

1951

W. B. Russell v. The Ogden Union Railway and Depot Company : Appellant's Reply Brief

Utah Supreme Court

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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.

Case No.
7647

APPELLANT'S REPLY BRIEF

FILED

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Clerk, Supreme Court, Utah

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

As stated by plaintiff in the first sentence of his answering brief, there is no dispute between the parties with respect to the facts and we will refrain in this reply brief from all unnecessary reference thereto.

The plaintiff has followed the pattern of the defendant's main brief in discussing the case under Points I to VII, inclusive, and we will adhere to this arrangement al-

though we do not consider it necessary to reply to the matters discussed by plaintiff under all seven points of issue.

POINT I.

Our position in connection with this assignment was that the court erred in admitting the transcript of the proceedings at the official investigation as substantive evidence of the facts therein stated, and in connection therewith we complain at a later point in the brief of the court's deciding the case solely and exclusively upon this improperly admitted evidence. We think that the case of *Slocum v. Delaware, Lackawana & Western Railroad Co.*, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577, has firmly established the procedure to be followed by state and federal courts in handling controversies under collective bargaining agreements with carriers. The plaintiff has devoted considerable space in his brief to explaining the holding of the Supreme Court of the United States in the *Slocum* case. As we understand plaintiff's contention, it is that the holding in the *Slocum* case does not limit the jurisdiction of trial courts merely to the hearing of an ordinary common law action for damages for breach of contract under the type of contract in question. This case is the same as *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, in that it is a simple common law action for breach of contract. The plaintiff endeavors to make a distinction between the *Moore* case and the *Slocum* case and *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255, 94 L. Ed. 542, 70 S. Ct. 585, on the grounds that the two latter cases in-

volved jurisdictional disputes. The Supreme Court of the United States in the Slocum case specifically eliminated room for any such distinction. It discussed the Moore case extensively in its efforts to carefully explain just what was held in the Slocum case. We have covered this matter fairly completely, but because counsel undertakes to tell us what the Supreme Court held we would like again to refer to the language of the Court itself where it is said:

“Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking *reinstatement* and *back pay*. Instead he chose to accept the railroad’s action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. *A common law or statutory action for wrongful discharge* differs from any remedy which the board has power to provide and does not involve questions of future relations between the railroad and its other employees.” * * *

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

The case before this court differs in no particular at all from the issues presented and finally adjudicated in the Moore case and we therefore think that this court is bound by the application of the Slocum case as the Supreme Court of the United States says it should be made. The Supreme

Court of the United States took occasion to point out that the New York Court of Appeals fell into the error of assuming state courts had the right to adjudicate disputes arising out of a carrier-union collective bargaining agreement, which is the ultimate result of the distinction which plaintiff in his brief is trying to make. Mr. Justice Black in reversing, stated:

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

Counsel for the plaintiff cite a number of cases at pages 13, 14 and 15 of their brief in their effort to nullify this language in the *Slocum* case. It should be pointed out, however, that these cases were all decided before the *Slocum* case and the courts in the cited cases thought they were following *Moore v. Illinois Central R. Co.*, as the New York Court of Appeals did, and were making the same mistake in doing so.

Apparently the reason for the plaintiff’s strenuous effort to establish that the *Slocum* case has no application is because of his concern over the provision of the contract which he contends provides the measure of damages for breach. The contract does not provide that upon breach thereof the plaintiff shall be paid for all time lost, but it provides for the payment of all time lost upon his *reinstatement to his former employment*. For this reason plaintiff contends in the face of the *Slocum* case that the trial

court had a right to reinstate and therefore had a right to award damages "for all time lost." If the court had a right to reinstate and did not reinstate, why then did it award the plaintiff "all time lost?"

On the precise matter involved under Point I, namely, that the court erred in admitting the unsworn transcript as substantive evidence and the corollary thereof, viz, refusing to allow the defendant to introduce any evidence whatsoever as to the merits of its action in discharging plaintiff, we cited the cases of *Tennison v. St. Louis-San Francisco Ry. Co.*, . . . Mo. . . ., 228 S. W. 2d 718, and *Johnson v. Thompson*, . . . Mo. . . ., 236 S. W. 2d 1. Both of these cases support our position and we confess that we were unable to find any others in the books. We did not find any to the contrary and counsel for the plaintiff has cited none. Here again the plaintiff, unable to find any law in support of his position, attempts to distinguish these cases from the present case. The agreement before this court provides, "No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established." The agreements involved in the cited cases provided that, "Trainmen shall not be suspended, discharged, or unfavorable entries made against their records without just and sufficient cause." Counsel even suggests that just and sufficient cause under the latter cases can be found without an investigation. The fact of the matter is that investigations were held in both cases and it is well known to all with any acquaintance with agreements under the Railway Labor Act, that under all types of collective bargaining agreements between carriers and employes,

