing, which thus conclusively established plaintiff's innocence of the charge, could not be admitted in evidence of the fact that his guilt had not been established at the hearing? Such is in fact our case. The record of the hearing was offered solely for the purpose of proving that at the hearing plaintiff's guilt had not been established. The establishment of his guilt was a condition to defendant's right of discharge, and the reception in evidence of the record of the hearing was, accordingly, proper.

The situation here is not dissimilar from that existing with respect to determinations by administrative bodies generally. Whether such bodies in acting upon matters within the scope of their authority acted arbitrarily or capriciously, and whether a fair hearing was had, is to be determined by the court in the light of the record of the hearing. In the instant case the transcript of the hearing conclusively shows that guilt was found by the defendant without a scintilla of evidence to support such finding. Thus it is that defendant finds it

necessary not only to seek to suppress the record of the hearing it held, and following which it acted, but also to justify the action it took by other alleged acts of misconduct which were neither the subject of the hearing, nor then assigned by the defendant as grounds for plaintiff's discharge.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION FOR NON-SUIT.

The answer to this point of argument is obviously simple. Plaintiff had a prima facie case for recovery upon the basis of the pleadings and stipulation alone. In other words, it was admitted and stipulated that plaintiff had been employed by defendant; that his employment was covered by the collective bargaining agreement; that defendant had discharged him; that but for the discharge he could have worked for defendant; and that as a result of his discharge his earnings from defendant had been lost to him. It was further admitted by the parties that under the collective bargaining agreement defendant's right to discharge was limited by the provisions of Rule 38. Under those circumstances the fact of discharge alone made out a prima facie case for recovery. The burden was then on the defendant to establish that the discharge was in accordance with the contract.

Defendant's own case of *Johnson v. Thompson*, *supra*, affirms this proposition. In it the court said:

“The contract of employment was admitted in this case and the terms thereof, that is, that deceased was employed as conductor by defendant in continuous employment. Under the pleadings it was admitted that deceased was discharged from his employment June 12, 1948, by the defendant, for alleged violation of its rules. Under interrogatories answered by defendant, evidence as to the loss of earnings was shown. The facts further offered by plaintiff show that the deceased offered to continue his employment but that such employment was refused. We think this evidence made a prima facie case. The justification of the discharge was affirmatively pleaded in defendant’s answer and the burden of establishing this defense was upon the defendant.”

In addition, however, to these admissions and stipulations, which in and of themselves made out a prima facie case, there was before the court at the time the motion for non-suit was made, the transcript of the hearing upon which plaintiff’s discharge was predicated, and which transcript showed on its face that plaintiff had not wilfully or otherwise violated the rule he was charged with having broken.

POINT III.

THE TRIAL COURT DID NOT ERR 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.

We have heretofore demonstrated under Point I hereof the correctness of the lower court's ruling in admitting in evidence the transcript of the hearing as bearing upon whether or not the defendant's discharge of plaintiff came within the contractual limitations thereon; that is, as bearing upon the question of whether plaintiff's guilt of the offense with which he was charged was established at the hearing. We now have before us the question of whether the court should have received other evidence tending to establish justification for plaintiff's discharge upon other grounds.

Stated another way, was the trial court limited in its determination of the propriety of plaintiff's discharge to a consideration of the hearing actually had, or could it consider other grounds the defendant might have had for discharging defendant, but as to which no charge was ever made or hearing had.

The specified charge against plaintiff was that he had absented himself in excess of ten days without leave. This, and no other matter, was the subject of the hearing, and upon this ground, and no other, was he discharged.

It is further to be noted that nearly *five months* after the initial dismissal this alleged absence without written leave *was still the only ground relied upon by*

defendant as justifying the charge. We invite attention to the letter of defendant's superintendent, R. E. Edens, dated January 22, 1945 (Plaintiff's Exhibit "C"), hereinbefore set out in full herein. In rejecting plaintiff's request for reinstatement with pay Mr. Edens said:

“The rules require yardmen to have a written leave to be absent from duty 10 days or more. Russell failed to do this, and it is my position that the action taken in his case is fully justified. Claim is therefore respectfully declined.”

It was not until after this action was brought that defendant realized that its original ground for discharge, confirmed some five months later, could not successfully withstand the scrutiny of the courts, and that it then began to cast about for some other basis upon which to justify its action. And so at the trial the defendant offered to prove as justification for plaintiff's dismissal, not his violation of this rule, but

- (1) That he was but an intermittent worker, and thus unsatisfactory;
- (2) That in truth and in fact plaintiff was not sick during the period in question, but physically able to work; and
- (3) That in testifying as he did at the hearing that he was sick, when in truth he was well, he had lied.

Several items of evidence were offered, but we believe they all come within one or the other of the above three categories.

Let's consider the second category first; that is, that plaintiff was in fact able to work during the period in question.

Whether or not he was sick was a subject for inquiry at the hearing had on August 3, 1945, as that constituted plaintiff's excuse for his absence from work. However, instead of developing that subject to its satisfaction at that time, defendant elected to accept the testimony of plaintiff himself with respect thereto. No continuance was requested by defendant to meet plaintiff's testimony in this regard.

Nor could it contend, nor does it, that it was taken by surprise at the hearing as to the reason assigned by plaintiff for his absence, i. e. that he was sick. On July 31st, or August 1st, (as the case may be) defendant's representatives talked with plaintiff by phone, and were at that time informed by plaintiff that his illness was such that he could not that day attend the scheduled hearing. Defendant, therefore, was fully informed as to the reasons assigned by plaintiff for his absence, and, during the two or three day interim between the date of this phone call and the hearing, had every opportunity to procure and present at the hearing such evidence as it might have, (including the testimony of its own doctor Stratford, whom plaintiff had consulted relative to his illness) tending to contradict plaintiff's testimony that the reason for his absence was his illness. But instead of so doing defendant was content with the testimony as introduced, closed its hearing on that testimony, and discharged plaintiff on the basis thereof.

