

1952

# W. B. Russell v. The Ogden Union Railway and Depot Company : Defendant's Brief in Answer to Petition for Rehearing

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

W. B. RUSSELL,

*Plaintiff,*

vs.

THE OGDEN UNION RAILWAY  
 AND DEPOT COMPANY, a corpo-  
 ration,

*Defendant.*

Case No.  
 7647

**DEFENDANT'S BRIEF IN  
 ANSWER TO PETITION  
 FOR REHEARING**

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**FILED**

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# INDEX

	Page
BRIEF IN OPPOSITION TO GRANTING RE- HEARING .....	2
ARGUMENT .....	3
I. THE COURT DID NOT ERR IN HOLDING THAT THE LOWER COURT HAD NO JUR- ISDICTION TO ORDER THE PLAINTIFF'S REINSTATEMENT WITH DEFENDANT COMPANY WITH SENIORITY RIGHTS UN- IMPAIRED .....	3
II. THE COURT DID NOT ERR IN HOLDING THAT IT WAS FOR THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE GROUNDS FOR DISCHARGE IN FACT EX- ISTED, AND DID NOT ERR IN HOLDING THAT IN DETERMINING THE QUESTION OF WHETHER GROUNDS FOR DISCHARGE EXISTED THE PARTIES WERE NOT CON- FINED TO THE TRANSCRIPT OF THE HEARING .....	5
CONCLUSION .....	13

## CASES CITED

Craig v. Thompson, ... Mo. ..., 244 S. W. 2d 37 .....	11, 12
Johnson v. Thompson, ... Mo. ..., 236 S. W. 2d 1 .....	9
Moore v. Illinois Central Railroad Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754 .....	8
Slocum v. Delaware, Lackawana & Western Railroad, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577 ...	4, 7, 8, 13
Tennison v. St. Louis-San Francisco Ry. Co., ... Mo. ..., 228 S. W. 2d 718 .....	9
Wilson v. St. Louis-San Francisco Ry. Co., ... Mo. ..., 247 S. W. 2d 644 .....	10, 11

In the  
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THE OGDEN UNION RAILWAY  
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**DEFENDANT'S BRIEF IN  
ANSWER TO PETITION  
FOR REHEARING**

---

Comes now the defendant in the above cause and respectfully petitions this Honorable Court to deny plaintiff's Petition for Rehearing for the reasons that:

I.

The court in its opinion did not err in holding that the lower court had no jurisdiction to order the plaintiff's reinstatement with the defendant company.

## II.

The court did not err in holding that the statements in the transcript relating to plaintiff's illness were hearsay, and did not err in holding that the lower court was in error in considering such statements as substantive evidence.

## III.

The court did not err in holding that the transcript was improperly considered by the lower court as the exclusive evidence of the facts therein testified to.

## IV.

The court did not err in holding that the lower court committed reversible error in rejecting defendant's evidence that the plaintiff had falsified at the hearing and was in fact not ill during the period in question.

## V.

The court did not err in holding that the defendant had a right to present any legal or equitable defense at the trial to prove justification for the discharge and that the trial court committed reversible error in rejecting such proffered testimony.

## BRIEF IN OPPOSITION TO GRANTING REHEARING

Out of deference to the rules governing the format of briefs on appeal before this court we have set forth above the negative of the five propositions asserted by counsel

for the plaintiff in his brief on petition for rehearing. Only two propositions are in fact argued by the plaintiff and he sets them forth on page 5 of his brief as follows:

“(1) The court erred in holding that the lower court had no jurisdiction to order the plaintiff’s reinstatement with defendant company with seniority rights unimpaired.

“(2) The court erred in holding that it was for the trial court to determine whether the grounds for discharge in fact existed, and in this determination it was not limited to the transcript of the hearing.”

## ARGUMENT

### I.

THE COURT DID NOT ERR IN HOLDING THAT THE LOWER COURT HAD NO JURISDICTION TO ORDER THE PLAINTIFF’S REINSTATEMENT WITH DEFENDANT COMPANY WITH SENIORITY RIGHTS UNIMPAIRED.