hearings are contemplated and are held where violations are charged and where it is anticipated discipline may be assessed. We are unable to see any distinction of substance between the expressions "his guilt established" and "without just and sufficient cause." Whatever the language used, these agreements all presuppose the right of management to discipline its employes for violation of not only its operating rules, but to discipline them for many things not specifically provided for. As the citations in our main brief show, the Railway Labor Act never contemplated that management should be deprived of the right to discipline its employes and to dismiss them for any cause sufficient to the management, so long as the management did not act arbitrarily and in bad faith. Does the expression "his guilt established" mean to the satisfaction of the employe or the employer and the employe both? It would be ridiculous to suppose that it did. Does it mean then that his guilt must be established to the satisfaction of the management "beyond a reasonable doubt" or "by a preponderance of the evidence?" There is no basis whatever in court decisions or the holdings of the National Railroad Adjustment Board for so concluding. In our main brief we cited a number of holdings of the Railroad Adjustment Board itself, wherein they have consistently taken the position that even though they had been sitting upon the matter in the original instance and would have decided the case otherwise or imposed a different or less severe penalty, they will not disturb the decision of management or the penalty imposed unless it clearly appears that the management in acting as it did, did so arbitrarily and in bad faith. The attempt to apply strict legal procedure to hearings which are conducted by laymen

and to a review thereof by the courts is wholly unwarranted and has never been contemplated in connection with collective bargaining agreements under the Railway Labor Act. Generally, the principles and the decisions of courts have furnished valuable guides in determining the reciprocal rights and duties of the parties under such agreements, but the subject matter being dealt with and the fact that laymen on both sides are attempting to adjust their disputes, necessitates some indulgence rather than strict adherence to legal principles. This is the underlying philosophy of the Slocum case. In asking for a strict legal approach *against the defendant*, counsel ignores this underlying philosophy. Plaintiff in this action has throughout, successfully sought the widest indulgence for himself and has insisted upon and secured the strictest sort of technical compliance with the contract on the part of the defendant company. In our main brief we pointed out that the rule of strict construction against the defendant is unwarranted for the reason that defendant did not draw the contract. It was drawn around a conference table by the parties, where neither had any advantage over the other.

But even so, there was substantial competent evidence at the investigation warranting the action of the defendant in dismissing plaintiff and on familiar principles applicable to decisions of administrative boards, which defendant's management is not, the court should not disturb the findings. The plaintiff in his brief says that there is nothing involved in this case except the question of whether or not the plaintiff absented himself without written leave for a period in excess of ten days. He adds, gratuitously, the

expression "wilfully or knowingly." We agree, except that there is no room for injecting into this case under the contract any claim that the defendant must establish plaintiff so absented himself "wilfully and knowingly." These words do not appear any place in the contract. What are the facts? We do not propose to rehash the matter, but there is absolutely no question but that the plaintiff was off the job in excess of ten days without written permission, which he knew was necessary to obtain and which he did not obtain and made no effort to obtain. The entire case is that simple and on the basis of that showing alone, which was admitted by the plaintiff himself at the hearing and is undisputed now, the management was justified in dismissing him, and there is no evidence whatsoever that such action was taken arbitrarily or in bad faith so as to warrant its reversal.

POINT II.

The plaintiff in his brief has little to say about this point wherein we contend that the court should have granted defendant's motion for a nonsuit. If we are right in our contention that the trial court committed error in admitting the transcript of the unsworn testimony at the investigation as substantive evidence of the facts therein stated, or wrong therein, but right in our contention that it did not support a finding that the management acted arbitrarily and in bad faith in dismissing plaintiff, then of course the nonsuit should have been granted. If we are right in either of these contentions, the record was absolutely destitute of any evidence which would support a cause of action. We would like to remark in passing that we think the evidence at the

close of the plaintiff's case was absolutely destitute of any evidence of damage. Counsel for plaintiff make the statement under Point II of their brief that it was admitted by the parties that "under the collective bargaining agreement defendant's right to discharge was limited by the provisions of Rule 38." We do not recall ever having made such a ridiculous admission and we have been unable to find in the record where we have done so. It is not the fact, and we have never admitted it to be the fact. Plaintiff argues the existence of the agreement and the fact of discharge alone "make out a prima facie case for recovery." Plaintiff also contends under this point that the burden was *upon the defendant* to establish that the discharge was in accordance with the contract. This is an argument of desperation, made in an effort to justify the palpable error committed in refusing to grant defendant's motion for a nonsuit, and is undeserving of further comment.