Let's reverse the situation and see where it leads, because any rule in this regard must of necessity work both ways.

Let's assume that plaintiff was silent at the hearing, and that the evidence adduced thereat by his employer was adequate to establish his guilt, and based thereon he was discharged. He then brought an action for wrongful discharge, and in response to his employer's reliance upon the evidence adduced at the hearing he then urged upon the court other evidence tending to disprove that which was established at the hearing. Is the court to be permitted to try that question over again, and determine as a result of such new hearing that the discharge was improper and thus hold the employer liable for wrongful discharge? Or will the court say, "*No, you had your hearing, and full opportunity to develop the evidence you now seek to introduce. The defendant, in discharging you, was entitled to rely thereon, and you will not now be permitted to go beyond that which was there presented.*"

We submit that in equity and justice under a contract such as this neither party may go beyond the hearing. Each party must present his case in full thereat, or be foreclosed. At the conclusion of the hearing the parties' rights and responsibilities are fixed, and they may safely chart their future course in the light of what the hearing established.

Now, as to categories (1) and (3); namely, that plaintiff was but an intermittent worker, and thus generally unsatisfactory, and that plaintiff testified falsely at the hearing. What we have heretofore said as to the conclusiveness of the hearing in fixing rights

and responsibilities is here applicable. Further than that, we say that the contract itself does not permit a hearing upon one alleged ground for discharge, a discharge upon that ground, and then a justification for the discharge upon some other ground.

The contract provides that before a covered employee may be discharged, an offense must be charged and a hearing had thereon. The contract does not permit a man to be discharged upon one ground, and then justification for the discharge had upon some other ground as to which he has had no opportunity to be heard.

Under a contract such as this a proper discharge may not be had without a hearing, nor may a discharge be supported upon grounds other than those stated in the specific charge. In *Kiker v. Insurance Company*, (N. M.) 23 P. (2) 366. the court said:

“Generally, in an action for wrongful discharge, the employer may plead in defense any sufficient cause, though it may have been unknown to him at the time, though his real reason or motive may have been something else, and though another cause may have been expressly assigned. Williston on Contracts, Sec. 744, 839; Labatt on Master and Servant, Sec. 187; Page on Contracts (2d Ed.), Sec. 3058; 19 R. C. L. 516; 39 C. J. 89.

“But the parties of course have the right to stipulate the maner in which the employer may terminate the contract. If they stipulate that it shall be by written notice specifying the cause, a discharge specifying no cause, or an insufficient cause, would be wrongful. *It follows that,*

under such a contract, a cause not specified would not be available in defense. Hughes v. Gross et al, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375, cited; 18 R. C. L. 516, Mortimer v. Bristol, 190 App. Div. 452, 180 N. Y. S. 55."

In *Cole v. Lowe's, Inc., Inc.*, 8 Fed. Rules Dec. 508, the court said:

"Where the contract specified grounds for termination or suspension and written notice is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. He cannot justify his action on other grounds named in the contract, which, although true, were not stated in the notice."

And in *Levy v. Jaratt*, (Tex) 198 S. W. 333, the court said:

"If the acts of misconduct other than planning to enter business for himself now charged against the plaintiff would have justified his discharge, they were not made the basis of the termination of the contract and could not affect the plaintiff's right to recover on it, as the defendant at that time did not treat such acts as being a breach of contract. * * *."

Thus, we respectfully submit as the contract calls for a charge, a hearing, and the establishment of guilt, as conditions to discharge, the employer cannot justify a discharge on grounds other than those embodied in the charge and made the subject of the hearing. As that is what the proffered testimony was directed toward, the lower court was correct in excluding it. And

we cannot conceive that any carrier, operating under contracts such as this, would consciously want the precedent established that a court, in trying the question of wrongful discharge, might go beyond the evidence adduced at the hearing itself. For under such a precedent, as heretofore pointed out, an employee might stand silent at the hearing, permit himself to be discharged, and then in a subsequent action for damages, prove to the court by evidence that he should have presented at the hearing that he was innocent of the charge upon which he was dismissed.

POINT IV

THE LOWER COURT DID NOT COMMIT 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.

(A) Subdivision (a) under this point of argument relates solely to the question of whether in determining the amount of plaintiff's recovery for his wrongful discharge, earnings of plaintiff in other employment between the date of his dismissal and the date of trial are to be deducted from the amount he could have earned from defendant but for the wrongful discharge.

In support of its contention that these interim earnings should be deducted, defendant relies upon the general proposition, with which we have no quarrel, to the effect that the measure of damages for breach of an employment contract generally is the amount the employee would have received under the contract, less what he has earned during the period. The difficulty with the application of this general rule to this particular case is that here the parties themselves have specifically contracted for the measure of recovery by plaintiff from defendant in the event of wrongful discharge.

Rule 38 of the collective bargaining agreement provides:

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

That the parties are fully competent and have the right to contract with respect to the measure of recovery in the event of a breach of the contract there can be no doubt. Indeed, a provision in an employment contract

liquidating the damages in the event of a breach is deemed appropriate. In 31 Am. Jur. (Labor) Section 127, it is thus stated:

“It is not improper in a collective bargaining agreement to provide for the payment of liquidated damages in case of breach by the employer without also providing for payment of such damages by the union.”

And in 35 Am. Jur. (Master and Servant) Section 76:

“The injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate.”

Defendant's position in this regard is wrapped up in the Slocum case, and its statement on page 51 of its brief succinctly states its position. This contention of defendant as so stated is as follows:

“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 employee 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 action.”

We now propose to take defendant's position, as set forth in its foregoing statement, point by point, and show its fallacy.