It is here said that the court’s action was purely “gratuitous” for the reason that the issue of reinstatement was not involved. The plaintiff says that he is not concerned with this “error” in the opinion and then proceeds to cite four cases on page 6 of the brief in support of his assertion that it was error to hold that the lower court was without jurisdiction even if reinstatement had been an issue. All of the cases cited, in so far as they conflict with the recent holding of the United States Supreme Court in



*Slocum v. Delaware, Lackawana & Western Railroad*, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577, on the matter of reinstatement have been overruled and superseded by this opinion of the court of last resort. We do not care to discuss the propriety of this court's discussion of the matter of reinstatement at any length. We think neither the opinion nor the "general policy" of the court needs any defense from us in this respect. The plaintiff has refused to recognize the existence of the *Slocum* case throughout the trial and throughout the briefs on appeal. The trial court also refused to recognize the existence of the *Slocum* case and this was the "fundamental error" as pointed out in the opinion. In reaching the conclusion in this case that a common-law action for damages for breach of contract and nothing else was available to plaintiff, as held in the *Slocum* case and as contended for by the defendant throughout, it was proper and necessary for this court to consider and discuss the rationale of the *Slocum* case. We do not think that the court was "gratuitously" deciding an issue not before it when during its discussion of the *Slocum* case as a whole it pointed out that the lower court was correct in refusing reinstatement. The court was reviewing an entirely new concept of the law on the rights and liabilities of parties to collective bargaining agreements under the Railway Labor Act as they were redefined in the *Slocum* case, which decision was not written until April of 1950. It was necessary to an understanding of and formed the basis of the court's treatment of the specific assignments of error which the court was called upon to dispose of. After the discussion objected to, the opinion

proceeded to say that while the trial court had correctly held it had no jurisdiction to grant reinstatement it "proceeded to adjudicate the case in all other respects in the same manner as might be done by such Board (National Railroad Adjustment Board). In so doing we are confident it erred. Thus concluding relative to the fundamental error alleged, we address ourselves to the several assignments of error with more particularity." At any rate we do not understand counsel's concern over the matter for he must be well aware of the fact that if reinstatement was, as he says, not in issue, anything this court said thereon could only be considered as dicta.

## II.

THE COURT DID NOT ERR IN HOLDING THAT IT WAS FOR THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE GROUNDS FOR DISCHARGE IN FACT EXISTED, AND DID NOT ERR IN HOLDING THAT IN DETERMINING THE QUESTION OF WHETHER GROUNDS FOR DISCHARGE EXISTED THE PARTIES WERE NOT CONFINED TO THE TRANSCRIPT OF THE HEARING.

This is nothing but Point III in plaintiff's main brief on appeal, appearing at page 21 thereof. For the convenience of the court we quote from plaintiff's main brief:

"Point III. The trial court did not err in limiting the evidence on the question of whether or not defendant had breached the collective bargain-



ing 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 the plaintiff's testimony contained in said transcript was false."

This court holds the court did err therein. The point was argued at length in plaintiff's main brief on appeal, and while it is argued further and in greater detail in the brief on Petition for Rehearing it does not seem to us that counsel presents anything new. This court in its opinion has properly held that the question plaintiff now seeks reconsideration of is one to be determined by the trial court *after a proper hearing*, which was not accorded the defendant in the court below.

Plaintiff says on page 3 of his brief, "What we here seek is a reconsideration by the court of the single question of whether this plaintiff was accorded his contractual rights, that is, was Rule 38 of the contract complied with." From a careful reading of plaintiff's entire brief and analysis thereof it is apparent that there is in fact, as counsel himself says, just this one question which is submitted to the court for reconsideration. For convenience we again quote the language of the rule:

"Article VIII, Rule 38. No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established. The man whose case is under consideration may be represented by an employe of his choice, who may be a committeeman, who will be permitted to interrogate witnesses. The accused and his representative

shall be permitted to hear the testimony of witnesses."

Counsel says that the following five conditions to proper discharge are required by the rule:

- (1) A fair and impartial hearing;
- (2) The right to be represented;
- (3) The right to interrogate witnesses;
- (4) The right to hear the testimony of witnesses;
- (5) The establishment of his guilt.

The burden of plaintiff's argument is that these matters were not established prior to the discharge. Counsel's whole trouble, it seems to us, is in the failure to recognize that whether these matters were or were not established prior to the discharge is, first, a matter for determination by a court or jury, and second, "having elected to bring a common-law action for wrongful discharge, the common-law principles relative to such action apply to the trial of the case", quoting from the court's opinion.