POINT III.

Our contention here that the court erred in limiting the evidence upon the question of breach solely to what appeared in the unsworn transcript of the testimony at the official investigation and in refusing to permit the defendant to prove that parts of the plaintiff's testimony even in this transcript were false, is, we believe, sufficiently covered in our main brief and herein under Point I to make it unnecessary to elaborate further upon this matter.

POINT IV.

In answer to our contention that the court in any event should have allowed as a deduction the sum of \$7,774.39,

which we managed to prove had been earned in other employment by the plaintiff, the plaintiff contends that the parties had stipulated in the contract that damages for breach thereof involving plaintiff's dismissal would be measured by "all time lost." We have no quarrel with plaintiff on the legal proposition that parties to a contract may stipulate therein as to the measure of damages in the event, and only in the event, that the amount stipulated for can be construed as damages contemplated or reasonably to be anticipated from the breach thereof. Otherwise, and in the event the damages are in excess of what it can be said was reasonably to be contemplated by the parties as flowing from a breach, the amount fixed becomes a penalty which the courts have refused to enforce. These are elementary and familiar principles of the law of damages. If we assume, as plaintiff says, that the contract contains a stipulation for damages and that the damages are "all time lost" and nothing more, so that even though one earned in other employment far in excess of what his wages may have amounted to, he may still recover the full amount of his wages, then it is not the kind of stipulation in the contract which courts will enforce. It is a penalty and nothing else. Such an interpretation as plaintiff would apply destroys the character of the expression "pay for all time lost" as a valid stipulation for liquidated damages. The contract does not provide for liquidated damages as awarded and as contended for by plaintiff. It provides, and we reiterate, that if "dismissal is found to be unjust, yardmen shall be *re-instated and paid for all time lost.*" It contemplates payment for "all time lost" only in the event the plaintiff is returned to service. It necessarily follows that unless he is

returned to service he is not entitled to *any* time lost within the contemplation or the terms of this collective bargaining agreement. As pointed out in our main brief, the Railroad Adjustment Board has on occasion required the payment of all time lost upon reinstatement being ordered, but it has just as frequently refused to order the carrier to pay for all time lost—sometimes ordering a portion of the time lost to be paid, sometimes ordering reinstatement without any requirement that the employe be paid for time lost. But one will search in vain for a case where it has ordered payment of *any* lost time without ordering reinstatement. It does not have such jurisdiction. Carrier-employe contracts do not contemplate or provide for such a result, that is, an award of damages without reinstatement. The right to damages lies only in the law. It exists because of the relationship of employer and employe. That is why the Supreme Court of the United States in the Slocum case held the dismissed employe has a common law right of action in the courts, but nothing else. It may be thought that the defendant cannot complain because only a part of the penalty is imposed upon it in requiring it to pay the plaintiff for all time lost without reinstatement. This is not sound, however, because the payment for time lost is dependent upon reinstatement. It is quite apparent that the penalty imposed upon a carrier to pay for “all time lost” was contemplated only in the event the employe had been wronged to the extent that he was to be exonerated completely or in part and returned to his employment. The plaintiff in this case never sought reinstatement at the hands of the Railroad Adjustment Board, and although his counsel resents our referring to the matter, there cannot be any doubt but that the

reason therefor was his lack of confidence in getting the very charitably disposed Railroad Adjustment Board to reinstate him, which would also have meant no award of damages. This was particularly true in view of the fact that the Brotherhood of Railroad Trainmen, the other party to this contract with the defendant, believed that the plaintiff was not entitled to reinstatement or at least this union refused, as we offered to prove, to consent to reinstating the plaintiff. As pointed out in our main brief in the case of *Eubanks v. Galveston, H. & S. A. Ry. Co.*, (Texas) 59 S. W. 2d 825, the expression "pay for all time lost" means nothing more, and at the most as therein stated, than an obligation of the railroad company to pay such damages as are occasioned by lost earnings. To place thereon the construction contended for by plaintiff would be to give this provision the character of a penalty and not one for liquidated damages reasonably contemplated by the parties for breach.

POINT V.