The first proposition is that the Slocum case holds that "courts have no jurisdiction other than to try a simple common-law action for damages for breach of contract". We submit that the Supreme Court of the United States in the Slocum case made no such holding. The language of that court in that case is:

"We hold that the jurisdiction of the Board (Railway Labor Board) to adjust grievances and disputes of *the type here involved* is exclusive."
(Italics added)

The dispute in the Slocum case involved conflicting claims between two unions with respect to certain jobs with the railroad. The railroad brought an action in the state courts of New York for a declaratory judgment as to which of the two unions had jurisdiction over these jobs. The effect of the Supreme Court's decision is simply that in *jurisdictional disputes* involving collective bargaining agreements, the Railroad Labor Board has exclusive jurisdiction. In no wise does the court's decision purport, other than in the specified instance there involved, to limit the jurisdiction of the courts.

Defendant's second proposition is that under the Slocum decision a court is without jurisdiction to interpret the collective bargaining agreement. The Slocum, decision however, says just the contrary. We again quote therefrom:

"Our holding here is not inconsistent with our holding in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 85 L. ed 1089, 61 S. Ct. 764. * * *. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful dis-

charge differs from any remedy which the Board has power to provide, and does not involve questions 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.” (Italics added)

Thus, we see that instead of holding that a court is without power to interpret provisions of a collective bargaining agreement, it specifically reaffirms that in actions for wrongful discharge, such as the present case, the court must of necessity interpret, and it has the power to interpret, the contract as it bears on the right of recovery.

Defendant’s next proposition is that under the Slocum decision a court is without power to pass on the question of “whether or not an employee is entitled to reinstatement” or “to any other benefits under the contract”. We do not concede the accuracy of this assertion as it relates to “reinstatement”, but do not argue it further as the problem of reinstatement is not here involved. As to the right of the court to interpret the contract in relationship to benefits conferred upon an employee wrongfully discharged, in an action it has before it arising out of such discharge, the decision is explicit in its affirmance of that right.

Defendant’s final assertion is that under the Slocum decision courts 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 action”. Well, of course, it’s obvious that the Slocum decision contains no expression at all

in that regard. If a court has jurisdiction to entertain an action for wrongful discharge, and there can be no question but that it has, the measure of recovery will be in accord with the terms of the contract, and neither the laws of Utah or of the United States provide against the parties to a contract agreeing to the measure of recovery in the event of a breach, which is what the parties here have done.

We invite the attention of the court to its decision in the case of *Foxley v. Rich*, 35 *Utah* 162, 99 *Pacific* 666, as follows:

“Where the parties themselves stipulate what the result of a breach of a particular contract shall be, the courts ordinarily have no authority to impose other consequences than those agreed upon.”

Also, to the case of *Rose v. Garn*, 56 *Utah* 533, 19. *Pacific* 645, as follows:

“No court has ever held that the parties may not agree between themselves as to the measure of damages that shall be sustained upon the breaching of a contract by either party.”

And in the concurring opinion to the above case, Mr. Justice Frick observed:

“Parties to a contract, unless prevented by public policy or some positive law, have the same right to determine and fix the consequences of a breach of the contract that they have to agree upon any other proper provision and, in case they have so agreed, courts must enforce their agreement. In that regard the case at bar, in my judgment, falls squarely within the rule laid down in the case of *Foxley v. Rich*, 35 *Utah*, 162, 99 *Pacific* 666.”

It remains only for the court to interpret the provisions in the contract

“In case dismissal is found to be unjust, yardmen shall be reinstated and *paid for all time lost*,”

Having now, we believe, successfully laid at rest any assertion that the Slocum case deprived the court of interpreting this provision of the contract, and applying it in fixing the amount of plaintiff's recovery, we give consideration to what it means. The difference here between plaintiff and defendant is simple. Plaintiff asserts that it means earnings which otherwise would have accrued to him from his employment at the railroad, without deductions. Defendant, on the other hand, contends that it is such earnings, less interim earnings from other sources between the time of discharge and trial.

In support of its position defendant relies upon the case of *Eubanks v. Galveston, H. & S. A. Ry. Co. (Texas)* 59 S. W. 285, decided by the Supreme Court of Texas May 3, 1933. In that case the contract provided that in the event of wrongful discharge the employee should be paid “for all time lost”. The Texas court, without setting forth in its opinion its reasoning in arriving at its conclusion, held that this meant that earnings between the date of discharge and the date of judgment must be deducted.

That the Texas court in so holding reached what we believe to be an erroneous conclusion is evidenced by the ruling of the Railroad Labor Board itself on this point. In Award No. 13048, Docket No. 22098 of the National Railroad Adjustment Board, *The Chicago, Rock Island and Pacific Railway Company*, decided

October 25, 1949, this particular phrase "and paid for all time lost" was carefully and extensively analyzed, both from the standpoint of the language of the phrase itself in the light of the general rule with respect to mitigating damages, and from that of public policy, and its conclusion was that earnings from other sources were *not* to be deducted. This was the conclusion reached by the lower court in this case.

In view of the importance of this particular question we take the liberty of quoting from the decision of the National Railroad Adjustment Board in connection with this award.

"The carrier urges substantially that if the claim is to be sustained on account of wrongful dismissal the award should be for pay for time lost from the carrier less earnings of claimant, if any, he made in other employment between the time he was discharged and the time reinstated.

In an approach to a determination of this question, it becomes necessary to examine the pertinent rule. The rule is Article 23 (d) as follows:

'Should such investigation prove the engineer unjustly disciplined, it shall be corrected and his record cleared; in case the suspension of dismissal is found to be unjust, he shall be reinstated and paid for all time lost.'

This provision of the agreement under law fixes the rights of the engineer and the liability of the carrier in the case of unjust suspension or dismissal.

If the literal wording of this rule is to be accepted it appears that thereby the carrier binds

itself to pay an engineer unjustly suspended or dismissed for all of the time which he lost in the position from which he was removed, and this without regard to any question of earnings elsewhere during the period of separation. To interpret it otherwise would be to give the words a meaning of which they are clearly not capable.

If they are to be given a different meaning, as the carrier insists that they must, that is that they must be interpreted to mean that an engineer shall be paid for all time lost less such earnings, if any, as shall have been received over that period from other employment, the reason therefor must come from some source other than the contract itself.