We think the foregoing is the gist of the court's opinion and it is, by plaintiff's own assertion, the portion of the opinion excepted to in his petition for rehearing. The holding is consistent with every adjudicated case we have been able to find; we have found none to the contrary and counsel cites none to the contrary that have not been swept into the discard by the *Slocum* decision. This court's holding recognizes and respects the holding of the Supreme Court of the United States in the *Slocum* case; that the

discharged employe may have a common-law action for damages for breach of contract in the courts of the land, but nothing else. And because that is the nature of the action, it is bound to follow that the *court* and *jury* must determine whether or not the contract has been breached, and either party to the action in a court of law has the right to produce any and all material, relevant and competent evidence in existence bearing upon that issue.

It is evident from an analysis of plaintiff's brief that the whole of his attack is leveled at the holding of the court set out in the following paragraph, to wit:

"Several assignments of error, presently to be individually considered, are bottomed on one fundamental contention. Defendant concedes that the respondent, although a railway labor employee and subject to the Railway Labor Act, might prosecute an action in the District court for wrongful discharge. But it contends that the respondent, having elected to bring a common-law action for wrongful discharge, the common-law principles relative to such action apply to the trial of the case, and that the court is without jurisdiction to construe the contract and to apply its provisions in such manner as might be done by the Railroad Adjustment Board pursuant to the provision of the National Railway Labor Act. (U. S. Code, Title 45, Chapter 8.) *Appellant's position on this fundamental proposition is sound.* That a distinction exists between proceedings before such Board and the awards which might be made by it, and a common-law action before the courts is, we think, abundantly clear from the cases of *Slocum v. Delaware, Lackawana and Western Railroad*, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577, and *Moore v. Illinois Central Railroad Company*, 312 U. S. 630, 61 S. Ct. 754." (Italics ours.)

The position taken by this court in the above quoted passage is we submit absolutely sound in the light of the cases therein cited. The plaintiff asks this court, without citing a single authority in point, to ignore the authorities supporting its position and reverse itself on this one "fundamental contention" made by the defendant throughout this litigation. To do so would be for this court to reverse itself upon every point decided, except the issue of damages, which plaintiff's counsel concedes is correctly decided, and would require the court to remand the case to the lower court solely for the purpose of fixing the amount of damages. The holding of the court in the above quoted paragraph is not only supported by the authorities therein referred to, but by the case 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, cited and discussed in the defendant's brief on appeal. The *Tennison* case was in point on the facts and the court therein refused to admit the transcript of the testimony at the official investigation on the ground that it was hearsay. The court 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*. (The point so stressed by plaintiff here.) However, defendant is no more precluded thereby from litigating in court the issue of 'just and sufficient cause' than is plaintiff. *Both may bring in any competent evidence they have and object to any incompetent evidence.*" (Italics ours.)

For a full discussion of the case see defendant's brief on appeal at pages 23, 24, 25, 26. To the same effect is the *Johnson* case discussed in our main brief at pages 26 and 27.

Counsel for the plaintiff and the trial court refused to recognize the existence of these cases or the soundness of the principles therein asserted. This field of the law being a new development, there are very few cases we have been able to find that were "pinpoint" authorities. We have found none holding contrary and counsel has at no time cited any.

There are, however, two cases of significance which have been decided since our main brief was written, which follow the *Johnson* and *Tennison* cases and support this court in that portion of its opinion now assailed.

In *Wilson v. St. Louis-San Francisco Ry. Co.*, . . . Mo. . . ., 247 S. W. 2d 644, decided March 10, 1952, rehearing denied April 14, 1952 by the Supreme Court of Missouri, the facts in so far as pertinent were these: Wilson, an engineer, was discharged by the defendant for failure to observe and obey certain signals, which resulted in a train wreck. In a suit for damages against the defendant he charged that he was "discharged without just and sufficient cause after a purported investigation and hearing which was entirely arbitrary." (*This is precisely what the plaintiff contends for in this suit.*) The railroad company took the position that Wilson, the employe in this instance, was confined at the trial to the evidence brought out at the hearing. The trial court permitted Wilson to produce whatever

evidence he had that he had obeyed the signals and the question of whether there was just and sufficient cause for his discharge was litigated before the jury. The trial court instructed that it was for the jury to determine whether just and sufficient cause for the discharge in fact existed, and this action was affirmed by the Supreme Court. The court said:

“Wilson’s evidence at the trial tended to show that he obeyed the signals, the railroad’s evidence tended to show that he violated the signals and the rules, and whether he did or did not and whether he was discharged without good and sufficient cause were for the jury to determine.”