The agreement here provided that, "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 offered to prove that the general committee meant the Brotherhood of Railroad Trainmen. The plaintiff in his brief, at page 42, contends that this provision relates to a situation where the dismissal was "rightful." The above quoted provision of the contract makes no such distinction and when the on-the-property operation of this contract between the carrier on one side,

and the union with its philosophy of seniority on the other side, is considered, it seems clear to us that no such distinction was intended. The plaintiff says, "Upon reinstatement an employee assumes his former seniority rating." In point of fact this is sometimes true and sometimes it is not true and it is not determined necessarily by the question of whether or not an employe was rightfully or wrongfully dismissed. Many men are rightfully dismissed from service and are thereafter returned to service by the company of its own accord, and sometimes because it is so ordered by the Railroad Adjustment Board. Sometimes they are restored to seniority rights, and sometimes they are returned to work with impaired seniority rights, which is simply one method of imposing penalty. There is no evidence of the fact, but it would seem reasonable to suppose that this provision was placed in the contract at the solicitation of the union. Certainly, the carrier would have no object in insisting upon the provision. Evidently the union insisting upon such a provision considered that six months was ample time for an employe to present to them, so that they could present to the company, an application for reinstatement. The union did not want an employe who had a clear right of reinstatement to remain off the job indefinitely, thus acquiring seniority to the prejudice of other employes, without earning it, and then to be reinstated at any time in the future that suited his convenience. The defendant in this case entered into a binding engagement with the BofRT on this matter and it is binding upon the plaintiff in this action. We say that we could not have reinstated the plaintiff without the consent of the BofRT had we so desired without breaching this contract and giving rise to a cause of action against us by every

man who was set down one place on the seniority roster because of such action. We said in our main brief, and we say again, that we were "maintaining the integrity of the agreement" in refusing to reinstate the plaintiff under all the circumstances and in view of this provision of the contract, and are content to leave it to this court to say whether or not such an argument is "frivolous": as characterized by plaintiff's counsel. This is simply another instance of the plaintiff seeking to hold the defendant strictly to account on a portion of the contract and at the same time urging that the defendant can disregard other provisions of the contract, procedural as well as substantive, when it would relieve the plaintiff of his own default. We think that we are bound by all the provisions of the contract, including the provisions which are purely procedural, and we think the plaintiff is likewise bound by all of the provisions of the contract.

POINT VI.

We here contended that the plaintiff was without any right to maintain an action for breach of the contract, but argued that if such a right at the time plaintiff commenced his action did exist he was estopped from asserting the same. Plaintiff says in his brief that, "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.” We may be at fault for not making it clear in our main brief that under Point VI we were asserting two propositions, and we would like to make it clear at this time that we do contend first, that the defendant was released from any liability to the plaintiff because of what amounted to an agreement between the parties to consider the controversy as closed and settled, and secondly, if such was not the result of the termination of negotiations between the parties, then the plaintiff is now estopped to maintain this action.

Much of plaintiff's brief on these two points is concerned with the alleged lack of authority of Mr. McDaniels, Acting Vice President of the Switchmen's Union of North America, to represent the plaintiff. It is claimed particularly that McDaniels had no authority to advise the defendant that the grievance was being withdrawn and that the defendant might treat the matter as closed. We cannot agree with counsel in his statement that, "The broadest scope of an agency of the type here involved is that which exists between an attorney and client." The relationship of attorney and client is an agency which is peculiarly inhibited by custom, ethics and statutory law. The relationship between the plaintiff and Mr. McDaniels was an agency in its broadest sense. We are not relying upon any *implied* authority in McDaniels to admit that the plaintiff falsified at the hearing, to withdraw the grievance and advise us that the case was closed. McDaniels was expressly authorized in writing by the plaintiff Russell as his "agent and representative in the prosecution of the grievance claimed," to handle all "further prosecution of the grievance," and to "negotiate,

adjust and dispose of the grievance claim *in any manner*." At no time did the plaintiff ever make any attempt to revoke this authority, as of course he had a right to do. He never took the witness stand to deny McDaniels' authority, or limit it in any way, nor to speak out in his own defense at the trial when publicly charged with false testimony and fraudulent conduct.

We think that the forbearance on the part of the defendant to progress its dispute before the Railroad Adjustment Board, as it had a right to do, after it was advised that it might treat the plaintiff's case as closed, constitutes consideration and is adequate to support what is the equivalent of a binding release.

But if the factual situation is such that it does not fit nicely into some common legal category we see no reason why it is not proper to urge, as we do, that the facts are such that in all equity and justice the plaintiff should be estopped from now maintaining this action. Upon a rereading of our argument of our Point VI in the main brief we feel that we therein fully meet every argument plaintiff advances on this matter of estoppel.

POINT VII.

Whether the findings and conclusions are supported by competent evidence and the judgment supported by the findings and conclusions depends entirely upon the decision of the court on the matters that have already been argued. We will therefore not prolong this reply by a further discussion thereof.