It is without question the general law of the land that an improperly discharged employe is required to make the best use of his time to seek other employment, and that having done so the discharging employer is entitled to have the earnings thereof set off in mitigation of the damage or against what he was entitled to receive under the contract of employment which was breached.

The carrier substantially contends that this general principle of law must be read into this provision and become a part of it and that a failure to do so is contrary to law and public policy.

No hesitancy is encountered in declaring that if the contract was silent, or unexplainably ambiguous, or provided that he should be reimbursed for his loss as distinguished from his time lost, or was couched in any terms other than a specific declaration that he should be paid "for all time lost", the principle contended for by the carrier would be applicable and controlling.

There is another well reconized principle of law which, since the agreement is specific in its terms, requires consideration here. *The principle is that parties capable of contracting may enter into a contract which is enforceable if it relates to a proper subject matter, and such a contract is not condemned as unenforceable by law or public policy, even though it contravenes a principle of law ordinarily deemed to be and accepted as limitation upon an ordinary contract.* The principle is one which guarantees and protects the right to freedom of contract in the absence of prohibition of law or of public policy. The effect of the rule is to say that a contract is enforceable and shall be enforced according to its terms unless it runs counter to a prohibition of law or of public policy.

Is therefore, the principle for which the carrier contends a prohibition in situations such as this under law or public policy?

Railroad labor relations with which the Adjustment Board has power to deal are controlled by the laws of the United States.

No statute of the United States has been found which directly or by reasonable implication prohibits or declares a public policy the effect of which is to prohibit enforcement of such contracts as this one in accordance with their specific terms.

In some of the state courts and in at least one Circuit Court of Appeals of the United States the view of the carrier has been sustained by decision.

The decisions of the state courts may be said to be controlled in the states where ren-

dered but they can have no effect upon contracts entered into pursuant to the laws of the United States.

As to the decision in the Circuit Court of Appeals case, in the light of considerations well known to all, it is belived that the declaration there, instead of declaring the true public policy of the United States with reference to contracts such as this one, runs counter thereto.

The courts do uphold and enforce contracts which provide for payment for damage on breach in excess of damage sustained, except in those jurisdictions wherein there is a prohibition, and even in those allowance is made as liquidated damages if the amount bears a reasonable relation to the actual damage sustained. As is well known particularly in connection with Office of Price Administration functioning, the Congress has enacted and declared and the United States Courts have approved, instead of condemning, a policy of exacting damages in excess of the actual damage sustained for entry into illegal contracts and for breach of legal contracts. In numerous instances the allowable amount was three times the actual damage.

With this line of legislation and judicial determination as an analogy it appears necessary to say that the enforcement of such contracts as this according to their literal terms does not offend against the laws of public policy of the United States.

Nothing having been found in the statutes of the United States or its public policy which prohibits or prevents enforcement of the contract in accordance with its specific terms and clear meaning, *the finding is that the claimant*

should be paid for all time lost while he was able to and could have worked in his assignment without deduction of outside earnings, if any." (Italics added)

We submit to the court the persuasiveness of the reasoning of the Railroad Adjustment Board in reaching the conclusion it did. We also invite the attention of the court to that phase of the decision of the Supreme Court of the United States in the Slocum case, *supra*;

"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. *Precedent's 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 system.*" (Italics added)

(b) and (c). The lower court held that the amount of plaintiff's recovery was upon the basis of the amount that he would have earned if he had worked for defendant every day from ten days after his application for reinstatement to the date of trial, and declined to consider evidence to the effect that prior to his discharge he had not worked steadily.

It was stipulated and agreed by the defendant that work was available continuously from the date of plaintiff's discharge, and that plaintiff's seniority was such that but for his discharge he could have worked every day from the date he was dismissed to the date of trial. Having thus agreed that work was available, and that plaintiff could have so worked every day, defendant

then offered to prove that during his four years of employment he had not worked every day, and also to prove the days during such period he had been absent. The purpose of this proof, as stated by counsel for defendant, was to establish a pattern from which the court might infer that as he had worked less than full time prior to his dismissal he would have worked less than full time subsequent thereto. (Tr. 36)

We submit that the ruling of the lower court was proper for two reasons. First, the nature of the offer left it entirely too speculative to permit the drawing of inferences. Was the reason for his pre-dismissal absences due to circumstances within his control, and which would continue? Were they caused by lower seniority ratings no longer affecting him? Were there illnesses or accidents responsible? In other words, could the work history of this man during the first four years of his employment in an industry, in which seniority plays so important a factor, be of any value at all in determining the probabilities of the amount of days he would put in thereafter in the light of a then seniority which would permit him to work every day if he so desired. It appears to us, as it appeared to the lower court, that the proffered evidence was entirely too speculative to be of any value, particularly as the most it would do was to show a pattern from which the court would have to draw inferences.

The second reason why the rejection of the evidence was proper is to be found in the last paragraph of the decision of the Railroad Labor Board in the *Chicago, Rock Island and Pacific Railway Company* case, *supra*, wherein the Board held:

“Nothing having been found in the statutes of the United States or its public policy which prohibits or prevents enforcement of the contract in accordance with its specific terms and clear meaning, the finding is that the claimant should be paid for all time lost *while he was able to and could have worked* in his assignment without deduction of outside earnings, if any.” (Italics added)

POINT V

THE TRIAL COURT DID NOT ERR 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.

A note to Section 38 of the agreement provides in part as follows:

“Reinstatement will not be permitted after the expiration of six months from date of dismissal, unless agreeable to the management and the general committee, * * *.”

We're off again on this matter of reinstatement, and as the defendant persists in arguing it, we must answer in self defense, as we do not want it understood that we agree that the foregoing provision of the contract constitutes any present defense to defendant's failure to reinstate plaintiff.