This, we submit, is consistent with the opinion of this court upon which plaintiff’s counsel asks this court to now reverse itself and grant a rehearing.

In the case of *Craig v. Thompson*, . . . Mo. . . ., 244 S. W. 2d 37, decided November 12, 1951 and since we wrote our main brief on appeal, the facts so far as pertinent were as follows: The plaintiff, a brakeman, was discharged for failure to answer a work call and thereafter brought suit in the courts to recover damages for unlawful discharge. He claimed that he was wrongfully and unlawfully discharged by the defendant, that the discharge was not for good and sufficient cause, and he was not accorded a fair and impartial investigation by the defendant, in violation of the company’s agreement with its employes. The court in its opinion said:

“The basic facts determinative of this appeal upon the question of whether plaintiff’s discharge was or was not wrongful are not in dispute.”



But the court held that the question as to whether or not the discharge was rightful or wrongful was to be passed upon and decided by the court or jury. The court said:

“Whether a certain state of facts as to which there is no dispute amounts to a legal justification for discharge i. e., whether the discharge was or was not wrongful, is a question of law for the court, but where the facts are in dispute as to whether the discharge was or was not wrongful, the question is always one for the jury under proper instructions.”

This case likewise supports this court in its holding upon this proposition which is the subject of attack in plaintiff's petition for rehearing. These are cases involving the alleged breach of collective bargaining agreements entered into pursuant to the National Railway Labor Act. These cases concern themselves with the “fundamental contention” made by us, as does this court in its opinion. Counsel attacks the holding of the court upon this “fundamental contention”, but in no respect does he address himself pertinently thereto. He concentrates upon the proposition that Rule 38 was not complied with *before* the plaintiff was discharged, a matter upon which he might be entitled to be heard before the National Railroad Adjustment Board. But in a court of law such an argument is utterly inconsistent with the proposition laid down by the above cited cases and by this court in the main opinion to the effect that in the trial of a common-law action for wrongful discharge the common-law principles relative to such action apply to the trial of the case. And that it is for the judge or jury in the last analysis to determine whether the discharge was wrongful or not. The plaintiff chose his forum

and must therefore permit the courts to adjudicate the questions involved. This court in its opinion has said that the question for decision by the trial court is whether or not the plaintiff was unjustly discharged, and the opinion says to us, "In this case it (defendant) must win or lose upon that issue." We are content with this holding; think we are entitled to that much and no more. What is there about it that is "unfair, unjust or inequitable" to the plaintiff or to other employes that may in the future be similarly situated? This court's opinion preserves to the plaintiff all the rights and remedies any litigant at any time has ever had in the courts in the kind of action that he himself elected to bring. The plaintiff asks this court in defiance of the opinion in the *Slocum* case, supra, to usurp the jurisdiction and prerogatives of the National Railroad Adjustment Board. It seems to us that the plaintiff endeavors to secure for himself the advantages that might have come to him from a hearing before the Railroad Adjustment Board, escape the disadvantages of a hearing before such Board, and to secure for himself such advantages as he has before a court or jury without submitting to the established rules of practice and procedure applicable in actions of this kind. Even prior to the *Slocum* case the plaintiff would have been required to make an election to proceed either in the courts or take his grievance to the Board, and it was generally held that once he made the election he was bound thereby.

## CONCLUSION

We concede the right of plaintiff's counsel to get himself in as good a position as possible for the retrial of this

case. We disagree with many things he has said in the brief and many interpretations he has put upon various incidental statements of the court. We do not believe, however, that a discussion of anything other than this one "fundamental proposition" is called for here and we are satisfied to confine ourselves to the one issue counsel has elected to attack the opinion upon.

We respectfully submit that the Petition for Rehearing should be denied.

Respectfully submitted,

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