CONCLUSION

The importance of the decision in this case not only to the defendant, but to all employers and employes as well, who work under collective bargaining agreements, cannot be overestimated. In this particular instance the decision is not alone a matter for concern to the defendant carrier, but is of concern to the other party to the contract, the Brotherhood of Railroad Trainmen, which we offered to prove is in agreement with the carrier on the propriety of defendant's refusal to reinstate the plaintiff. There is no controversy between the parties to this contract—the trainmen's union and the defendant company, although we admit the right of the individual employe to disagree. It is a matter of the utmost concern to the defendant carrier and will be to other carriers and other employers who maintain collective bargaining agreements to learn whether or not they still have the right to discipline employes, so long as they act in good faith in doing so.

It might be helpful to the court if in conclusion we very briefly summarize what has transpired in this suit. The appeal involves not only the facts as they appear in the record, but the competency, materiality and propriety of much evidence which we offered and which was rejected. We think the defendant in this case did not have its day in court. The trial court first, over objection, admits in evidence the hearsay and unsworn testimony given at the investigation; not for impeachment, not as an admission, not for any lawful purpose we can perceive, but as evidence of the truth of the facts therein stated. Based on this hearsay evidence, the trial court proceeds to decide that the plain-

tiff was “not guilty” of the charge made against him and that the defendant breached the collective bargaining agreement in dismissing him. This was all the evidence offered by plaintiff on the propriety of the dismissal and the court refused to hear a single word of evidence from the defendant on the subject. For all we know, the court may have decided that plaintiff was “not guilty”—“beyond a reasonable doubt,” or guilt was not established by a “preponderance of the evidence.” It is perhaps immaterial, for certainly the court did not ask itself as it should—does the record show that the defendant has acted arbitrarily or in bad faith, or its decision would have been otherwise. Assuming, of course, that the court had the right, which we deny, to decide the case on the bare record of the investigation. Thus convicting the defendant without any opportunity whatsoever to be heard, the court turns to the question of damages. Without any evidence thereon offered by the plaintiff, who had the burden to prove his damages, and with only our stipulation that plaintiff *could* have worked every day had he so desired, the court gives the plaintiff his gross wages for the full period of time—365 days a year. The “period” is over four and a half years and not over five years, as we inadvertently stated in our main brief, and which minuscule error on our part was resented by counsel. So much, and that is all, for plaintiff’s case.

After thus deciding the case *prima facie* in favor of the plaintiff, the court refused to allow the defendant to introduce any evidence on the question of damages. The court refused to allow as a deduction the sum of \$7,774.39, the amount proved without contradiction to have been earned

by plaintiff in other employment. The court refused to give any consideration to the fact shown by the transcript itself that the plaintiff worked a total of only 62 days in the first six months of 1945 preceding his dismissal. The court refused to permit a showing that the plaintiff worked less than half-time at any time during his employment with the defendant since the year 1941 as having a bearing on the probabilities of his working every day, 365 days a year, from August, 1945, to September, 1950. The court refused to permit a showing by Dr. Keith Stratford, company doctor, that plaintiff falsified at the hearing relative to the nature and extent of his alleged illness. The court refused to permit the defendant to show that the plaintiff had falsified as to his engaging in lucrative outside employment during the 10-day period involved in the investigation and during which he claimed he was ill, "right down in bed." The court refused to admit on this phase of the case, or at least refused to take into consideration, the plaintiff's own admission that his "testimony" given at the official investigation was false. The court refused to permit defendant to prove that the union, the Brotherhood of Railroad Trainmen, sole bargaining agent and the other party with the defendant to the contract, was never agreeable to reinstatement of this man at any time, which was a necessary requirement under the contract and which was occasioned by plaintiff's own delay in petitioning for reinstatement. And last, and to our minds most important of all, the court disregarded the fact that the parties had, in keeping with the underlying concept of the Railway Labor Act, adjusted their differences between themselves pursuant to a negotiated contract. The latter again involved the court's complete disregard of

the plaintiff's own admission that he had falsified at the hearing, and occupied an untenable position both at the hearing and later in seeking reinstatement. It involved a total disregard by the court of plaintiff's voluntary abandonment of his claim and his assurance given to defendant that the claim was withdrawn and the case closed.

It is incredible. No system of law, no body of rules or principles, which makes any pretension to distinguishing right from wrong, to working justice between men, to maintaining social control, can countenance such an intolerable travesty as is reflected in the disposition of this case. It is not merely erroneous in law, it is monstrous and immoral.

We respectfully submit that the case should be remanded to the District Court with instructions to enter judgment in favor of the defendant of "no cause of action."

Respectfully submitted,

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