At the outset it should be observed that the foregoing provisions comes into the agreement as a "Note" to the portion of Rule 38 that immediately precedes it, and which relates to the dismissal of yardmen. It is obvious that it relates to a rightful dismissal, and not a wrongful dismissal. In other words, where an employee has been rightfully discharged, he will not be reinstated by the employer without the union's consent. The reason for this is obvious. Upon reinstatement an employee assumes his former seniority rating, which affects the seniority status of many other employees. Hence, the union naturally wants a voice in the matter of such reinstatement. Why it is tied in to the six months period the writer is not informed, but it is to be assumed that seniority rights may not be fixed within such limited period, and thus a reinstatement within a period of six months may not have the adverse effect on other employees that a later reinstatement would have.

But defendant now would extend it to cover a wrongful discharge, as well as a rightful one. In other words, that it can wrongfully discharge an employee — arbitrarily refuse to reinstate him for a period of six months — and then escape entirely the consequences of its unlawful conduct by smugly asserting that *both* the union and itself are not agreeable to giving the employee back the job from which he had been wrongfully dismissed. We cannot conceive that any court would countenance any such course of conduct, nor that this court will render any comfort to the defendant on this ground. If this plaintiff was wrongfully discharged, the law and the contract has given him his remedy, and it is not to

be taken from him by any arbitrary failure of the defendant to rectify the wrong within the six month's period. Two wrongs do not make a right, and if the defendant was wrong in dismissing him in the first instance it doesn't make it right by simply refusing to reinstate him until after a period of six months has elapsed.

Further than that, and even if it be assumed that the provision relates to a wrongful discharge, which requires a tortured interpretation of the word "discharge", it is of no avail to the defendant, because, if such note is actually a part of the contract itself, this particular provision is of no force or effect. In *Piercy v. L. & R. Co. (Ky.)* 248 S. W., 1042, it is held:

"The primary purpose in the organization of labor unions and kindred organizations is to protect their individual members and to secure for them a fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers look always to the securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual member, and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person. The organization is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions. *Hudson v. C., N. O. & T. P. Railway Co.*, 152 Ky 711, 154 S. W. 47, L. R. A. (N. S.) 184.

If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization, to which the one entitled thereto is a member, it would be builded upon a flimsy foundation of sand which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him."

This view was affirmed in the case of *System Federation Number 59 v. Louisiana A. & A. Railway Company*, 119 *Federal* (2) at page 514. Further, in the case of *Henry S. Grove*, 22 *Fed.* (2) 444, it was held that an individual cannot be deprived by a union of any substantive right he has.

We refer also to the numerous awards of the Railroad Adjustment Board and to the court decisions cited by defendant in its brief to the effect that the disciplining of employees, and the hiring and firing thereof, is the prerogative of management. Defendant cannot blow hot and cold on this thing at the same time, and its now pious protestations that in refusing to reinstate the plaintiff to the position from which he was wrongfully discharged constituted "maintaining the integrity of the agreement" is frivolous.

However, this all relates to the question of reinstatement, which is not before this court. It was before the lower court, and that court refused to reinstate. Whether the lower court was right or wrong — whether its denial was actuated by this argument or some other — is really now immaterial.

POINT VI

THE TRIAL COURT DID NOT COMMIT 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.

Defendant's argument under this point is more difficult for us to follow than any that precedes it. Apparently two propositions are involved, first, that Mr. McDaniels in writing the defendant as he did under date of May 14, 1944, (Defendant's Exhibit 3) in effect released the defendant from any liability to plaintiff, and, second, if that letter did not constitute a release, plaintiff's failure to prosecute any further claim until May 22, 1949, when this action was commenced, effected an estoppel.

This involves the assumption, for the sake of the argument, that plaintiff had been wrongfully discharged and as a consequence had a claim for redress against defendant. Upon that assumption we examine the question of the effect thereon of Mr. McDaniels' letter of May 14, 1946. That letter is as follows:

134 Cleveland Avenue
Salt Lake City 4, Utah
May 14, 1946

"Mr. F. C. Paulsen, Vice President
Ogden Union Railway and Depot Co.
10 South Main Street
Salt Lake City 1, Utah

Dear Sir:

Reference is made to our conference, your office, May, 1946, in connection with your file 011.221 attached to our grievance, reading:

‘Claim for reinstatement, with seniority rights unimpaired, and compensation at the applicable rate, August 6, 1945 and each SUBSEQUENT date thereto until restored to service favor switchman W. B. Russell, Ogden yard, account dismissed from the service August 4, 1945 for his alleged responsibility in connection with unauthorized leave of absence’

in connection with the reinstatement of former switchman W. B. Russell, Ogden, Utah.

As agreed during our conference, further action on the subject matter was to be held in abeyance pending our investigation of undesirable procedure on the part of Mr. Russell resulting in false testimony evidenced during formal investigation of August 3, 1945.

This investigation has been completed and it is 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 grievance possessing dissimilar facts and circumstances devolving upon similar allegations as appear in the introduction of the formal investigation of August 3, 1945 we are withdrawing the grievance and the case is closed.

Yours truly,

PS: Note change in address.

Phone 7-7593

/s/ C. E. McDaniels
C. E. McDaniels, Acting Vice
President, S. U. of N. A."

Prior thereto plaintiff had authorized the Switchman's union to represent him as his "agent and representative in the prosecution of grievance claim", and to act as his "agent and representative * * in all further prosecution of the * * grievance", and to "negotiate, adjust and dispose of the grievance claim in any manner". (Exhibit B)

Defendant's first point is that by virtue of the authority vested by Exhibit B, the letter of May 14, 1946 constituted a release. We dispose of that contention by observing that an effective release requires consideration, and defendant does not suggest that the letter of May 14, 1946, whatever it may have been intended to mean, is supported by any consideration.

We pass, therefore, to the next question as to whether it can be said to be in effect a statement of abandonment by plaintiff of his claim for redress, and, if so, if plaintiff was, on May 22, 1949, when this action was commenced, estopped from prosecuting his claims.

As it is contended by defendant that the authorization (Exhibit B) operated to constitute the officers of the Switchman's Union as plaintiff's agent with authority broad enough to cover an abandonment of the claim, it is well to pause here long enough to consider briefly some fundamental principles of the law of Agency. The fiduciary character of the relationship is pointed out in 3 C. J. S. (Agency) Section 138, as follows:

“As has been pointed out in Section 1 of this Title, the relationship existent between principal and agent is a fiduciary one, demanding conditions of trust and confidence. Accordingly, in all transactions concerning or affecting the subject matter of his agency, it is the duty of the agent to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his principal.”

Now what is the authority of an agent, engaged for the purpose of handling a claim for redress, to bind his principal by a voluntary acknowledgement that the principal has no right to redress. The broadest scope of an agency of the type here involved is that which exists between attorney and client, and if it be said that this agency was of equal breadth, nevertheless it would not and could not encompass the power of *retraxit*, which is the voluntary acknowledgement that plaintiff has no cause of action. *Mutual Life Insurance Co. of N. Y. v. Phillips* (Ark) 169 S. W. (2) 132.

As stated in 7 C. J. S. (Attorney and Client) Section 87:

“*Retraxit*. The entry of a retraxit, which operates as a perpetual bar to the cause of action, must, ordinarily, be made by plaintiff in person, as stated in the title Dismissal and Non-suit Section 5 (18 C. J. p. 1148 notes 38-42) and his attorney has no implied or apparent authority to take such action but can do so only where he has been specially authorized by his client, unless there is a statute vesting a party's attorney of record with such power.”

And *Glover v. Bradley* (C. C. A. 4th) 233 Fed. 721:

“Nor has an attorney the power, except under special authority, to execute a retraxit or disclaimer, or otherwise to bind the client by the surrender of his rights: for a retraxit, or disclaimer, or other form of a surrender, being in the nature of a release, must be made by the party himself. *Dickerson v. Hodge*, 43 N. J. Eq. 10 Atl. 111; *Thompson v. Odum* 31 Ala. 108, 68 Am. Dec. 159; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568; *Coates v. Santa Fe Ry. Co.*, 15 Ariz. 25, 135 Pac. 717; *Turner v. Fleming*, 37 Okl. 75, 130 Pac. 551, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238. In *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed.

Now, where is the special power in this authorization which vests the Switchmen' union with the authority effectively and conclusively to bind the plaintiff by a voluntary acknowledgment that plaintiff has no valid claim for redress?

The duty of an agent is the furtherance of his principal's business; not the retarding thereof, or its abandonment. This is particularly true with respect to the relationship between a union and its members, as evidenced by the decisions in *Piercy v. Louisville & N. Ry. Co.*, and *supra*, and *System Federation No. 59 v. Louisiana A. & A. Ry. Co.*, 119 Fed. (2) 514.

What meaning is to be assigned to the word “dispose”, in the phrase “negotiate, adjust and dispose of”? We submit that it embraces acts similar to negotiation and adjustment, and none other. Certainly not the waiver, release or abandonment of plaintiff's rights.

One of the earliest cases we find reflecting upon this matter is that of *Love v. Pamplin*, 21 Fed. 755, in which the Circuit Court for the Western District of Tennessee was called upon to construe the meaning of the word "dispose" in the phrase "sold, leased or disposed of". The court reached this conclusion:

"The language of the prohibition is that the reservations shall not be 'sold, leased or disposed of'; and although the words last used 'disposed of' might seem to embrace other dispositions than those of sale and lease, yet they cannot, upon the principal *noscitur a sociis* be extended so as to include any other than those of a character like those specially named."

The application of this doctrine in the decided cases is legion. In the interests of brevity we cite only the case of *State v. Western Union Telegraph Co.* (Ala) 72 So. 99:

"The maxim 'noscitur a sociis' means that general and specific words which are capable of an analogous meaning, being associated together take color from each other, so that the general words are restricted to a sense analogous to that of the less general."

We submit, accordingly, that the word "dispose of": taken in conjunction with the less general words, and particularly in conjunction with the evident purpose of the authorization as a whole, is limited in meaning by the more restricted words with which it is associated.

Now as to the question of estoppel, which defendant raises as a bar to plaintiff's action. As preliminary to this, however, is a determination of whether

the letter of Mr. McDaniels to defendant justifies the interpretation defendant now seeks to place thereon, namely, that insofar as plaintiff is concerned, he acknowledged he had testified falsely at the hearing, and he would not further prosecute his claim for redress for his discharge. The second paragraph of the letter states:

“As agreed during our conference, further action on the subject matter was to be held in abeyance pending our investigation of undesirable procedure on the part of Mr. Russell resulting in false testimony evidenced during formal investigation of August 3, 1945.”

All this says is that the union is investigating the contention that Russell testified falsely. We then go to the next paragraph, as follows:

“This investigation has been completed and it is 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 and circumstances devolving upon similar allegations as appear in the introduction of the formal investigation of August 3, 1945 we are withdrawing the grievance and the case is closed.”

Here Mr. McDaniels says the investigation is completed, but is entirely silent on what conclusion was reached. Defendant says this constitutes an admission by plaintiff that plaintiff testified falsely, but how defendant twists the statement that the investigation is completed, into an acknowledgement of guilt, is not apparent. The letter goes on to say “we are withdraw-

ing the grievance and the case is closed'', but this is tied into the phrase that precedes it that "it is without prejudice to our contentions and position as expressed in our letter of February 15, 1946''. In the letter of February 15, 1946, the position had been taken that plaintiff had been wrongfully discharged, and was entitled to redress.

By the letter of May 14, 1946, all that is said is that "without prejudice" to the contention that plaintiff had been wrongfully discharged, and was entitled to redress, "we" (that is the union) are withdrawing the grievance and the case is closed. In other words, without prejudice to plaintiff's rights, we (the union) are withdrawing the grievance, To us, all it means is, that for reasons best known to the union, notice is given to defendant that it is withdrawing from its representative capacity, and withdrawing the grievance it filed on his behalf, *but*, such withdrawal is without prejudice to any further action plaintiff himself might care to take.

Fairly contrued the letter simply says: So far as the union is concerned the case is closed. So far as the individual is concerned, our closing of the case is without prejudice to him, and leaves him free to pursue whatever remedies he may have.

In this connection it should be borne in mind that following plaintiff's discharge, his application for reinstatement, and defendant's denial of such application for reinstatement and reaffirmance of the discharge and the ground thereof, all within the period of six months from the date of discharge, plaintiff's rights, if any he had, were fixed. He could pursue those

rights either before the Railroad Adjustment Board, or before the courts. Before doing either, he elected to give the railroad further opportunity to review his grievance.

The union, which was undertaking this latter step in his behalf, then withdrew the grievance and closed the case insofar as it was concerned. But in so doing the union could not prejudice what rights plaintiff had by reasons of the discharge and the defendant's categorical refusal to reinstate him. Nor did the union attempt so to do, but on the contrary made its withdrawal of the matter upon the express condition that it was "without prejudice" to plaintiff's position as set out in his application for reinstatement dated February 15, 1946.

But defendant claims that, regardless of what the letter meant, it was entitled to and did rely upon it as constituting an abandonment by plaintiff of his claim for redress, and plaintiff is now estopped from prosecuting his claims. Before considering this matter further, it may be well to have in mind certain fundamental concepts.

First. Estoppel cannot be founded upon an illegal or invalid act. 31 C. J. S. (Estoppel) Section 72.

Hence, if, as we contend, the union was without power or authority to surrender plaintiff's right of redress, its attempt so to do cannot give rise to an estoppel.

Second. It is essential to an equitable estoppel that the person asserting the estoppel shall

have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial, and justified. 31 C. J. S. (Estoppel) Section 72.

How does the defendant seek to meet this test? We quote from its brief, page 63:

“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.”

Let's analyze the situation. Defendant had discharged plaintiff; plaintiff had raised the question of the propriety of the discharge and asked for reinstatement. Defendant's superintendent had reviewed the case, and formally advised plaintiff of his affirmance of the discharge. Plaintiff's representative had then requested defendant to further consider the matter, and when it was in that status advised defendant that *without prejudice* to the claim of wrongful discharge it (the union) was withdrawing the grievance. Now defendant says that had it not been for the withdrawal of the grievance it *might possibly* have changed its mind. At the outset, this fails to meet the test that the change of position which will constitute an estoppel must be “actual and substantial”, because all that defendant will agree to is that but for the letter it *might* have given plaintiff some favorable consideration.

Third. The doctrine of estoppel is for the protection of innocent person, and only the innocent may invoke it. A person may not assert an estoppel for the purpose of obtaining the benefit of, or shielding himself from, the results of his own wrongful act. 31 C. J. S. (Estoppel) Section 75.

For the purpose of considering the defense of estoppel it must be assumed that at the outset the defendant was the wrong doer, and plaintiff had a claim for redress, of his wrongs, for otherwise the asserted defense has no place in these proceedings. We therefore have an outstanding example of a wrongdoer seeking to invoke the equitable doctrine of estoppel as a shield against the consequences of his own wrong.

And defendant's only answer to the dilemma it thus finds itself in is that had the plaintiff proceeded against defendant immediately it *might* have effected some settlement of plaintiff's claim for redress in some manner less expensive to it than ultimately resulted, that is, by possibly reinstating him on a "leniency basis" or "on probation", or "without loss of seniority rights", or "with some back pay". In other words, had negotiations not been broken off, defendant might have been successful in effecting a compromise of plaintiff's claim. The answer to it is that, in the first place, such possibilities of a compromise cannot form the basis of an estoppel, and, secondly, defendant never did, nor does it now, affirmatively assert that there was ever anything in the picture, so far as it is concerned, other

than that embodied in the letter of its superintendent dated January 22, 1946, wherein it reaffirmed the discharge, and the propriety thereof.

Fourth. Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference. Nothing can be supplied by intendment. No one should be denied the right to set up the truth unless it is in plain contradiction of his former allegations or acts. If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel. 31 C. J. S. (Estoppel) Section 77.

This case certainly does not meet the foregoing test. The most that could be said of Mr. McDaniels' letter is that it is ambiguous and uncertain, and a least as susceptible to the construction we place thereon as the construction urged by defendant. It being susceptible to the construction we place thereon, and such construction being consistent with the right asserted by plaintiff, the letter creates no estoppel.

One other comment with regard to the defense of estoppel. Counsel for defendant loosely speak of plaintiff's failure for a period of "five years" to prosecute his action, and of a "five year vacation", well recognizing that such exaggeration may tend to prejudice the plaintiff. Let's stick to the facts. Defendant admits the claim was still pending with it in May, 1946. This action was filed in May, 1949. The period is three years,

not five, and an examination of the record before this court will make apparent that the delay in bringing the action to immediate trial, once it was filed, was no more the fault of plaintiff than defendant. And we can't help observing at this point that while the lower court's judgment was entered December 22, 1950, that it was not until May 23, 1951, or over five months later, that plaintiff's briefs were served and filed. We appreciate that defendant and its counsel have other matters requiring their attention, and make reference to it only for the purpose of demonstrating that there are reasons for delay often not apparent from the face of the record.

POINT VII

THE TRIAL COURT DID NOT ERR IN ENTERING ITS FINDINGS OF FACTS AND CONCLUSIONS OF LAW, AND IN ENTERING ITS JUDGMENT UPON SUCH FINDINGS AND CONCLUSIONS.

Except for one matter, everything covered by this point has heretofore been answered in this brief, and we will not prolong the same by making further reference thereto.

The single matter that does require consideration hereunder relates to the applicability of Rule 55 (b) to the case of sickness. Such rule is as follows:

“Yardmen taking leave of absence for a period in excess of ten days must secure and fill out form 153 so the leave will be covered as a matter of record.”

It was and is the plaintiff's contention that such rule has no application to an absence occasioned by

sickness, and that a proper discharge cannot be predicated thereon in the case of an employee who is absent in excess of ten days because of sickness, and who has not filled out such form. On the other hand, defendant insisted in the lower court, and we assume it is still its position, that such rule applies in the case of sickness or accident or other unforeseen contingency the same as in the case of an employee absenting himself for purely personal reasons. The point scarcely merits argument. How can it apply to one who is home sick in bed, or in the hospital suffering from an accident? How may an employee who is taken sick today know whether his illness will be such as to necessitate his absence beyond a period of ten days?

Defendant attempts to answer that by saying that in such a case a phone call by the individual, or by someone on his behalf, will suffice. But such a phone call isn't a compliance with the rule, and one it is admitted that a phone call, in the case of sickness or accident, will suffice, then it is admitted that the rule has no application in the case of those contingencies.

But even if it be conceded that a phone call should have been made, as defendant would have it, is the record clear on the point that such communication by phone wasn't made within the ten-day period? The last day that plaintiff worked was July 21, 1945. From the transcript of the hearing (Exhibit "A") it appears that on July 31st, 1945, which was the 10th day and so within the period, plaintiff received a phone call from defendant, at which time he told defendant that he was sick. True, there is some discrepancy between the transcript of the hearing and the pleadings, in that in the

latter the date of this phone call is referred to as being on August 1st, but we submit that in the light of the evidence it may well be that the phone call was within the ten-day period, in which case it meets even defendant's theory.

We submit, however, that a phone call isn't within the rule. The rule calls for written notice on Form 153, and notice other than as specified doesn't meet the rule. On its face the rule does not, nor can it in the very nature of things, apply to an absence occasioned by sickness.

Accordingly, the only question the court had to determine, other than the measure of damages, was whether the defendant was justified in discharging plaintiff for being absent in excess of ten days without having filled out Form 153. To make this determination the court had to construe the discharge in the light of Rule 38, which required notice of the charge, a hearing thereon, and guilt established. If plaintiff violated Rule 55, it was because he wasn't sick. And all of the evidence adduced at the hearing on the charge against him established that he was sick. The court therefore concluded, as it of necessity had to, that at the hearing it was established that plaintiff's absence was occasioned by sickness; that because of such sickness as so established he had not violated the Rule; and there being no violation of the Rule the discharge predicated thereon was wrongful.

As this answering brief is rapidly drawing to a close, one or two further observation should be made relative to defendant's discharge of the plaintiff, and the legal consequences thereof.

Defendant maintains that Rule 55 (b) applies under all circumstances and violations, including sickness and accident. Assuming, without conceding, that this anomaly is in fact the correct interpretation of this provision of the contract, and that plaintiff's failure to fill out form 153 constituted a violation thereof, the violation of the Rule still is not sufficient to justify the discharge under adjudicated decisions. We say this for two reasons; first, to justify a discharge upon the violation of the rule, it must be shown that the violation was willful and intentional; and, second, to justify the discharge upon the violation of the rule, it must be shown that plaintiff knew the violation of the rule would be considered by the defendant as grounds for discharge.

Now as to the first premise; that is, that plaintiff's violation must be willful and intentional. In the case of *Ehlers v. Langley*, (Calif.) 237 Pac. 55 the court held:

“Although it is not necessary that the violation be perverse or malicious, or that it be the result of an evil intent toward the master, it must be made clear that the thing done or omitted to be done was done or omitted intentionally, the rule being grounded on the theory that willful disobedience of specific instructions of the master, if such instructions be reasonable and consistent with the contract of employment, is a breach of duty—a breach of the contract of service; and like any other breach of contract, of itself entitles the master to renounce the contract of employment.”

In *Goudal v. DeMille Pictures Corp.*, (Calif.) 5 Pac. (2) 433, it was held:

“To constitute a refusal or failure to perform the conditions of a contract of employment such as we have here, there must be, on the part of the actress, a willful act or willful misconduct. (May v. New York Motion Picture Corp. 45 Cal. App. 396, 187 P. 785; Ehlers v. Langley & Michaels Co. 72 Cal. App. 214, 237 P. 55)”.

So even though it be said that the failure of an incapacitated employee to secure and fill out Form 153 covering his absence constitutes a technical violation of the rule, still such violation, being neither willful nor intentional cannot be used by the employer as a ground for discharge.

Second, to justify the discharge, it must be shown that the plaintiff knew that his failure to secure and fill out Form 153 might be used by his employer as a ground for discharge. True it is, in this case, defendant proved that it had in the past used a violation of Rule 153 as a reason for discharge, but it did not prove, nor offer to prove, it had ever discharged an employee for violating the rule *where the violation resulted from illness or accident*.

We submit the following cases as authority for the proposition that the defendant could not properly discharge this employee for a violation of the rule resulting from illness without a showing that it had in the past invoked the same penalty against other employees for similar violations.

National Labor Relations Board v. Kohen-Ligon-Folz, 128 F. (2) 502;

National Labor Relation Board v. Weyerhouser Timber Co., 132 F. (2) 234;

National Labor Relations Board v. Viking Pump Co., 113 F. (2) 759;

National Labor Relations Board v. Empire Worsted Mills, 129 F. (2) 688;

National Labor Relations Board v. Oregon Worster Mills, 96 F. (2) 193.

Finally, as the rule itself states, the filling out of the form is solely to make the absence a matter of record. Unless, therefore, defendant has shown (and it has not) that in failing to have a form covering this particular absence as a matter of record it has been adversely affected, the purely technical violation of the rule could not be relied upon as a basis for discharge. Moreover, that the filling out of the form is merely for the record shows that the requirement of the rule relates only to voluntary absences. Imagine an employee being required to fill out a form stating in substance, "I hereby apply for a leave of absence for the purpose of being sick for a period in excess of ten days".

The trial court, accordingly, did not err in entering findings of fact and conclusions of law as it did, nor in entering judgment as it did on such findings and conclusions.

CONCLUSION

We respectfully submit that the judgment of the lower court should be affirmed

Respectfully submitted,

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